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PACIFIC REPORTER
SECOND SERIES



101 P.2d – 102 P.2d

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WILLIAM H. WASTE [2] - - - - - - - - - - - San Francisco

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[1] Became Chief Justice June 10, 1940.
[2] Died June 6, 1940.

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CALIFORNIA REPORTER

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101 PACIFIC REPORTER

SECOND SERIES

15 Cal.2d 268

CALIFORNIA TRUST CO. v. GUSTASON.

L. A. 16185.

Supreme Court of California.

March 30, 1940.

1. Pleading ⇐225(1)

Where, when demurrers to answer and cross-complaint in suit to quiet title were sustained without leave to amend, defendant made no request for leave to amend, no claim of abuse of discretion in denying leave to amend could be made under the rule of law then prevailing, before the enactment in 1939 of section 472c of the Code of Civil Procedure. Code Civ.Proc. § 472c, as added by St.1939, p. 2235.

2. Appeal and error ⇐854(3)

Where special as well as general demurrers of plaintiff were sustained, judgment for plaintiff must be affirmed, even though it be true, as contended by defendant, that his answer pleaded a defense and that his cross-complaint stated a cause of action, if any grounds of the demurrer were good as to both pleadings.

3. Pleading ⇐126

Where complaint in action to quiet title alleged that "plaintiff is now and at all times herein mentioned" was the owner of the realty, defendant's denial "that plaintiff is now and at all times herein mentioned is the owner" of the realty described in the complaint was an "admission" of plaintiff's ownership, since the denial was evasive, and either averment might be true, even though together they might not be true.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

4. Pleading ⇐127(2)

In action to quiet title, admission of title or ownership in the plaintiff by defendant would not be conclusive against the defendant if defendant alleged facts establishing a right to a lien on the realty.

5. Vendor and purchaser ⇐341(2)

In action to quiet title, wherein defendant claimed a lien, defendant's allegations that he entered into agreements for purchase of realty from plaintiff because of fraud and misrepresentations of plaintiff, that on discovery of fraud he rescinded agreements, and that he was entitled to a lien for money paid to plaintiff, were insufficient to establish a lien, where agreements were not pleaded, no false representation was set forth, there was no allegation of knowledge of falsity on part of plaintiff, and no allegation of reliance on representations by defendant was made.

6. Pleading ⇐310

In action to quiet title, wherein defendant claimed a lien for money paid to plaintiff under agreements for purchase of realty, which were allegedly induced by plaintiff's fraud, recitals in defendant's notice of rescission, attached to answer as an exhibit, of false representations, were insufficient as allegations of false representations, since court has no duty to ferret out necessary elements of a cause of action or defense by referring to exhibits attached to a pleading.

7. Quieting title ⇐39

In action to quiet title, allegations of defendant that he entered into agreements for purchase of realty from plaintiff because of fraud of plaintiff, that on discovery of fraud he rescinded agreements, and that he was entitled to a lien for money paid to plaintiff, would not tend to diminish or defeat plaintiff's recovery, and were not a proper ground for counterclaim.

8. Pleading ⇐18, 19

In action to quiet title, defendant's answer was bad for uncertainty, ambiguity, and unintelligibility, where it was impossible to tell what right, title, or interest defendant claimed to have in the realty, or whether he claimed title, a lien, or some other interest, or whether he claimed any such interest in the whole or in some part thereof.

9. Pleading ⇐106(2)

Defendant's allegation that there was pending in certain court another action wherein the same parties were litigants and that the same subject-matter was involved, would, as an attempted plea in abatement, fall before special demurrer, where it did not state when the other action was brought, what the cause of action was, nor what relief was demanded.

10. Limitation of actions ⇐129

Where defendant in November, 1932, discovered plaintiff's alleged fraud in the inducement for execution of agreements for purchase of realty by defendant from plaintiff, and plaintiff's complaint in action to quiet title was filed in July, 1936, defendant's cross-action therein based on fraud was barred by two or three year limitations,

since limitations may be set up as a bar to a cross-action if the statute has run before the complaint was filed. Code Civ. Proc. § 338, subd. 4; § 339, subd. 1.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action to quiet title to three lots by the California Trust Company against David G. Gustason, wherein the defendant filed a cross-complaint. From a judgment quieting title in plaintiff, the defendant appeals.

Judgment affirmed.

William G. Condron, of Los Angeles, for appellant.

Swanwick, Donnelly & Proudfit and Donald O. Welton, all of Los Angeles, for respondent.

GIBSON, Justice.

Plaintiff sued to quiet title to three lots in Los Angeles. Defendant answered, admitting that he claimed an interest in the property, and denying that his claim was without right; alleging that he entered into certain agreements for the purchase of the property under promises more particularly set out in his cross-complaint, and that he served plaintiff with a notice of rescission when he discovered fraud had been perpetrated upon him; and further alleging that at the time of the discovery of the fraudulent misrepresentations he had complied with all the covenants and conditions to be performed by him. As an affirmative defense, defendant alleged that another action was pending between the same parties involving the same subject matter. Defendant prayed that the agreements be declared a lien upon the property. Defendant also filed a cross-complaint, alleging that in reliance upon certain fraudulent representations he had been induced to enter into purchase agreements for this property. He prayed for judgment in the sum of $11,356, paid by him prior to the discovery of the alleged fraud, and asked that the same be declared to be a lien on the property.

General and special demurrers to both the answer and cross-complaint were filed by the plaintiff. After twice permitting amendments the trial court sustained the demurrers without leave to amend. Judgment was then entered quieting title in plaintiff, and defendant appealed.

[1, 2] At the time the demurrers were sustained, without leave to amend, defendant made no request for such leave. Under the rule of law then prevailing, before the enactment in 1939 of section 472c of the Code of Civil Procedure, St.1939, p. 2235, no claim of abuse of discretion in denying such leave could be made. See Fitzpatrick v. Fidelity, etc., Co., 7 Cal.2d 230, 60 P.2d 276. This is apparently conceded by defendant, his argument being that the answer pleads a defense, and that the cross-complaint states a cause of action. But in view of the fact that special as well as general demurrers were sustained, the judgment must be affirmed, even though this be true, if any grounds of the demurrer are good as to both pleadings.

[3] Examining the answer, we find that in the first paragraph defendant by denying two distinct propositions stated conjunctively in the complaint, admits ownership and title in the plaintiff. The complaint alleged that "* * * plaintiff is now and at all times herein mentioned as to it was the owner of the following described real property * * *." The answer read "* * * defendant denies that plaintiff is now and at all times herein mentioned is the owner of that certain real property described in the complaint." The courts have long held that such a denial results in an admission of the allegation—in this case ownership in the plaintiff—for the reason that such a denial is evasive, and either averment might be true, even though together they may not be. Janeway & Carpender v. Long Beach Co., 190 Cal. 150, 211 P. 6.

[4] However, such an admission of title or ownership in the plaintiff would not be conclusive against the defendant's case, if he alleged facts establishing a right to a lien upon the property. In this connection the answer admits that defendant claims some right, title and interest in the property, and alleges that "under date of May 6, 1929, and May 8, 1929, he entered into certain agreements for the purchase of said real estate, under the provisions and conditions therein contained and under additional promises and agreements made to him by the plaintiff and its agents, as hereinafter more particularly set out in defendant's cross-complaint" and that "copies of the agreements above referred to were recorded, respectively, in book 11787, page 179, and in book 11784 at

page 203 of the Official Records of Los Angeles County and remain of record and uncancelled". It is further alleged that when defendant "discovered that fraud and misrepresentation had been perpetrated upon him, he immediately, and to wit; on or about November 10, 1932, served on plaintiff personally, Notice of Rescission and at said time offered to give to plaintiff quitclaim deed to the premises purchased by him, and demanded that it refund to him the sum of $11,356.40, which he had paid to said plaintiff, prior to the discovery of the fraud and misrepresentation. Copy of Notice of Rescission served on plaintiff is hereto attached, marked Exhibit 'A' and made a part hereof; that at the time of the discovery of the fraudulent misrepresentations, defendant and cross-complainant had complied with all the covenants and conditions to be performed by him."

[5, 6] It is on the basis of the foregoing allegations that defendant claims a lien on the property. His theory is, in substance, that this part of the answer sufficiently pleads the defense of fraud in the inducement of contracts for the sale of the property. Assuming that there might in these facts be a defense if it were properly pleaded, the insufficiency of the pleading is obvious. The agreements were not pleaded at all, either in haec verba or according to their legal effect. No statement is made as to their terms or conditions, and it cannot be determined what right or title these agreements, or their alleged fraudulent procurement, conferred upon defendant, or how, it was conferred. Nor are the necessary elements of fraud pleaded. Defendant charges in legal conclusions that he discovered that "fraud and misrepresentation had been perpetrated upon him". Not a single false representation is set forth, there is no allegation of knowledge of falsity on the part of plaintiff, and no allegation of reliance on the representations by defendant. See Harding v. Robinson, 175 Cal. 534, 166 P. 808; Azarello v. Bessolo, 87 Cal.App. 272, 262 P. 66; Griswold v. Morrison, 53 Cal.App. 93, 200 P. 62; Swasey v. De L'Etanche, 17 Cal. App.2d 713, 62 P.2d 753. It is true that the notice of rescission, attached to the answer as an exhibit, contains recitals of false representations upon which defendant claims he relied. But such inferential pleading is, of course, wholly insufficient; it is not the duty of a court to ferret out necessary elements of a cause of action or defense by referring to exhibits attached to a pleading. As the court said in Burkett v. Griffith, 90 Cal. 532, 27 P. 527, 529, 13 L.R.A. 707, 25 Am.St.Rep. 151, "Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." See, also, McClellan v. State of California, 119 Cal. App. 535, 6 P.2d 994.

[7] But even if the fraud were properly pleaded, it would not constitute either a defense or counterclaim. The recitals in the notice of rescission, if treated as allegations in the answer, would not support any claim of right, title or interest in the property involved, and therefore are not a defense to an action to quiet title. Such allegations do not tend to diminish or defeat the plaintiff's recovery, and are not a proper ground for counterclaim. In a similar situation in Hanes v. Coffee, 212 Cal. 777, 778, 780, 300 P. 963, 964, the court said: "The complaint seeks to quiet title; the counterclaim is for damages. The granting of the recovery prayed for in the counterclaim would not diminish or defeat the plaintiff's recovery; it would not affect the relief demanded in the complaint in the slightest degree."

[8] Furthermore, the answer is manifestly bad as against the special demurrer for uncertainty, ambiguity, and unintelligibility. It is impossible to tell what right, title or interest defendant claims to have in the property; or whether he claims title, a lien, or some other interest; or whether he claims any such interest in the whole or in some part thereof.

[9] The answer finally alleges as a separate affirmative defense that "there is now pending in the Superior Court of the State of California in and for the county of Los Angeles, Case No. 360896 wherein the same parties are litigant. That the same subject matter is involved in said action as in case No. 404719 herein, to-wit, the Agreement for Sale of Real Estate between the California Trust Company, a Corporation, plaintiff herein and David G. Gustason, the defendant herein." As an attempted plea in abatement, this allegation must also fall before the special de-

murrer. It does not state when the other action was brought, what the cause of action was, nor what relief was demanded. See Scheeline v. Moshier, 172 Cal. 565, 158 P. 222; Fresno Investment Co. v. Russell, 1921, 55 Cal.App. 496, 203 P. 815; McCormick v. Gross, 135 Cal. 302, 67 P. 766.

[10] The cross-complaint more fully sets forth defendant's claim of fraud in the agreement of sale of the property. Plaintiff demurred on the ground, among others, that "Defendant's second amended cross-complaint does not state facts sufficient to constitute a cause of action for the reason that the cause of action, if any, therein alleged is barred by the provisions of subdivision 1 of section 339 and subdivision 4 of section 338 of the Code of Civil Procedure." These sections require that an action be brought within two or three years respectively after discovery of fraud. Appellant alleges that he discovered the fraud in November, 1932. The complaint was filed in July, 1936, and the cross-complaint in August, 1936. The Statute of Limitations may be set up as a bar to a cross-complaint if the statute has run before the complaint was filed, as was the case here. Whittier v. Visscher, 189 Cal. 450, 209 P. 23. It is therefore obvious that defendant's cause of action based on fraud was barred by the statute.

It appears that none of defendant's pleadings is good, and that the demurrers were properly sustained.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.

HOUSER, Justice (concurring).

I concur in the judgment; but I do so reluctantly. If the statements made in the several pleadings of defendant may be assumed to be true, as a matter of justice he is entitled to some equitable consideration. And although it may be true that so-called "authorities" support the judgment, in my opinion, to deny any relief whatsoever in the face of pleaded facts which, if established, should result in some sort of judgment in favor of defendant, savors of a yielding to form rather than a reliance upon substance. Generally speaking, application of the rule of "stare decisis" may be an aid to the administration of justice; but when it becomes apparent that an injustice will result, ancient declarations of law—which may have been unquestionable with reference to situations with which former courts were faced—should not now be permitted to prevail. In these days when liberality in pleading is being so insistently urged by the lawyers of our country, it would seem unfair to refuse to entertain a probable defense to an action, or a good cross-complaint thereto, for the sole reason that facts which were apparently sufficient to authorize some sort of relief to defendant were poorly pleaded or were not presented in accordance with established "form". Although reasonable and sound rules for pleading may not and should not be wholly disregarded, neither should pure technicalities nor "red tape" of any sort with respect to such rules be recognized as even persuasive in affording a sufficient reason for a denial of simple justice.

I concur: CARTER, J.



15 Cal.2d 243

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. REIDY et al.

L. A. 16181.

Supreme Court of California.

March 27, 1940.

As Modified April 25, 1940.

1. Mortgages ⇐529(3, 5)

Generally, courts can vacate a foreclosure sale where there has been fraud in the procurement of the foreclosure decree or where sale has been improperly, unfairly, or unlawfully conducted, or is tainted by fraud, or where there has been such a mistake that to allow it to stand would be inequitable to purchaser and parties, and sham bidding or restriction of competition or inadequacy of price when coupled with other circumstances of fraud may constitute ground for setting aside foreclosure sale.

2. Mortgages ⇐517, 549

Where on foreclosure of a mortgage a deficiency judgment could not be had, foreclosure sale was not rendered fraudulent and void by fact that pledgee of mortgagee acting in good faith for best interests of pledgee and mortgagee entered a bid which

exceeded value of property at time of sale and which was made with intent to discourage bidding or redemption by junior encumbrancers in hope of securing payment of debt because of a rise in value of property, and hence junior encumbrancer was not entitled to rent collected from mortgaged premises during redemption period. Code Civ. Proc. § 707.

3. Mortgages ⇐548

Where junior encumbrancer was party to foreclosure action by pledgee of first mortgagee, knew terms of first mortgage and those of loan secured by pledge of mortgage and value of mortgage property, and did not challenge foreclosure decree or attempt to set it aside or seek to establish a right of redemption, encumbrancer was not entitled on foreclosure by pledgee of commissioner's deed as a mortgage to claim income from property on ground that foreclosure sale was void as fraudulent, especially where junior encumbrancer did not seek to have foreclosure sale vacated or offer to redeem property.

4. Mortgages ⇐516

Fact that a bank purchased mortgaged property on foreclosure and took title as a pledgee of mortgagee was a matter of concern only to bank and its pledgor, and such fact conferred no additional rights upon junior encumbrancers and did not render either foreclosure decree or foreclosure sale vulnerable to attack by other parties.

5. Mortgages ⇐245

A pledgee who becomes the purchaser at a foreclosure sale under a collateral mortgage acquires under the statute an absolute title to the property, although he is under a duty to account to the pledgor for the proceeds. Civ.Code, § 3006.

In Bank.

Appeal from Superior Court, Los Angeles County; Le Roy Dawson, Judge.

Action by the Bank of America National Trust & Savings Association, a national banking association, against P. M. Reidy and Marion Reidy, his wife, the Hammond Lumber Company, and others, to foreclose a commissioner's deed, wherein named defendants filed cross-complaints. From a decree directing a foreclosure, the Hammond Lumber Company appeals.

Affirmed.

Holbrook, Taylor, Tarr & Horton, Horton & Horton, and Joseph K. Horton, all of Los Angeles, for appellant Hammond Lumber Co.

Freston & Files, Edmund Nelson, Howard Waterman, Benjamin I. Bloch, and Ralph E. Lewis, all of Los Angeles, for respondent Bank of America Nat. Trust & Savings Assn.

William Ellis Lady and H. C. Millsap, both of Los Angeles, for respondents P. M. Reidy and Marion Reidy.

Y. B. Arsen, of Los Angeles, for respondent Onnik Timourian.

EDMONDS, Justice.

This controversy presents only the question whether the appellant, which had a junior lien upon certain real property, is entitled to the income of the property while the respondent bank was foreclosing its senior encumbrance.

The first mortgage was executed in 1925 by the then owner of the property to secure the payment of a note for $80,000 in favor of the respondent Reidy and his wife. About the same time several junior encumbrances were recorded, one being a deed of trust to secure a note of the owner in favor of Hammond Lumber Company. Later, the Reidys borrowed $70,000 from the bank's predecessor, and to secure the loan gave the $80,000 note and mortgage as collateral security.

Upon default in the payment of the note of which he was a payee, and notwithstanding the fact that the mortgage was still under pledge to the bank, P. M. Reidy commenced a suit for its foreclosure. The bank, which was named as a defendant in this action, filed a cross-complaint against the mortgagor and several encumbrancers, including the Hammond Lumber Company, asking that it be permitted to foreclose the mortgage in order to protect its security as the pledgee thereof. While the cause was awaiting trial, Hammond Lumber Company, which had meanwhile foreclosed its junior encumbrance, a deed of trust, and became the purchaser at the sale, received the trustee's deed to the property. Later, when the foreclosure action came to trial, the Hammond Company stipulated that the pledged mortgage was prior to any lien or interest in the property which it might assert.

On January 31, 1929, a decree of foreclosure was entered, adjudging that the sum of $70,000 borrowed by the Reidys from the bank was due and owing; that payment thereof was secured by pledge of the mortgage sought to be foreclosed; and that the sum due on the mortgage was $87,512, exclusive of certain items of interest and costs. Among other things, the decree ordered a sale of the property by a commissioner, and application of the proceeds of sale as follows: (1) to payment of costs and expenses of sale; (2) to payment of the amount due the bank from the Reidys; (3) to payment to the Reidys of any amount due them after paying the claim of the bank; and (4) the surplus, if any, to be paid into court. Upon appeal by a junior encumbrancer, the decree was affirmed, with a slight modification not here material. Reidy v. Young, 119 Cal.App. 322, 6 P.2d 112. At the foreclosure sale thereafter held, the bank bid in the property for $70,000 and on March 5, 1930, at the expiration of the period of redemption, received a commissioner's deed. The present action was commenced by the bank for the purpose of foreclosing this deed as a mortgage.

The complaint alleged that although the certificate and deed were absolute in form, they were accepted by the bank as additional security for the Reidy loan, and constituted "a further mortgage of the real property", and that payment of the balance due on the loan was in default. The prayer was for foreclosure and judgment against the Reidys in the amount of any deficiency.

Separate answers were filed by the several defendants, and Reidy and the Hammond Lumber Company each filed a cross-complaint. The latter alleged that, unknown to it, the bank had accepted the commissioner's certificate and deed only as security, and they constituted nothing more than a further mortgage; that, therefore, it, the Hammond Company, was the owner of the property at all times subsequent to April 3, 1928 (the date of the trustee's deed to it), and as such owner was entitled to recover from the bank all rents, issues, and profits of the property subsequent to March 5, 1929, the date of the certificate of sale under the decree of foreclosure.

The cause was tried in September, 1932, but was reopened several times for the admission of further evidence, with the result that findings and decree were not signed until June, 1936. The decree granted the bank the relief which it sought and directed a foreclosure as prayed.

With respect to the issues made by the cross-complaint of the Hammond Lumber Company, it was conceded that the net income in controversy received from the operation of the property from June 30, 1930, to February 1, 1936, amounted to $15,866, but the court concluded that the Hammond Company was not entitled to this profit. It found that a receiver appointed in the prior foreclosure action had operated the property from a time prior to March 5, 1929, to April 26, 1930; that on the latter date possession of the property was delivered to the bank, and the bank thereafter continued to operate it "as the holder of the first mortgage lien" thereon, and "as agent of said P. M. Reidy". It is not true, the court expressly found, that the Hammond Company has at all times since April 3, 1928, or at any time since March 5, 1929, been the owner of the property, and it is not true that at all of said times, or at any time since March 5, 1929, that company was entitled to rents, issues, and profits thereof, or that the bank was indebted to it in any sum. The decree adjudged that the company had no right, title, interest, lien, or claim to the property, or right of redemption therein.

The Hammond Company alone appealed from the decree. In support of its claim that it should have been given judgment against the bank for income received from the property it contends that it was not debarred of its rights in the property by the foreclosure of 1929 and the issuance of the commissioner's certificate and deed, because as to it that foreclosure was collusive, fraudulent, and ineffective for any purpose.

The charge of fraud is grounded upon the following facts which, appellant states, were established on the trial by uncontradicted evidence: At the time of the 1929 foreclosure sale the value of the real property, according to the bank's appraisal, was from $35,000 to $40,000. The bank planned to bid up to the latter sum for it, and to take a deficiency judgment against P. M. Reidy for the balance due on his loan. On the morning of the sale, however, Mr. Reidy called at the bank and persuaded it to agree to increase its bid to $70,000 in order to "protect him with reference to possible redemption by other

parties that were interested." In return he agreed to give the bank $10,000 and additional security. The bank carried out its part of the agreement but all of Mr. Reidy's promises were not fulfilled and the bank was therefore compelled to seek redress by filing the present action for further foreclosure.

The court found that immediately prior to the commissioner's sale, at the request of P. M. Reidy, the bank agreed that for the benefit of P. M. Reidy it would bid in the property for the sum of $70,000 and that the commissioner's certificate of sale and the deed to be subsequently delivered would be held by the bank as security for the payment of his indebtedness to it.

The effect of this bid, the appellant urges, was to stifle competition and to deprive it of an opportunity to either bid for or redeem the property; hence the foreclosure sale was irregular and unfair. Moreover, says the appellant, it did not conform to the foreclosure decree because the bank did not credit the amount bid for the property upon the Reidy loan, as the decree directed, but, instead, sued to foreclose its commissioner's deed as a mortgage.

[1, 2] It is the general rule that courts have power to vacate a foreclosure sale where there has been fraud in the procurement of the foreclosure decree or where the sale has been improperly, unfairly or unlawfully conducted, or is tainted by fraud, or where there has been such a mistake that to allow it to stand would be inequitable to purchaser and parties. Sham bidding and the restriction of competition are condemned, and inadequacy of price when coupled with other circumstances of fraud may also constitute ground for setting aside the sale. Haley v. Bloomquist, 204 Cal. 253, 268 P. 365; Dealey v. East San Mateo Land Co., 21 Cal.App. 39, 130 P. 1066; Bernheim v. Cerf, 123 Cal. 170, 55 P. 759; Packard v. Bird, 40 Cal. 378; Goodenow v. Ewer, 16 Cal. 461, 76 Am.Dec. 540. However, where on foreclosure of a mortgage a deficiency judgment cannot be had, and that was the situation confronting the bank (Reidy v. Young, supra), it is not unusual for a mortgagee to make a bid for the property in the amount owing on the debt. The sale is not rendered fraudulent by the fact that such bid exceeds the value of the property at the time of sale and was made with the intent of discouraging bidding or redemption by junior encumbrancers in the hope of finally securing payment of the debt because of a rise in value of the property in the future. So long as a bid is legitimately made, there is no theory which requires the creditor to bid only a small amount, raising it by degrees only to that required to meet competition. And the situation is not altered where a pledgee of a mortgagee, acting in good faith for the best interests of both, makes the same bid the mortgagee would himself have made.

[3] Moreover, the appellant is not entitled to the relief demanded by its cross-complaint even if it were correct in its contention that the bid of the bank was fraudulent. The Hammond Company was a party to the foreclosure action and the pleadings fully disclosed the relations of the other parties and showed that the bank was asking for a decree of foreclosure as a pledgee of the mortgage. The terms of the mortgage and also those of the bank loan were known to the appellant. It also knew, or should have known, the approximate value of the property. Yet it did not challenge the foreclosure decree, which was affirmed on appeal (Reidy v. Young, supra), nor did it complain at the time of the foreclosure sale that the bank's bid was excessive, or that it should bid only an amount equal to the actual value of the property and rely upon a deficiency judgment for the balance of the debt. It made no effort to set aside the sale either by motion or by an independent action in equity or seek to establish a right of redemption. It advanced no claim whatsoever until the present action was brought by the bank revealing a private agreement with the pledgor as to the manner in which the pledge should be collected, and even then it did not seek to have the foreclosure sale vacated, nor did it offer to redeem the property for an amount equal to its value at the time of the foreclosure sale.

[4] Upon no theory may it be held that appellant is entitled to the rent collected by the bank. The foreclosure sale was at most voidable, and a purchaser at such a sale is entitled to the income of the property during the period of redemption. Sec. 707, Code Civ.Proc.; Reidy v. Young, supra. The fact that the bank made the purchase and took title as a pledgee of the mortgagee was a matter of concern only to itself and its pledgor. It conferred no additional rights upon junior encumbrancers,

and it did not render either the foreclosure decree or the sale vulnerable to attack by other parties.

[5] Section 3006 of the Civil Code declares the right of a pledgee to collect collateral security held in pledge, and it is the law of this state, that a pledgee who becomes the purchaser at a foreclosure sale under a collateral mortgage acquires absolute title to the property, although he is under a duty to account to the pledgor for the proceeds. Kelly v. Matlock, 85 Cal. 122, 24 P. 642; Hoult v. Ramsbottom, 127 Cal. 171, 59 P. 587; Johnson v. Mortgage Guarantee Co., 117 Cal.App. 416, 4 P.2d 208; McArthur v. Magee, 114 Cal. 126, 45 P. 1068; Beatty v. Pacific States, etc., Co., 4 Cal. App.2d 692, 41 P.2d 378; Reidy v. Young, supra. Here the duty of the bank to account to its pledgor, as affected by the pledgor's failure to carry out the terms of the agreement at the time of the sale has been met by the provisions of the decree of foreclosure, from which no appeal has been taken by either the bank or the pledgor.

The decree is affirmed.

We concur: WASTE, C. J.; GIBSON, J.; CARTER, J.; SHENK, J.; CURTIS, J.



15 Cal.2d 319

PENDLETON v. FERGUSON et al.

L. A. 16184.

Supreme Court of California.

March 30, 1940.

Rehearing Denied April 29, 1940.

See 101 P.2d 688.

1. Contracts ⇐143

If an agreement is not ambiguous on its face, court must ascertain intention of parties by reference to agreement itself.

2. Patents ⇐191

A patent granted by the United States confers on patentee exclusive rights to make, to use, to vend patented article, and such incidents of ownership of a patent may be granted or conferred separately. 35 U.S.C.A. § 40.

3. Patents ⇐190

In action to quiet title to letters patent, a finding that plaintiff did not intend to convey to defendant the title or any portion thereof to patents described in the complaint was unsupported in view of unambiguous language of agreement conveying from plaintiff to defendant exclusive right to lease, manufacture, use, sell, and distribute pumps in a stated area covered by the patents described in the complaint. 35 U.S.C.A. § 40.

4. Patents ⇐190

In action to quiet title to letters patent, evidence that defendant responded with words "Have it your way" to statement by plaintiff that he would not recognize defendant's rights under a contract, containing no termination or forfeiture provision, by which plaintiff conveyed to defendant exclusive right to lease, manufacture, use, sell, and distribute in a stated area pumps covered by the patents was insufficient to warrant finding that agreement was abandoned by mutual consent.

5. Patents ⇐214

A written notice of intention to terminate agreement granting exclusive right in a stated area to lease, manufacture, use, sell, and distribute pumps covered by patents, did not effect a cancellation of agreement where agreement contained no provision authorizing its cancellation upon notice by either party.

6. Appeal and error ⇐1010(1)

In action to quiet title to letters patent, due execution of agreement whereby plaintiff conveyed to defendant exclusive right in a stated area to lease, manufacture, use, sell, and distribute pumps covered by patents being admitted, and no evidence having been offered to establish termination of agreement, which had not by its terms expired, finding of trial court that agreement was not in full force and effect would be set aside and a judgment based thereon reversed.

7. Courts ⇐489(3)

While the federal courts have exclusive jurisdiction of all cases arising under the patent laws, such jurisdiction does not extend to all questions in which a patent may be the subject matter of the controversy, for courts of a state may try questions of title, and may construe and enforce contracts relating to patents.

8. Courts ⇐489(3)

State court had jurisdiction of an action to quiet title to letters patent rights to which were allegedly conveyed by plaintiff

to defendant under a written agreement where determination of whether relief prayed for should be granted required application of rules and principles of equity cognizable in the state courts and in no degree depended on any act of Congress concerning patent rights.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Action by Charles B. Pendleton, also known as C. B. Pendleton, against P. L. Ferguson, the Automatic Deep Well Pump Company sued as Automatic Deep Well Pump Company of Arizona, and others, to quiet title to five letters patent. From a judgment for the plaintiff, the named defendants appeal.

Reversed.

Arthur F. Larrabee and Randall & Bartlett, all of Los Angeles (Kenneth W. Kearney, of Los Angeles, of counsel), for appellants.

Marshall Nuckolls, of San Francisco, and Edmund S. Green, of Los Angeles, for appellant W. W. Thayer.

Ben F. Griffith and Malcolm Archbald, both of Los Angeles, for respondent.

CARTER, Justice.

By this action plaintiff sought to quiet his title as against the defendants to five certain letters patent issued to plaintiff by the government of the United States and particularly described in the complaint. Judgment was entered in favor of the plaintiff granting the relief prayed for against all of the defendants. This appeal is prosecuted by defendants Ferguson and Automatic Deep Well Pump Company, who claim an interest in three of said letters patent based upon an agreement entered into between plaintiff and defendant Ferguson on May 15, 1924, which agreement was assigned to defendant Automatic Deep Well Pump Company on October 20, 1928. Said agreement recites that plaintiff is the owner of the mechanical devices for which patents have been issued to plaintiff and that defendant Ferguson desires to buy the exclusive right to manufacture, use, lease, sell and distribute the pumps covered by the patents in the state of California and Mexico. It was therein agreed that in consideration of the sum of twenty-five thousand ($25,000) dollars paid in cash and on time by defendant Ferguson, and for other considerations, the plaintiff sells and assigns to defendant Ferguson the exclusive right to lease, manufacture, use, sell and distribute said pumps in California and Mexico, and defendant purchases such rights from plaintiff, subject to the terms of the agreement. The terms of the purchase are that defendant agrees to pay a royalty of fifteen (15%) per cent; to have the word "Patented" stamped on the pumps; that defendant has the right to institute and maintain in his own name suits for accounting at his own expense and that the expense of litigation against infringers should be equally borne by the parties to the agreement. Said agreement further provides that defendant shall keep books of account, open to inspection of plaintiff, and shall deliver statements on the dates when royalties are payable; that the parties agree to co-operate in the manufacture, sale, use and rental of the pumps; that defendant Ferguson shall have the right to assign any part or all of his rights under the agreement, and agrees to notify plaintiff within fifteen (15) days after the consummation of any such assignment, and that the royalties due under the agreement shall be paid to any person upon the order of plaintiff.

The execution of this agreement was admitted by plaintiff, but he claims that it was not the intention of the parties to convey thereby any title or portion thereof to any of the patents; that said agreement was abandoned by mutual consent of the parties and that said agreement was canceled and terminated by plaintiff prior to the assignment by defendant Ferguson to Automatic Deep Well Pump Company.

The trial court found that plaintiff was the owner of the patents described in the complaint; that plaintiff and defendant Ferguson entered into the agreement of May 15, 1924, and that said agreement had been assigned by defendant Ferguson to defendant Automatic Deep Well Pump Company. The trial court also found that defendants Ferguson and Pump Company had not done or performed the things on their part to be performed under said agreement and that neither of said defendants had any rights under said agreement. The court then found: "That the allegations contained in Paragraphs II, III, V, and VII of the answer of defendants P. L. Ferguson and the Automatic Deep Well

Pump Company are true, but the Court finds from the evidence that it was not the intention of the parties to any of the instruments mentioned in said paragraphs (Agreement of May 15, 1924, and assignment thereof to Automatic Deep Well Pump Company) to convey any title or portion thereof to any of the patents described in the complaint herein, and the Court further finds that whatever rights were vested in defendants P. L. Ferguson and the Automatic Deep Well Pump Company by the instruments described in said paragraphs were wholly and completely abandoned by the mutual and voluntary consent of all the parties to said instruments and considered of no force or effect by all of said parties at all times after October 21, 1928. The Court further finds that the instrument set forth in Paragraph II of the answer of P. L. Ferguson and the Automatic Deep Well Pump Company was cancelled and terminated by plaintiff prior to the alleged assignment thereof to the defendant Automatic Deep Well Pump Company."

The judgment decreed that plaintiff is the sole, absolute and exclusive owner of the letters patent described in the complaint, including the sole and exclusive right to manufacture, sell, use and distribute the property described in said patents; that one of the defendants has any right, title or interest in any of said patents, property or property rights and that said defendants are permanently restrained and enjoined from claiming any right, title or interest therein.

In presenting their appeal to this court from the judgment, the appealing defendants contend that the finding hereinabove quoted is contradictory; that said finding is not supported by any evidence and that the trial court had no jurisdiction over the subject-matter of the action.

We do not deem it necessary to consider the contention of the defendants that the above-quoted finding is contradictory for the reason that we are satisfied from a very careful perusal of the record that the evidence is insufficient to support said finding and that the judgment of the trial court must be reversed on this ground.

The agreement of May 15, 1924, between plaintiff and defendant Ferguson provides in part:

"The party of the first part hereby sells and assigns to party of the second part exclusive right to manufacture, lease, use, sell and distribute the aforesaid pumps in the State of California and Mexico, and party of the second part hereby purchases from party of the first part the exclusive rights to manufacture, lease, use, sell and distribute all of said pumps and improvements thereon in the State of California and Mexico, subject to the provisions and stipulations of this agreement.

"First: Party of the second part agrees to pay party of the first part a royalty equal to fifteen (15%) percent of all charges made and received by party of the second part from the proceeds of the sale, use, rental, installation or any other disposition made of each pump hereinbefore described by party of the second part. Said royalty to be paid quarterly and a separate accounting to be made of royalties payable on each pump hereinbefore described."

We will first give consideration to that portion of the above-quoted finding of the trial court that it was not the intention of the parties to said agreement of May 15, 1924, to convey any title or portion thereof to any of the patents described in the complaint herein.

[1] In determining whether or not this portion of said finding is supported by the evidence, our attention is first directed to the agreement in question. It is well settled that if the agreement is not ambiguous on its face, we must ascertain the intention of the parties by reference to the agreement itself.

There appears to be no ambiguity or uncertainty on the face of the agreement. It states in clear, plain and simple language an intention to convey from plaintiff to defendant Ferguson the exclusive right to lease, manufacture, use, sell and distribute the pumps covered by the patents therein described in the states of California and Mexico, subject to the provisions of said agreement.

[2, 3] A patent granted by the United States confers upon the patentee three exclusive rights. They are: the right "to make", the right "to use", and the right "to vend" the patented article. 35 U.S.C.A. § 40, Rev.Stats., sec. 4884. These are the incidents of ownership of a patent and they may be granted or conferred separately. Adams v. Burke, 17 Wall.U.S. 453, 456, 21 L.Ed. 700; Braun, Bryant & Austin v. McQuire, 201 Cal. 134, 255 P. 808. By said agreement, plaintiff conveyed and

assigned to defendant Ferguson all that plaintiff had to grant in said letters patent so far as the states of California and Mexico were concerned. Such being the case, it is obvious that the finding that there was no intention to convey the title or any portion thereof to the patents described in the complaint must fall in face of the clear and unambiguous language of the agreement.

[4] The only testimony claimed by plaintiff as indicating any intention on the part of defendant Ferguson to consent to the termination of said agreement appears in the testimony of the plaintiff, where, in testifying to a conversation with defendant Ferguson in regard to the terms of a subsequent agreement, the question arose as to whether or not such agreement should cover only territory outside of California, and plaintiff stated that he wouldn't in any way or under any circumstances recognize defendant Ferguson's 1924 contract of California, and defendant Ferguson replied, "Have it your way."

Several other agreements were entered into between the plaintiff and defendant Ferguson and Automatic Deep Well Pump Company involving the same patents covered by the agreement of May 15, 1924, the first of which was entered into on August 22, 1928, and the last on January 14, 1931, but all of these agreements covered territory in addition to California and Mexico, and in none of them was any reference made to the agreement of May 15, 1924; nor was any provision made therein for the cancellation or termination of said agreement.

On page 13 of respondent's brief, counsel state: "Ferguson testified that the contract with Pendleton and the Pump Company was cancelled by mutual consent of all parties (Rep.Tr., p. 79, l. 10 to p. 82, l. 9)." We have carefully examined the transcript reference and find that the contract mentioned in the testimony was plaintiff's exhibit 8, which was an agreement dated October 31, 1928, between plaintiff, defendant Thayer, and Automatic Deep Well Pump Company, and no reference was made therein to the agreement of May 15, 1924. From our examination of the record, we are unable to find any evidence from which an inference can be drawn that there was any intention on the part of either defendant Ferguson or Automatic Deep Well Pump Company to abandon or terminate the agreement of May 15, 1924. On the contrary, the assignment of said agreement to Automatic Deep Well Pump Company on October 20, 1928, and the recording of said assignment with the United States patent office on January 25, 1932, would negative any such intention. It is our conclusion, therefore, that the finding of the trial court that said agreement was wholly and completely abandoned by the mutual and voluntary consent of all the parties and considered of no force or effect by all of said parties at all times after October 21, 1928, is not supported by the evidence.

[5] The agreement contains no provision for its termination or forfeiture for nonperformance of any of its terms and no instrument in writing was ever executed by defendant Ferguson or Automatic Deep Well Pump Company, which could be construed as evidencing an intention on their part to cancel, abandon or otherwise terminate said agreement.

However, on October 26, 1926, plaintiff wrote a letter to defendant Ferguson in which he stated: "You are hereby notified of the cancellation and termination of agreements made by myself and the Automatic Pump Company and myself and P. L. Ferguson, dated May 15, 1924, covering the manufacture, lease, use, sale and distribution of automatic fluid pressure displacement pumps covered by patents numbers 1368528—1473512—1523709."

Defendant Ferguson ignored said letter and refused to recognize plaintiff's right to cancel or terminate said agreement.

While the letter written by plaintiff to defendant Ferguson on October 26, 1926, might be considered as a notice of the intention of plaintiff to cancel and terminate said agreement, such notice was of no force or effect for the reason that the agreement of May 15, 1924, contained no provision authorizing its cancellation or termination upon notice by either party thereto, and therefore the mere giving of such notice did not constitute a cancellation or termination of said agreement.

The letter above mentioned is the only basis upon which plaintiff predicates his contention that the agreement of May 15, 1924, was canceled and it was evidently the basis of the finding of the trial court to that effect. We therefore hold that the finding of the trial court that the agree-

ment of May 15, 1924, was canceled and terminated by plaintiff prior to the alleged assignment thereof to the defendant Automatic Deep Well Pump Company is not supported by the evidence.

[6] The due execution of the agreement of May 15, 1924, between plaintiff and defendant Ferguson being admitted, and no evidence having been offered to establish the termination of said agreement, and it not having by its terms expired, it is still in full force and effect, and the finding of the trial court to the contrary must be set aside and the judgment based thereon must be reversed.

Appellants contend that the trial court had no jurisdiction to hear or determine this action, but we cannot agree with this contention.

A review of the authorities convinces us that the issues raised by the pleadings in this action bring the case clearly within the jurisdiction of the courts of this state.

[7, 8] It appears to be the settled rule that while the federal courts have exclusive jurisdiction of all cases arising under the patent laws, such jurisdiction does not extend to all questions in which a patent may be the subject-matter of the controversy, for courts of a state may try questions of title, and may construe and enforce contracts relating to patents.

As we understand the issues in this case, they simply involve a contract relating to the title to certain patents. A determination of whether or not the relief prayed for should be granted must be arrived at by the application of rules and principles of equity cognizable in the courts of this state and in no degree whatever upon any act of congress concerning patent rights.

In the case of Luckett v. Delpark, Inc., 270 U.S. 496, 46 S.Ct. 397, 399, 70 L.Ed. 703, the late Chief Justice Taft, in an exhaustive opinion reviewed the cases on this subject and quoted with approval the rule announced by Chief Justice Taney in the case of Wilson v. Sandford, 10 How. 99, 13 L.Ed. 344, which appears to be directly in point in the case at bar. In the case of Luckett v. Delpark, supra, Chief Justice Taft said:

"In Wilson v. Sandford, supra, a bill in equity was filed in a federal Circuit Court setting forth complainant's ownership of a patent, an assignment to defendants of a license in consideration of five promissory notes, with a condition of reversion to complainant on failure to pay any note. The bill averred that the first two notes were not paid, insisted that the license was forfeited by the failure and the licensor was fully reinvested at law and in equity with all his original rights, that the defendants were using the patented machine and were infringing the patent, prayed an account of profits since forfeiture, a temporary and permanent injunction, and a reinvestiture of title in the complainant. On demurrer, the bill was dismissed for lack of jurisdiction as not arising under the patent laws. Chief Justice Taney, speaking for the court, said:

" 'The rights of the parties depend altogether upon common-law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited, and the prayer is "that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court," and for an injunction. But the injunction he asks for is in consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside; and if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of Congress concerning patent rights.' "

The judgment of the trial court is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; GIBSON, J.

I dissent: HOUSER, J.

BIEWEND v. BIEWEND.*

Civ. 6288.

District Court of Appeal, Third District, California.

April 2, 1940.

Rehearing Denied May 2, 1940.

Hearing Granted May 31, 1940.

1. Judgment ⇐815

The courts of California recognize judgments of sister states. U.S.C.A.Const. art. 4, § 1.

2. Divorce ⇐331

The alimony provision of Missouri divorce decree would not be enforced in California after wife's remarriage, notwithstanding that no statute nor decision in Missouri was found holding that wife's subsequent marriage absolved husband from making alimony payments, in view of declaration of policy of California code that on wife's remarriage husband should no longer be obligated to provide for her support. Code Civ.Proc. § 1875, subd. 3; Civ.Code, § 139; U.S.C.A.Const. art. 4, § 1.

3. Judgment ⇐823

Although California court could not modify or change Missouri decree, it could refuse to enforce particular provision that was in conflict with California statutory idea of public policy. U.S.C.A.Const. art. 4, § 1.

4. Divorce ⇐331, 332

A provision of Missouri divorce decree awarding wife $25 weekly for support of herself and minor children would not be enforced in California, where youngest child had reached age of 21 and decree did not specify what part of weekly sum was for support of children and what part for support of wife. U.S.C.A.Const. art. 4, § 1.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Lottie C. Biewend against Adolph C. Biewend on a Missouri divorce decree. From a judgment for plaintiff, defendant appeals.

Reversed.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

Charles H. Epperson and Lawrence Edwards, both of Stockton, and Nathan H. Snyder, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, Lottie C. Biewend, was, until May 10, 1918, the wife of defendant, Adolph C. Biewend. Upon that day in the state of Missouri, she obtained a decree divorcing her from defendant, and providing, among other things, for the payment to her of $25 each week, for the support of herself and their four minor children. Thereafter, in October, 1938, in the county of San Joaquin, she filed an action based upon the Missouri decree for all money unpaid under that decree, and recovered a judgment for the instalments that had accrued within five years prior to the beginning of the California action, and an order for the payment to her of the sum of $25 a week from the date of the judgment in this state.

It appeared from the findings that subsequent to the divorce, Lottie C. Biewend had, in 1919, in the state of Kansas, married one Frank Zumwalt, and lived with him as his wife until 1921, when she divorced him. Thereafter, and in July, 1922, plaintiff, then Lottie C. Zumwalt, without a marriage ceremony, resumed marital relations with Biewend and lived with him for approximately two years, when they came to California, where they continued to live together for two more years, when they again separated.

It was also apparent from the record that the youngest child had reached his majority in 1928, approximately ten years before the action in California was commenced.

Appellant first contends that the marriage of plaintiff to Zumwalt relieved him, her former husband, of any further obligation under the judgment of divorce, to thereafter pay her anything for her own support or maintenance.

Secondly, that plaintiff could not collect from the defendant for the support and maintenance of the children after they had reached the age of majority, and also that the action is barred by the statute of limitations.

Thirdly, that if plaintiff is entitled to collect anything she is not entitled to the full amount specified in the judgment, which was for herself, and for the minor children, and as all of the children have now reached the age of majority, there is nothing upon which a court could base

* Subsequent opinion 109 P.2d 701.

a judgment for a less amount, except by speculation.

The divorced wife of defendant, within approximately eighteen months after the final decree, married one Frank Zumwalt. Did such marriage automatically release defendant from his legal obligation to comply with the order of the Missouri court whereby he was directed to pay to plaintiff the sum of $25 each week for the support of herself and her minor children?

Respondent insists that under the rule of comity and the full faith and credit clause of the Constitution of the United States, art. 4, § 1, the obligation rests upon the courts of California to recognize and enforce the judgment of the state of Missouri as it would have been in the state where rendered. Milwaukee County v. M. E. White Co., 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220; 34 Cor.Jur. 1128, 1129.

[1] Respondent also relies upon several California cases which lay down the rule that the courts of this state will recognize and enforce decrees for alimony from foreign states. Palen v. Palen, 12 Cal. App.2d 357, 55 P.2d 228; Rinkenberger v. Rinkenberger, 99 Cal.App. 45, 277 P. 1096; Barns v. Barns, 9 Cal.App.2d 427, 50 P. 2d 463; Creager v. Superior Court, 126 Cal.App. 280, 14 P.2d 552; Cummings v. Cummings, 97 Cal.App. 144, 145, 275 P. 245. With the principles there announced we are in accord. The courts of this state do recognize the judgments of our sister states. It would result in an inextricable confusion if each state was encouraged to modify, amend or change the decree originally granted by a sister state, and consequently the party aggrieved should ordinarily seek his relief in the court which first gave the decree its vitality.

[2, 3] By the provisions of section 1875, subdivision 3, of the Code of Civil Procedure, the courts of this state take judicial notice of the laws of the several states, and the interpretation thereof by the highest court of appellate jurisdiction within such state, and we find no statute nor decision in Missouri holding that a subsequent marriage of the wife absolves a husband from making payment of alimony to her. Normally under such circumstances, the courts of this state would promptly enforce a judgment of a sister state, impelled to do so by the constitutional direction of our state and federal Constitution, and the rules of comity existing between the several states. However, we have a direct declaration of policy found in section 139 of the Civil Code to the effect that upon the remarriage of the wife the husband shall no longer be obligated to provide for her support. In the Slaughter House cases, 16 Wall. 36, 77, 21 L.Ed. 394, it is said: "Its sole purpose [of the constitutional provision guaranteeing equality of privileges and immunities to the citizens of the several states] was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

In 5 Ruling Case Law 911, section 5, it is said: "In the recognition and enforcement of foreign laws the courts are slow to overrule the positive law of the forum, and they will never give effect to a foreign law when to do so would prejudice the state's own rights or the rights of its citizens, or when the enforcement of the law of the forum, whether that policy be reflected in statutory enactment or not."

In Hudson v. Von Hamm, 85 Cal.App. 323, 259 P. 374, the question of faith and credit between the states and the question of comity is well considered.

In Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868, 869, the court declared: "The plaintiff's duty toward his wife is to support her while she remains single or until she dies. If she marries again, or if she dies, that duty toward her will terminate."

In Parker v. Parker, 203 Cal. 787, 266 P. 283, the reviewing court refused to uphold an order directing that execution issue to collect instalments of alimony accruing after the marriage of appellant to another. In Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53, the defendant was directed in the final divorce decree to pay to plaintiff, his wife, certain monthly payments. Thereafter the divorced wife remarried. The former husband moved to modify that portion of the decree compelling him to make payments of alimony. The trial court refused to change the decree, but upon appeal the Supreme Court held that good public policy would not compel a divorced husband to support his former wife after she became another man's wife, except under extra-

ordinary circumstances, and that the burden of making such a showing was upon the former wife. The court cited in support of this rule, California Jurisprudence, volume 1, page 1039, and Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520.

In Hale v. Hale, 6 Cal.App.2d 661, 45 P.2d 246, 247, the parties were divorced. The former husband became delinquent in certain payments he was ordered by the decree to make for the support of the plaintiff and her minor children. The plaintiff had remarried and the children had become of age. The trial court directed that execution issue against the husband. The reviewing court set aside that order, holding that the husband's duty to support his wife terminated with her remarriage, and his duty toward his children terminated as to them as the last child attained its majority, and since the remarriage of the former wife she had been presumptively supported by her present husband, and plaintiff had made no attempt to overcome that presumption.

From the foregoing authorities and the underlying principles of comity and good faith, although we in California cannot modify or change the decree of Missouri we can refuse to enforce the particular provision that is in conflict with our statutory idea of public policy.

[4] Furthermore, from the findings it appears that the youngest child reached the age of majority in 1928. The decree does not specify what part of the $25 payable each week was for the support of the children and what part for the support of the wife, and as stated in Hale v. Hale, supra, for the court now to determine what was personally due and necessary for plaintiff after 1928, "would be to indulge in speculation and guess, and such determination is clearly not the province either of this court or of the trial court".

The trial court in the instant case entered judgment against defendant for all sums accruing under the judgment during the period of five years immediately preceding the filing of this action. As the youngest child was then over twenty-one years it would appear that the amount necessary for the support of the former wife was so uncertain as to prevent the issuance of a judgment thereon.

In Evans v. Evans, 116 Wash. 460, 199 P. 764, 765, a case strongly relied upon by appellant, plaintiff brought an action to recover alimony claimed to be due under a judgment of divorce rendered by the courts of Illinois. The judgment provided that defendant pay to plaintiff $60 each month for the support and maintenance of herself and her minor children. The elder child attained the age of majority on March 18, 1911. An action on the judgment was commenced April 12, 1911. On appeal, the Supreme Court of Washington held the amount to which plaintiff was justly entitled could not be ascertained, and until so determined she was not entitled to recovery of the full amount. The court there said: "The question in the case is whether the respondent had the right to recover under the decree the amount there specified after one of the children, or both, had reached the age of majority. * * * The decree does not segregate the amount which was intended for the maintenance and education of the children or either of them from the amount which was intended for the support and maintenance of the appellant. * * * But the question is, can a recovery be had after one of the children becomes of age when the decree does not make a segregation. After the first child became of age the liability of the respondent under the decree for the maintenance and education of that child ceased. Likewise with reference to the second child. C.J. vol. 19, p. 360."

Without discussing other points raised by appellant, it would appear that plaintiff is not entitled to recovery, and the judgment must be reversed. It is so ordered.

We concur: THOMPSON, J.; TUTTLE, J.

PEOPLE v. STEINFELD.

Cr. 3310.

District Court of Appeal, Second District, Division 2, California.

April 2, 1940.

Rehearing Denied April 15, 1940.

Hearing Denied May 2, 1940.

1. Gaming ⇐79(1)

In prosecution for keeping and occupying a room for the purpose of recording wagers on horse races, it is not necessary, to justify conviction for prosecution, to establish that defendant was owner or lessee of the premises used for the prohibited purpose, but it is sufficient if prosecution establishes that defendant aided and abetted in the occupancy of the premises for the illegal purpose. Pen.Code, § 337a, subd. 2.

2. Gaming ⇐98(5)

Evidence that defendant was seated behind desk in room used to record wagers on horse races, that he accepted money placed as a wager, and that on desk in front of defendant were papers used by persons who record wagers, justified conviction of keeping and occupying a room for the purpose of recording wagers on horse races. Pen. Code, § 337a, subd. 2.

3. Criminal law ⇐1186(4)

Statement by judge to defendant who was being tried without jury, that judge did not believe a word defendant said, that defendant knew he was lying, and that defendant would be a lot better off if he spoke the truth, constituted improper conduct, but no "miscarriage of justice" resulted warranting reversal of conviction where defendant admitted his guilt when judgment was pronounced. Pen.Code, § 337a, subd. 2; Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

4. Witnesses ⇐88

A defendant in criminal prosecution had the constitutional right to testify in his own behalf and is entitled to the same courtesy and consideration from trial judge as any other witness.

5. Criminal law ⇐254

In a criminal trial before a judge, without a jury, legitimate comments during examination of witnesses which are necessary to bring out the truth are in order, but the final conclusion as to guilt or innocence of defendant should be withheld until conclusion of trial.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Morris Steinfeld was convicted of keeping and occupying a room for purpose of recording wagers on horse races, and he appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Irwin H. Roth, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Warner I. Praul, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

WOOD, Justice.

Defendant was charged by information with the crime of violating subdivision 2 of section 337a of the Penal Code in that he kept and occupied a room for the purpose of recording wagers on horse races. He was found guilty at a trial by the court without a jury and prosecutes the present appeal from the judgment of conviction.

From the evidence presented by the prosecution it appears that defendant was arrested on August 19, 1939, in a room at the rear of a barber shop at 4370 West Adams street in the city of Los Angeles. When the officers arrived there were about ten persons in the room and just outside the door in the backyard there were fifteen or twenty more persons. The room contained paraphernalia that was being used in violation of the code section under which defendant is prosecuted. In his brief defendant concedes that the evidence is sufficient to establish that the room was being used to record wagers on races but contends that the evidence fails to establish that he was the party who kept or occupied the room. In one corner of the room was a desk which one of the officers described as "an L-shaped desk that fitted around one corner and makes a square with the two walls". When the officers entered defendant was behind this desk and talking over the telephone. The receiver was at his ear and he was talking numbers into the telephone, the officer hearing him say "one across". A woman, identified as Mrs. Etta Cross, walked up to defendant and laid a one dollar bill on the desk saying, "Give me 305 to place". Defendant looked at Mrs. Cross and nodded. An examination

of the "run down sheet" which was found in the room revealed that 305 was the number of a horse named "Lieutenant Greenock", running in the sixth race at Del Mar. On the desk in front of defendant the officers found a number of papers known as "take sheets" which, according to the testimony, are instruments commonly used by persons who record wagers on horse races. No person other than defendant was behind the desk. When the officers placed defendant under arrest they asked him how long he had been at the premises in question and also if he was the owner of the "take sheets" and "racing forms" found on the premises. To these questions defendant refused to give any answer at all and refused to converse with the officers other than to give his name. After his conviction defendant was arraigned for judgment and at that time he told the court that he was guilty of the offense for which he had been tried. The record discloses the following:

"The Court: * * * Now, have you any legal cause to show at this time why judgment and sentence should not be pronounced?

"Mr. Roth: No legal cause, your Honor.

"The Defendant: All I want to say is that I am guilty.

"The Court: What?

"The Defendant: I lied about everything, and I am guilty."

[1, 2] In his brief counsel argues that the evidence is insufficient to justify the conviction. It was not necessary for the prosecution to establish that defendant was the owner or lessee of the premises which were admittedly used for the prohibited purpose. The proof of the prosecution is sufficient if it establishes that defendant aided and abetted in the occupancy of the premises for the illegal purpose. People v. Tuttle, 27 Cal.App.2d 647, 81 P.2d 571. We are satisfied that the evidence is sufficient to justify the conviction. In view of defendant's clear admission of guilt at the time judgment was pronounced it is difficult to perceive how counsel for defendant could reasonably expect to secure a reversal of the judgment, for it cannot be successfully argued that there has been a miscarriage of justice. Unquestionably section 4½ of article VI of the Constitution of California is applicable.

[3-5] Defendant complains that the trial judge was guilty of misconduct during the course of the trial and cites the following taken from the reporter's transcript:

"The Court: I don't believe a word you say, Steinfeld. You know you are lying. You would be a lot better off if you come through with the truth. Since you want to lie about it—

"The Witness: I am not lying.

"The Court: Oh, don't give me that stuff, go on, that is all."

The conduct of the trial judge is not to be commended. Defendant had the constitutional right to testify in his own behalf and was entitled to the same courtesy and consideration as any other witness. It is not customary in American courts which follow approved principles of decorum to address witnesses in the curt manner in which defendant was addressed. Neither is it customary to interrupt the testimony of witnesses to accuse them of lying. When the witness in a dignified manner replied that he was not lying the judge characterized his statement as "that stuff". A witness should be able to rely confidently upon the court for protection from such treatment, but in this instance the witness had no recourse. It does not follow, however, that the improper conduct of the judge calls for a reversal of the judgment of conviction. The case was not tried before a jury and the judge himself was the arbiter of the issues of fact. In the nature of proceedings such as those under review it is necessary for the judge to receive impressions as to the veracity of the witnesses while they are testifying. Legitimate comments which are necessary to bring out the truth are in order but the final conclusion as to the guilt or innocence of the defendant should be withheld until the conclusion of the trial. Judgments may not be reversed for misconduct of the judge unless the misconduct has resulted in a miscarriage of justice. People v. Johnson, 11 Cal.App.2d 22, 52 P.2d 964. It cannot be concluded from the record before us that defendant was misled or otherwise prejudiced as to the final result of the trial by the conduct of the judge.

The judgment is affirmed.

I concur: MOORE, P. J.

McCOMB, Justice (concurring).

I concur in the judgment on the sole ground that, in view of the fact that the defendant at the time of his arraignment for judgment and sentence admitted his guilt,

he has failed to show that he was prejudiced by any ruling of the trial court. He has fully supplied any deficiencies there may be in the evidence by his own admissions. Therefore, under section 4½ of article VI of the Constitution of the state of California we cannot reverse the judgment.

I fully concur in the statements in the majority opinion relative to the utter impropriety of the trial judge's conduct toward the defendant. There is never a circumstance which justifies a trial judge in being discourteous to parties litigant or counsel in either a civil or criminal action.



38 Cal.App.2d 341

JONES v. BRIDGES.

Civ. 2280.

District Court of Appeal, Fourth District, California.

April 4, 1940.

1. Appeal and error ⇐907(5)

What jury observed on visit to place of plaintiff's accident during trial was evidence, in personal injury action, which appellate court would presume supported verdict and judgment for defendant.

2. Negligence ⇐32(1), 52

The owner of property is not insurer of invitee's safety, but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils.

3. Negligence ⇐67

An owner of property is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed by invitee in the exercise of reasonable care.

4. Negligence ⇐32(1)

As regards duty owed by owner of premises to invitee to keep premises in reasonably safe condition, the terms "safe" and "reasonably safe" are synonymous.

See Words and Phrases, Permanent Edition, for all other definitions of "Safe" and "Reasonably Safe".

5. Trial ⇐267(3)

In action by patron against cafe owner for broken leg sustained by patron in falling down steps leading to lavatory, modification of instructions requested by patron so that instructions stated that it was duty of owner to use "ordinary" care to keep premises "reasonably safe" in some instances, and "safe" in others, for use of patrons, was not error, since terms "safe" and "reasonably safe" were synonymous.

6. Negligence ⇐141(4)

An instruction that duty rested upon patron of cafe, who was injured when she fell down steps leading to lavatory, to look where she was going and see that which was in plain sight, and that it was negligence on her part not to so use her faculties, was not error.

7. Negligence ⇐136(27)

Whether a plaintiff should have seen a danger in front of her is usually a question of fact for jury, and usually contributory negligence as matter of law should not be predicated on a failure to see a danger where plaintiff took some precautions for her safety.

8. Appeal and error ⇐201(2)

The failure of plaintiff to assign remarks by trial judge as error and to request instruction to jury to disregard them must be held to waive any error in them.

9. Appeal and error ⇐231(1)

A request, at close of case, by plaintiff for a general instruction that comments of court or counsel were not to be considered as evidence, was not sufficient to call to mind of trial court remarks at which it was directed, and hence reversible error could not be predicated on refusal to give such instruction. Const. art. 6, § 4½.

10. Negligence ⇐134(3)

Evidence was insufficient to entitle patron of cafe, who was injured when she fell down steps leading to lavatory, to recover from owner on theory that she failed to see steps because of being blinded by light in areaway after crossing dance hall which was kept very dark.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Mattie Jones against Jesse Bridges for a broken leg suffered by plaintiff in falling down steps in a cafe owned by

defendant. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Calvin H. Conron, Jr., and J. W. Heard, Jr., both of Bakersfield, for appellant.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

MARKS, Justice.

This is an action to recover damages for a broken leg suffered by plaintiff in falling down two steps leading to a lavatory which was part of a cafe owned and operated by defendant in or near the city of Bakersfield. The jury returned a verdict for defendant and plaintiff has appealed from the judgment entered on the verdict.

The cafe is entered from the north through a door into a refreshment room which is twenty feet in width and twenty-five feet in length. In this room is an L-shaped bar with stools along both fronts. To the rear of the refreshment room is a dance hall twenty-five feet in width and thirty feet in length. The two rooms are connected by an archway in the partition. While the width of the arch is not given, it would seem from a diagram in the record to be about ten feet wide. It is over seven feet high.

The lavatories were on the southerly side of the dance hall at about the center of that wall. The door leading to the women's lavatory opened outward from the dance hall into an areaway and was nearly opposite one side of the arch. It was an ordinary inside door and had a threshold under it one-half inch above the level of the dance floor. This threshold was one and one-half or two inches above a cement step on the areaway side of the door. This step was thirteen inches wide. There was a second cement step, fourteen inches wide, with seven-inch risers to this first step and to the floor of the areaway. The door had a coil spring on the inside at the top which acted as a door closer. The areaway was well lighted.

Plaintiff, with a male companion, entered the cafe between ten and ten-thirty on the evening of July 29, 1937. The couple seated themselves at the bar and ordered drinks. This portion of the premises was well lighted. After remaining at the bar for about thirty minutes plaintiff asked her companion for directions to the lavatory. This was her first visit to the cafe. She proceeded across the dance floor to the lavatory door. She described the happening of the accident as follows:

"I walked across the dance floor to the lavatory, and opened the door, and there was no light, and I went to the first door—the dance floor was all dark, and I opened the door to go through, and I started to fall. There was a big bright light over the door on the other side. That shined right in my eyes and I fell. * * *

"Q. But you were able to see the door when you got there? A. Yes.

"Q. And you opened that door and just show us what you did—illustrate to us what you did? A. I walked up to the door, opened the door and started falling.

"Q. Did you stumble over anything? A. I was standing by that threshold front of the door.

"Q. Did you stumble over anything? A. No sir.

"Q. Did you slip on anything? A. No sir."

No other witness testified as to the manner in which plaintiff received her injuries.

If we understand plaintiff and her counsel correctly, it is their theory that, after opening the door from what they maintain was the very dark dance hall, plaintiff was blinded by the light in the areaway; that because of being so blinded she failed to see the steps leading from the dance floor to the areaway; that it would have been safer construction to have had a hand rail on the right hand side of the steps. They argue that the negligence of defendant consisted of, (1) not having the dance hall sufficiently illuminated; (2) in not having a hand rail along the steps; (3) in not having the upper step as wide as the door instead of a width of thirteen inches.

[1] The jury was taken to the scene of the accident during the trial. What they observed there is not in the record. However, what they saw was evidence which we must presume supports the verdict and judgment. Ethel D Company v. Ind. Acc. Com., 219 Cal. 699, 28 P.2d 919; Haase v. Central Union H. S. Dist., 27 Cal.App.2d 319, 80 P. 2d 1044.

Plaintiff argues that the trial court committed prejudicial error in modifying instructions she proposed, in giving instructions proposed by defendant, and in refusing to give instructions requested by her.

Plaintiff proposed, and the trial court gave, the following instruction: "The occupier of a building must exercise ordinary

care to render the premises reasonably safe to persons whom he induces to come thereon by invitation express or implied."

Other instructions requested by plaintiff did not have the word "ordinary" before "care", nor the word "reasonably" before "safe". The trial judge inserted the word "ordinary" in all of them, and in part of them the word "reasonably" before "safe", and in others he failed to make that change. Thus the jury was instructed that it was the duty of defendant to use *ordinary* care to keep his premises *reasonably safe* in some instances, and *safe* in others, for the use of plaintiff, an admitted invitee, who was entitled to use the lavatory.

Plaintiff's argument in support of her theory that it was error to so modify an instruction is summarized as follows: "First, they reduced the duty of care of the proprietor from 'safe' to 'reasonably safe'; and second, they further reduced the duty to 'exercise ordinary care to keep premises reasonably safe'."

Plaintiff cites numerous cases where the appellate courts have remarked that it was the duty of the owner of a building to keep it in a safe condition for the use of his invitees. Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; Giannini v. Campodonico, 176 Cal. 548, 169 P. 80; Madigan v. O. A. Hale & Co., 90 Cal.App. 151, 265 P. 574; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Corbett v. Spanos, 37 Cal.App. 200, 173 P. 769; Stewart v. Lido Cafe, 13 Cal. App.2d 46, 56 P.2d 553. In but one of these cases were instructions given to the jury involved. Madigan v. O. A. Hale & Co., supra. There, as here, the court instructed the jury that it was the duty of the owner to maintain the premises "in a safe condition" and also "to maintain it in a reasonably safe condition". No error was found in these instructions in that case.

[2, 3] The degree of care which an owner owes to an invitee is thus set forth in Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801, 802: "The owner of property, in so far as an invitee is concerned, is not an insurer of safety, but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76." See, also, Bruce v. Risley, 15 Cal.App.2d 659, 59 P.2d 847; Adams v. Dow Hotel, 25 Cal.App.2d 51, 76 P.2d 210; Vitrano v. Westgate Sea Products Co., 34 Cal.App.2d 462, 93 P.2d 832.

[4, 5] Of course, in a restricted sense, a safe condition may mean one in which there is no possibility of danger. We have concluded, after studying many cases, that when the courts, in speaking of the duty owed to an invitee, said that the owner should keep his premises in a safe condition, they did not give to the word "safe" any such meaning of absolute absence of any possible danger. Many statutes requiring employers to provide "safe" places wherein their employees work, have been construed by the courts. It has been very generally held that in such statutes "safe" means "reasonably safe"; that the two expressions are synonymous and interchangeable. See Valentine v. Hayes, 37 Cal.App. 42, 173 P. 410; Gobar v. Kratowicz, 179 Wis. 256, 191 N. W. 509; Waterbury v. Chicago, Milwaukee & St. Paul Ry. Co., 207 Ill.App. 375; Lively v. American Zinc Co. of Tennessee, 137 Tenn. 261, 191 S.W. 975; Kuhn v. Cincinnati Traction Co., 109 Ohio St. 263, 142 N.E. 370. We believe that these rules should be applied here, and that consequently we must conclude that when our courts have said that an owner must keep his premises safe for use by an invitee they did not require of him a guaranty against any possible injury, but only that he use ordinary care to keep his premises in a reasonably safe condition for use by an invitee. With this construction placed on those terms there was no confusion in the instructions and no error in those modified by the trial court.

[6, 7] The trial court instructed the jury that a duty rested upon plaintiff to look where she was going and to see that which was in plain sight in front of her; that it was negligence on her part not to so use her faculties. Such a duty has been recognized in decisions. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Weddle v. Heath, 211 Cal. 445, 295 P. 832; Blodgett v. B. H. Dyas Co., supra. However, it has been frequently held that whether or not a plaintiff should have seen a danger in front of her is usually a question of fact for the jury and that usually contributory negligence as a matter of law should not be predicated on a failure to see a danger where she took some precaution for her safety, the question of her negligence depending on the facts of the particular case. See, White v.

Davis, 103 Cal.App. 531, 284 P. 1086; Shaw v. Robertson, 8 Cal.App.2d 520, 48 P.2d 128; Francis v. Riddle, 15 Cal.App.2d 282, 59 P.2d 532; Healy v. Yellow Cab Co., 32 Cal.App. 2d 479, 90 P.2d 116.

[8] Plaintiff now complains of remarks by the trial judge which she argues were unjustified comments on the weight of the evidence. None of these remarks were assigned as error and there was no immediate request for an instruction to the jury to disregard them. The failure of plaintiff to assign the remarks as error and to request an instruction to the jury to disregard them must be held to waive any error in them.

[9] At the close of the case plaintiff did request a general instruction that "comments of court or counsel are not to be considered by you as evidence". The instruction was not directed to any particular remarks of either the trial judge or counsel. The comments by the court set forth in the brief are unimportant and the trial court's attention should have been directed to them at the time the instruction was presented. It may be that the remarks had passed from his mind at the time. If we should hold that the remarks were erroneous, which we do not, we could not predicate reversible error on the refusal to give this instruction under these circumstances. The very general character of the instruction was not sufficient to call to the mind of the trial judge the remarks at which it was directed.

[10] Plaintiff urges that the verdict and judgment are contrary to the evidence. Our study of the record causes us to conclude that they are supported by a great preponderance of the evidence.

Plaintiff did not know what caused her to fall. The jury was left to speculation on that question. She was the only witness who testified that the dance hall was so dark that she could see nothing when crossing it. Her companion and another witness characterized the light there as "dim". All of the other witnesses, including some of plaintiff's, testified that there was one or more lights illuminated in the dance hall. Many witnesses described it as well lighted. Thus plaintiff's contention that upon opening the door she was blinded by the strong light in the areaway so that she could not see the steps in front of her is effectively disposed of. Thus the jury had much evidence before it to support a finding of contributory negligence on the part of plaintiff and little to support any conclusion of negligence on the part of defendant.

The record does not show any miscarriage of justice in the judgment for defendant. The errors of law occurring during the trial were not sufficiently prejudicial to permit a reversal of the judgment. Sec. 4½, Art. VI, Const.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



FEWEL & DAWES, INC. v. PRATT.*

Civ. 6324.

District Court of Appeal, Third District, California.

April 4, 1940.

Rehearing Granted May 3, 1940.

For Subsequent Opinion see 103 P.2d 209.

1. Assignments ⇐68

Where licensed insurance broker agreed to divide life insurance commissions to be earned in future with unlicensed assignor acting for subsequently organized corporation to which assignor assigned contract and with which broker did not contemplate contracting and broker thereafter repeatedly accepted and requested execution of receipts for commissions paid to corporation in name of assignor, broker was "estopped" by his conduct from contending that assignment of agreement terminated the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

2. Contracts ⇐54(1)

Where licensed insurance broker agreed to divide life insurance commissions to be earned in future, with unlicensed assignor acting for subsequently organized corporation to which assignor assigned contract and with which broker did not contemplate contracting and the only service called for on the part of the assignor was his influence with prospective insurance purchaser, and he was not required to contact insurers or to perform any servicing of policies, acts of the assignor were sufficient consideration to support agreement.

3. Insurance ⇐12

Where licensed insurance broker agreed to divide life insurance commissions to be

* Subsequent opinion 109 P.2d 650.

earned in future with an unlicensed assignor acting for subsequently organized corporation to which assignor assigned contract and which at the time performance under contract was undertaken was licensed assignor's agreement for division of life insurance commissions to be earned in the future was not in violation of statute forbidding a person to act as a life agent until licensed so as to void the contract. Pol.Code, § 633aa.

4. Insurance ⇐12

The statute forbidding any person to act as a life agent of any insurer until licensed was enacted for the protection of the public and conduct constituting acts of an insurance broker in violation of its provisions are void. Pol.Code, § 633aa.

5. Insurance ⇐12

Under statute forbidding any person to "act as a life agent" of any life insurance company until licensed, unlicensed person who agreed with licensed insurance broker to divide certain life insurance commissions to be earned in the future did not "act as a life agent" so as to void the agreement to divide commissions. Pol.Code, § 633aa.

See Words and Phrases, Permanent Edition, for all other definitions of "Act as a Life Agent".

6. Insurance ⇐12

Where licensed broker agreed to divide life insurance commissions to be earned in the future with unlicensed assignor acting for subsequently organized and licensed corporation to which assignor assigned contract, assignor acted in the status of a promoter whose contract became valid notwithstanding corporation was not in existence when executed. Pol.Code, § 633aa.

7. Insurance ⇐12

Where assignee of an agreement to divide life insurance commissions at time of performance of agreement and at commencement of action to recover commissions was a duly licensed insurance broker, it was not material to the right to recover commissions that there was a lapse in license during period after rights accrued. Pol.Code, § 633aa.

8. Insurance ⇐12

Where licensed insurance broker agreed with unlicensed assignor acting for subsequently organized and licensed corporation to which assignor assigned contract to divide certain life insurance commissions and agreement was a continuing one, broker could not terminate contract without mutual consent of all parties.

9. Limitation of actions ⇐53(2)

Where agreement to divide life insurance commissions was in full force and no accounting of commissions had taken place, statute of limitations began to run from the date of the last item on the account.

10. Contracts ⇐350(1)

Under an agreement to divide life insurance commissions, finding that defendant was paid $23,074.29 as commissions and that plaintiff's share of 50 per cent. amounted to $11,537.14 and plaintiff had been paid $2,687.75, leaving a balance due under the agreement of $8,849.39, was sustained by the evidence.

11. Interest ⇐67

Where licensed broker agreed with another to divide life insurance commissions and it was not shown when payments of commissions were made to the broker and it was impossible to determine when the commissions were received by the broker, assignee seeking to recover share of commissions was not entitled to interest on unpaid commissions which were received by the broker.

12. Judgment ⇐735

Where licensed broker agreed to divide insurance commissions with unlicensed assignor who acted for subsequently organized corporation which procured license before performance of contract and in interpleader action, wherein sole issue was whether broker was a trustee of interpleaded fund and as such violated duty by assigning fund to various claimants, court adjudicated that agreement to divide commissions was void, judgment was not "res judicata" in action to recover commissions, since it was not within the court's province in the interpleader suit to challenge the judgment upon which execution had issued.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

Appeal from Superior Court, Los Angeles County; J. A. Smith and Ruben S. Schmidt, Judges.

Action by Fewel & Dawes, Inc., a corporation, against Franklin L. Pratt, for an accounting of life insurance commissions earned pursuant to a contract. From a

judgment for the plaintiff, defendant appeals.

Modified and as modified affirmed.

Hugh Ward Lutz, of Los Angeles, for appellant.

Hulen C. Callaway and Joe Crail, Jr., both of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment rendered in favor of respondent corporation upon an action brought for an accounting of life insurance commissions earned pursuant to a contract therefor.

The appellant, a life insurance broker, had been writing insurance since 1922 for John G. Bullock of Los Angeles. In 1928, Mr. Bullock desired to take out additional insurance to the amount of $150,000. The appellant Pratt was requested by Mr. Bullock some time in July, 1928, to divide with Mr. Fewel commissions to be earned from the additional life insurance. Mr. Fewel was at that time a son-in-law of Mr. Bullock, and became an officer of each one of the successive corporations involved in this suit.

Mr. Bullock, Mr. Pratt and Mr. Fewel met in Bullock's office July 10, 1928, to discuss the arrangement for a division of commissions between Fewel and Pratt. Pratt objected to working with Fewel's associates and requested that he should handle his part of the agreement by himself. But Mr. Fewel objected to eliminating his business associates. Regardless of this objection, it was agreed that Pratt would divide his commissions with Fewel, each to receive fifty per cent of the earned commissions. On this same day, July 10, 1928, Fewel accompanied Pratt to the latter's office, and the following writing was executed by Mr. Pratt:

"July 10, 1928.

"Mr. Richard W. Fewel,
716 South Spring St.,
Los Angeles:
Dear Mr. Fewel:

This is to confirm our verbal understanding of this date that we will work together in the purchase of insurance for Mr. John G. Bullock, on the basis of an equal division of the commissions.

Very truly yours,
F. L. P."

At the time of the agreement to divide commissions Fewel was a partner in an insurance brokerage firm known as Universal Underwriters. He was planning the organization of a new corporation to take over his insurance business. This new organization, Moore, Fewel & Company, was incorporated July 30, 1928, and it was duly licensed as an insurance broker on August 10, 1928. Mr. Fewel was an officer and director of this company. On September 1, 1928, Mr. Fewel assigned to Moore, Fewel & Company, the new corporation, all of his interest in and to the agreement with Mr. Pratt.

None of the life insurance policies contemplated by the terms of this agreement were obtained until 1930, although it appears that Pratt received a commission in 1929 on a policy taken out in 1922, which was converted in 1929. Numerous policies of insurance were written on the life of Mr. Bullock during the years 1930, 1931 and 1932. The record shows that Mr. Pratt received $23,074.29 as earned commissions on the insurance represented by the various policies. This figure includes the commission received by Pratt in 1929 on the policy taken out in 1922. On July 31, 1930, Pratt and Fewel met in Bullock's office and the first division of commissions was then made. It appears a controversy over paying Fewel any part of the commissions then occurred on the ground that he did not have a broker's license. However, Pratt made a check out to Fewel for $789.08 and took a receipt from him, signed "Moore, Fewel & Devlin, By Richard W. Fewel". Thereafter other commissions were divided, for which receipts were invariably issued by Mr. Fewel in the name of the corporation and accepted by the appellant. On February 19, 1931, Pratt made the last division of commissions with Fewel, for which a receipt in the name of the corporation was given to Pratt by Fewel. At this time Mr. Pratt claimed that he then informed Fewel the agreement should be terminated and that he would not be further bound thereby. The payments by Pratt to Fewel up to and including this last date amounted to $2,687.75. No payments were made to Fewel after February 19, 1931. Prior to that date arrangements were made between Pratt, Fewel and Bullock, whereby some of the money received as commissions was advanced to Bullock to finance premiums due. Fewel was also in debt to Bullock for money previously borrowed and some of the moneys due to Bullock were credited to the account.

Mr. Bullock died September 15, 1933. This action was commenced December 12, 1935. Judgment was entered in favor of the respondent on June 24, 1936. The findings of fact and conclusions of law determine that Richard W. Fewel was acting for and on behalf of the respective corporations of which he was an officer, and that the agreement of July 10, 1928, was properly assigned to Moore, Fewel & Devlin, Inc., Ltd.; that the agreement was a valid and enforceable contract between Pratt and the respondent corporation; that the contract was not terminated on February 19, 1931; that the cause of action was not barred by statutory provision or by laches; and that upon an accounting had the respondent was entitled to $8,849.39 general damages, and $1,993.30 interest.

About December 12, 1935, respondent levied an attachment upon certain funds held by the executors of the estate of John G. Bullock. After entry of judgment on June 24, 1936, no stay having been obtained by appellant, execution was levied by the respondent against these same funds. The executors thereupon filed an action of interpleader, and paid the moneys into court, alleging that numerous claims had been made thereto by various creditors of said Franklin L. Pratt. Respondent filed an answer and cross-complaint in this action, setting forth its claim to the interpleaded fund. The cross-complaint sets forth and alleges a prior right to the interpleaded fund for the reasons that, (1) the rights of other claimants were based on certain assignments from Pratt which constituted fraudulent conveyances, and, (2) the fund was impressed with a constructive trust and therefore no assignments could be validly made by Pratt.

The court in this interpleader action found that Fewel & Dawes, Inc., were entitled to recover said moneys subject to the right of two other claimants, who held valid assignments from Pratt. The court also found that the interest of Fewel & Dawes, Inc., existed, however, only by virtue of the levy of the writ of attachment and the subsequent levy of a writ of execution. As to the second cause of action, which was predicated on the theory of a constructive trust in the fund for the benefit of respondent corporation, the court found that no such trust existed. The findings of fact determined that the contract of July 10, 1928, was not made with or on behalf of Moore, Fewel & Company; that, on the contrary, the agreement was made with Richard W. Fewel and that it was void, as he was not a licensed life insurance agent or broker at the time of said agreement, nor at any time thereafter; that the claim for the funds in question from the estate of John G. Bullock, deceased, was properly made in behalf of Franklin L. Pratt. The judgment in this interpleader action was entered on November 8, 1937, and became final after time for appeal had elapsed. Appellant sought to introduce that final judgment as evidence in this case to establish it as res adjudicata and to create an estoppel.

[1, 2] There is ample evidence to support the finding that Mr. Fewel was acting for and on behalf of Moore, Fewel & Company when he entered into the agreement with Pratt on July 10, 1928. Mr. Fewel testified that he stated to Pratt in the presence of Mr. Bullock on July 10, 1928, that he would not do business without his associates. This statement was repeated to Pratt in the latter's office on the same day and at which time Mr. Pratt executed the written agreement. If Fewel intended at the time of the agreement to act solely in his own behalf, there is no reason why he should have assigned the agreement to the corporation. If Fewel had intended to act as a broker in his own behalf he could have obtained a license for that purpose. Even though appellant did not contemplate contracting with the assignee corporation as a party to the agreement, he is, nevertheless, estopped by his conduct from contending that the assignment of the agreement by Mr. Fewel terminated the contract. The appellant not only repeatedly accepted, but he requested the execution of receipts for commissions paid to Fewel in the name of respondent's assignors. Receipts executed in this manner were received by appellant up to and including February 19, 1931. Until that date the appellant made regular division of commissions earned under the agreement. It does not appear that any objections were ever made regarding performance on the part of respondent's assignors. The only personal service called for on the part of Fewel was his influence with Mr. Bullock. He was not required to contact the insurance companies or to perform any servicing of the policies. This furnished sufficient consideration and evidence to support the agreement. Performance, to this extent, on the part of Fewel, and in behalf of the respective assignee corporations, did not materially alter the relationship or rights as between the par-

ties. There was no substitution of performance which would impair the rights of appellant under the agreement.

At the time of the execution of the written agreement on July 10, 1928, Fewel was not licensed to act as a life insurance broker. Moore, Fewel & Company, the first assignee, was not then in existence. The contention made by appellant, that the contract is void as contrary to the express provisions of the Political Code, section 633aa, would be well taken, provided Fewel's action on and prior to July 10, 1928, constituted a violation of the provisions of the statute. Section 633aa merely provides in that regard: "No person shall, within this state, *act* as a life agent of any life insurance company until such person shall have first obtained a license under the provisions of this section from the insurance commissioner authorizing him so to act."

[3] It cannot be said that Fewel was violating any of the foregoing provisions by merely entering into an agreement with Pratt for a division of life insurance commissions to be earned in the future. He did not thereby "act" as an insurance broker. The written agreement to divide commissions which was signed by Mr. Pratt constituted a binding agreement between the parties, but it did not give rise to performance on the part of Fewel of any act in violation of the statute. The evidence does not disclose any solicitation for insurance or affirmative action on his part in conflict with the statute. Mr. Bullock, the father-in-law of Fewel, was the moving party in procuring the agreement. For reasons of his own, he desired that Mr. Fewel should receive part of the commissions to be earned by Mr. Pratt. Mr. Pratt had previously written insurance for Mr. Bullock for a unmber of years. The evidence shows that the actual work in procuring and servicing the policies to be procured under the agreement was to be performed by Mr. Pratt individually. In fact, there were applications for insurance pending at the time of the execution of the contract for about $150,000. Mr. Pratt had been handling that business. The conduct of Fewel does not constitute a violation of the provisions of Political Code section 633aa.

[4] That section was enacted for the protection of the public. It is true that conduct constituting *acts* of an insurance broker in violation of its provisions would be void. The real estate brokers' act belongs to this same class of statutes. In concluding that the agreement under consideration was not violative of section 633aa, and that the respondent was entitled to recover commissions, we are strongly influenced by a number of California decisions wherein the licensing of real estate brokers under a similar statute was involved. In Houston v. Williams, 53 Cal.App. 267, 200 P. 55, a leading case on this point, the plaintiff, a real estate broker, entered into an agreement in writing with the defendant. The plaintiff was given the exclusive agency to sell or exchange property belonging to the defendant. At the time of this written agreement, the plaintiff was not licensed under the real estate brokers' act. At the time the plaintiff procured a purchaser under the agreement, however, he had procured a license, authorizing him to engage in the business of a real estate broker. In holding that the plaintiff was not precluded from recovering compensation for his services, the court said, 53 Cal.App. at page 271, 200 P. at page 56: "It is a reasonable construction of the act to hold that it is unlawful for any one to engage in the business of a real estate broker without having secured a license, but he is not precluded from recovering compensation for his services if he had such license at the time his cause of action arose, although his contract may have been executed prior to that time when he had no license. Herein, manifestly, the cause of action arose when plaintiff obtained a purchaser for the property, and it is not disputed that then he had the proper license, and it was so alleged in the complaint."

It is true that the court in the Houston case based its decision upon the limitation found in section 20 of the real estate brokers' act, St.1919, p. 1259, and that the court concluded that the limitation gave plaintiff his right to maintain the action for compensation. While section 20 of that act was properly considered in determining the invalidity of the contract in question, it also appears that section indicated the time at which the invalidity arose. Section 20 provided that no action could be maintained "without alleging and proving that such person * * * was a duly licensed real estate broker or real estate salesman *at the time the alleged cause of action arose*". (Italics ours.) Obviously, the invalidity of the transaction would exist unless it were shown that the agent had a license at the time of performance. It cannot be deemed that the invalidity of the transaction arose at an earlier date, at the

execution of the contract for instance. If the contract was invalid *prior to the time of performance,* the invalidity could not be cured by subsequently procuring a license. That seems to be a reasonable construction of section 20. It appears to be a fair interpretation of the legislative intent with respect to the real estate brokers' act.

[5] In the present case we conclude that the action on the part of Mr. Fewel in becoming a party to the written agreement did not constitute acts in the capacity of a life insurance broker or agent, within the meaning of the provisions of Political Code section 633aa. The contract was not void merely because it was entered into by an unlicensed individual. The provisions of section 633aa reasonably appear to apply only to acts in furtherance of the performance of life insurance contracts, such as the solicitation or procuring of policies. Mr. Fewel did not perform such acts.

In Fitzhugh v. Mason, 2 Cal.App 220, 83 P. 282, the validity of a contract, under the act of March 23, 1901, St.1901. p. 641, entitled "An act to regulate the practice of architecture," was in issue. The act made it a misdemeanor for any person to practice architecture without a certificate. Plaintiff was an architect and he entered into a contract of employment before obtaining an architect's certificate. The court held that a contract for the employment of an architect was not rendered illegal or void because made in advance of the issuance of a certificate, although in order to carry out the contract it would be necessary for the architect to take out his certificate.

[6] Mr. Fewel and Mr. Pratt, having entered into a valid agreement on July 10, 1928, and Moore, Fewel & Company existing as a duly incorporated and licensed insurance broker on August 10, 1928, there was nothing to prevent a valid assignment of said agreement to Moore, Fewel & Company on September 1, 1928. As stated, no performance under this agreement took place until 1930, with the exception of the conversion of one policy in 1929. Although Moore, Fewel & Company was not yet organized at the time of the written agreement, it seems clear that recognized authorities place Fewel in the status of a promoter whose contract would become valid and which might be assigned to a subsequently organized corporation. Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33, 53 P. 440; Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418; Chater v. San Francisco Sugar Refining Co., 19 Cal. 219, 220.

[7] The record conclusively shows that the respective assignee corporations to which the agreement was transferred were licensed insurance brokers throughout the entire time of performance under the agreement. Moore, Fewel & Company was licensed from August 10, 1928, to June 30, 1930; Moore, Fewel & Devlin, Inc., Ltd., from July 1, 1930, to June 30, 1932; Moore, Fewel & Dawes from July 1, 1932, to October 6, 1933. On October 11, 1933, Moore, Fewel & Dawes, Inc., changed its corporate name to Fewel & Dawes, Inc. There was a lapse in its license from October 6, 1933, to November 10, 1933. Performance under the agreement having come to an end with the death of John G. Bullock, and respondent being a duly licensed life insurance broker at the time of performance and at the commencement of this action, it is not material that there was a lapse in the corporation's license from October 6, 1933, to November 10, 1933.

[8] The agreement of July 10, 1928, was a continuing agreement or contract and there is nothing to show that such contract was not to exist as long as Mr. Pratt procured insurance under said agreement. The evidence shows that Mr. Bullock contemplated taking out $150,000 additional insurance at the time the written agreement was executed. Mr. Pratt had no option to terminate the contract at will. There is no evidence that the contract was terminated on February 19, 1931, as contended by appellant. The contract could only be terminated by the mutual consent of all parties. Findings Nos. 27 and 28 to the effect that the contract was not terminated are supported by the evidence.

[9] Appellant failed to show that he was entitled to expenses incurred in connection with the servicing of the policies, or to reimbursement for traveling expenses. The agreement being in full force on and after February 19, 1931, and no accounting having taken place, the statute of limitations did not begin to run in favor of appellant at this time. It began to run from the date of the last item of the account. Mr. Bullock was receiving a portion of the commissions which went to pay premiums. It is true that the only proved financing of paid premiums in which Fewel directly participated occurred prior to February, 1931. However, the evidence shows that the appellant had the duty of keeping

a record of the insurance transactions, and of handling the commissions earned through the procuring of the policies. The evidence shows that sums of money were advanced to the appellant for the purpose of paying premiums as late as February, 1933. The contract between appellant and respondent being in force at that time, and appellant having made no division of commissions since February, 1931, it must be presumed that the contract was still in force. Under such circumstances the statute of limitations did not begin to run against respondent until the death of Mr. Bullock, or at least until it was shown that the last policy of insurance under the agreement had been procured.

[10] There is no merit in the contention that a proper accounting was not had between the parties. An accounting was held and the record failed to show any prejudice to appellant with the exception of the item of interest which was allowed. Respondent introduced in evidence a record containing a list of the companies, the policies and premiums and the commissions which were earned. Appellant reserved the right to check the correctness of this record, and to offer evidence of any error which it might contain. The court found that appellant was paid $23,074.29, as commissions under the agreement, and that respondent's share of fifty per cent thereof amounted to $11,537.14. The court also found that respondent's assignors had been paid by appellant on account of its share of said commissions only the sum of $2,687.75, leaving a balance due to respondent under the agreement of $8,849.39. That finding is supported by the evidence.

[11] The contention of appellant that findings Nos. 24 and 25 with respect to the interest allowed is not supported by the evidence. The record fails to disclose the dates of payments of commissions to appellant. At least it is impossible to determine which dates refer to the specific times when the commissions were received by the appellant. The record therefore fails to show that respondent is entitled to interest on unpaid commissions which were received by the appellant. The judgment should, therefore, be modified by disallowing the items of interest in the sum of $1,933.30.

[12] We are of the opinion it was not the court's province in the suit of interpleader to challenge the judgment upon which execution had issued. The sole issue which was presented to the court in that cause of action was neither involved in nor determinative of the issues in the present suit. The issue before the court in that action raised the question as to whether the appellant, Mr. Pratt, was a trustee of the interpleaded fund, and as such, whether he violated his duty as trustee by assigning that fund to various claimants. A finding that he was not a trustee of said fund for the benefit of the respondent herein did not determine the issues presented in this suit for an accounting. That former judgment, therefore, is not res adjudicata of the issues presented in this case.

In support of the determination that the judgment of interpleader is not res adjudicata of the issues of this case, we quote from the opinion rendered in Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 P. 1108. In discussing the principles applicable to res adjudicata and estoppel by judgment, the court said at page 561 of 95 Cal., at page 1110 of 30 P.: "If, however, the cause of action or demand upon which the former judgment was rendered is different from the one prosecuted in the second action, it is then necessary to ascertain as a question of fact what issues or matters were determined in the former action, and then to determine as a matter of law whether those issues and their determination were essential to the former judgment; for it is only issues upon which that judgment depends that the parties are estopped from litigating in any other action. * * * The judgment in such a case does not become an estoppel as to all matters which might have been litigated therein, but only as to such as were actually litigated, and which were necessary to be determined by the court before rendering its judgment upon the demand or the defense."

An examination of the cases cited by appellant fails to disclose any precedent for the application of res adjudicata or estoppel under the circumstances of this case.

The judgment is modified by striking therefrom the items of interest allowed in the sum of $1,993.30. As so modified the judgment is affirmed. The respondent may recover its costs.

We concur: PULLEN, P. J.; TUTTLE, J.

38 Cal.App.2d 261

KROEKER et al. v. HURLBERT et al.

Civ. 2528.

District Court of Appeal, Fourth District, California.

April 1, 1940.

Hearing Denied May 29, 1940.

1. Quieting title ⇐44(2)

In action to quiet title, where defendants, including broker whom plaintiffs had employed to purchase realty, admitted plaintiffs' ownership except with respect to a mineral interest and alleged that plaintiffs had conveyed that interest to one defendant as trustee for a good and valuable consideration, evidence that the only consideration for deed to trustee was broker's services as plaintiffs' agent in purchasing realty was admissible.

2. Quieting title ⇐34(5)

In an action to quiet title, brought for the purpose of determining any adverse claim of the defendant, the plaintiff is not required to set forth the nature of the defendant's claim.

3. Quieting title ⇐44(4)

In action to quiet title, the introduction by plaintiffs of their deed in fee simple made out a prima facie case.

4. Principal and agent ⇐178(1)

Where purchasers of realty, who had agreed to convey an interest in minerals to their broker as compensation for his services, left deed to interest with escrow holder with instructions to deliver it upon completion of escrow but expressly instructed holder that it had nothing to do with consideration for deed and that it should not collect anything for purchasers on account of deed, holder's knowledge, if any, that a commission was being paid to broker by former owner of realty, related to a matter not within scope of holder's agency, and hence purchasers were not bound by any such knowledge.

5. Brokers ⇐67(2)

A real estate broker should not be relieved from the consequences of a plain fraud and violation of his duty to his employer on a technical constructive notice to the employer unless that is necessary to conserve established rules.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action to quiet title by Jake K. Kroeker and another against Edward Dale Hurlbert, as trustee, and others, wherein defendants filed a cross-complaint. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Oliver M. Hickey, of Los Angeles (Nathaniel Halpern, of Los Angeles, of counsel), for appellants.

Borton, Petrini, Conron & Borton and Henry E. Schmidt, all of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title. On July 21, 1936, the plaintiffs employed the defendant E. C. Hurlbert, who was a real estate broker, to assist them in locating the owner of a 40-acre tract of land and in purchasing the same for the lowest amount for which it could be purchased. As compensation for his services, the plaintiffs agreed to convey to him an undivided one-fourth interest in and to all oil and petroleum substances within or underlying the land. Hurlbert located the owner of the land and reported to the plaintiffs that it could be purchased for $1,500 cash. The plaintiffs paid that amount and received from the owner a deed conveying the tract to them. The deal was handled through an escrow with a title company. The plaintiffs had also left with the title company a deed conveying a one-fourth interest in the oil and petroleum under this land, which deed, at the request of E. C. Hurlbert, was made to, and later delivered to, his son Edward Dale Hurlbert, as trustee. Without the knowledge of plaintiffs E. C. Hurlbert had secured from the former owner of the land an agreement to pay him a commission of 5 per cent for selling the same and, under instructions from the former owner and from Hurlbert, the title company paid E. C. Hurlbert $75 out of the $1,500 deposited by the plaintiffs.

After a trial of the action the court found, among other things, that the plaintiffs employed E. C. Hurlbert to purchase the property from the former owner; that as compensation for such services E. C. Hurlbert was to receive one-fourth of the oil and gas substances under said land; that the plaintiffs executed a document purporting to be a grant deed conveying to Edward Dale Hurlbert, as trustee, an undivided one-fourth interest in and to all oil and gas substances under this land; that E. C. Hurlbert secured possession thereof from

the title company; that he furnished no consideration whatever for said purported deed except his services as agent of the plaintiffs in the purchase of said real property; that Edward Dale Hurlbert, individually or as trustee, furnished no consideration whatever for said purported deed; that Edward Dale Hurlbert was not known to the plaintiffs; that E. C. Hurlbert procured an agreement from the former owner of the land to pay to him a commission for effecting said sale; that said commission, in the sum of $75, was paid to E. C. Hurlbert; that this was done without the knowledge or consent of the plaintiffs; and that E. C. Hurlbert concealed from the plaintiffs the fact that he received a commission from the former owner. A judgment was entered quieting the plaintiffs' title to the property in question and denying relief to the defendants. From this judgment the defendants have appealed.

[1] It is first contended that any evidence in the record which supports the findings to the effect that E. C. Hurlbert procured an agreement for a commission and collected a commission from the former owner of the land, without the knowledge of the respondents and concealing that fact from them, was erroneously admitted since the respondents had not alleged a cause of action setting up fraud or breach of trust on the part of E. C. Hurlbert as a ground for invalidating the deed by which they had conveyed an undivided one-fourth interest in the oil and gas under this land. The complaint is in the usual and ordinary form for quiet title actions, merely alleging ownership, that the defendants claim some right or interest, that such claim is without right, and asking that the defendants be required to set forth the nature of their claim. The appellants filed an "answer and cross-complaint", in which they admitted respondents' ownership of the property in question, with the exception of an undivided one-fourth interest in and to oil and petroleum substances thereunder, and alleged that Edward Dale Hurlbert, as trustee, was the owner of an undivided one-fourth interest in such oil and petroleum substances and that the respondents had conveyed to him, as trustee, such a one-fourth interest "for a good and valuable consideration". The respondents answered the cross-complaint, denying all the allegations thereof.

Irrespective of the complaint, the matter of the consideration for this deed was put in issue by the allegations of the cross-complaint and the answer thereto. The respondents introduced in evidence their deed from the former owner of the land and rested. The appellants introduced the deed purporting to convey to them a one-fourth interest in the oil substances. The respondents then introduced the evidence with respect to the consideration for that deed. This evidence was responsive to that issue under the pleadings, first raised by the appellants, and was properly admitted. It clearly appears from this evidence that the only consideration for this deed was the services of E. C. Hurlbert acting as the agent of the respondents in buying this land for them. As such agent, it was his duty to obtain the land for them at the lowest possible price, the court's findings, as to his failure to perform that duty and his breach of faith in this regard, are amply supported by the evidence.

[2] An additional reason why this evidence was admissible is, we think, to be found in the fact that this case is not within the exception to the usual rule applying in quiet title actions, which exception, where applicable, requires that facts relied upon as showing fraud shall be pleaded in the complaint. It is well settled that, in an action to quiet title brought for the purpose of determining any adverse claim of the defendant, the plaintiff is not required to set forth the nature of the defendant's claim. Hyatt v. Colkins, 174 Cal. 580, 163 P. 1007. In that case, the court said: "Appellant cites Hibernia S. & L. Society v. Ordway, 38 Cal. [679], 681, as sustaining his claim of the necessity of setting forth in the complaint the nature of the instrument asserted to constitute a cloud upon title. But that was an entirely different action from the one instituted here. That was an action to have a particular instrument, which was specifically pleaded and which it was asserted constituted a cloud on the title of plaintiff, declared invalid. But that class of cases is different from the case at bar. They are provided for under sections 3412 and 3413 of the Civil Code. The present action is one provided for under section 738 of the Code of Civil Procedure. The distinction in this respect in which Hibernia S. & L. Society v. Ordway, cited by appellant, is discussed, is fully pointed out in Castro v. Barry, supra [79 Cal. 443, 21 P. 946], to which reference for any further enlightenment on the point is directed."

An exception to this general rule is to be found in such cases as Burris v. Adams, 96 Cal. 664, 31 P. 565, Maison v. Puntenney, 212 Cal. 134, 298 P. 33, and Carpenter v. Smallpage, 220 Cal. 129, 29 P.2d 841. In all of those cases the defendant had a clear record title to the property and the plaintiff was unable to make out a prima facie case, to show any title in himself, until he attacked and secured the annulment of the particular instrument constituting the defendant's title. In such cases, in which the plaintiff necessarily seeks to have his title to property quieted as against a particular instrument which must be attacked on the ground of fraud before any title can vest in the plaintiff, it has been held that the party claiming to be defrauded must, as in all other cases where fraud is the basis for relief, plead the pertinent facts relied upon as grounds for setting aside the particular instrument.

The exception above referred to is applied in that class of cases which are provided for under sections 3412 and 3413 of the Civil Code, while the general rule applies in cases under section 738 of the Code of Civil Procedure. There is a marked distinction between actions to determine adverse claims under the latter code section and actions to have a certain instrument cancelled and adjudged to be void, which were common in the old chancery practice, and the right to which has been preserved under section 3412 of the Civil Code as limited by section 3413. Castro v. Barry, 79 Cal. 443, 21 P. 946. As pointed out in that case, there is an essential difference in the purpose of the two classes of action. In the latter, the proceeding is aimed at a particular instrument or piece of evidence while the former is aimed at the claims of an individual who is asserting some claim against the plaintiff's property, whether such claim be founded on evidence or utterly baseless. In actions to cancel a certain instrument it is necessary for the complaint to state a case within the code sections for which reason it is essential to allege the facts affecting the validity and invalidity of the instrument which is attacked.

[3] The instant case comes within the general rule applied in Moore v. Copp, 119 Cal. 429, 51 P. 630; Baker v. Baker, 9 Cal. App. 737, 100 P. 892; Lewis v. Marshall, 90 Cal.App. 351, 265 P. 862; Hyatt v. Colkins, supra. The action was one to determine adverse claims and appellants did not have a clear record title to the property, which must be set aside before the respondents could show any title in themselves. The respondents had a deed in fee simple which they introduced in evidence and which made out a prima facie case. If the appellants had not appeared or had not introduced the deed upon which they rely the respondents could have secured a judgment binding upon the appellants. Any necessity for proof on the part of the respondents along the lines complained of arose from, and such evidence was introduced in reply to the evidence offered by the appellants.

Nor do we think there is anything in the case of Thompson v. Moore, 8 Cal.2d 367, 65 P.2d 800, 109 A.L.R. 1027, which compels a different result here. While the action in that case was in the form of a quiet title action the plaintiff so worded his complaint as to make it a direct attack upon the trust deed relied upon by the defendant, and set forth the facts relied upon as showing that the same had been obtained by fraud. The language used in the opinion in that case must be read in the light of the circumstances there appearing. Anything further was not necessary to the decision therein, and we think it was not intended thereby to overthrow the long established and general rule that an action may be brought under section 738 of the Code of Civil Procedure to determine any adverse claim without anticipating the defenses, unless the case comes clearly within the established exception where a clear record title is in the defendant and the plaintiff cannot show title in himself until he has successfully attacked his adversary's title, in which event he must allege facts to show the fraud or other ground upon which he relies.

[4] In their closing brief the appellants, for the first time, raise the further point that the escrow holder was the agent for all parties to the escrow, that this escrow holder knew that a commission was being paid to E. C. Hurlbert by the former owner of the land, and that this knowledge is imputed to the respondents under rules laid down in such cases as Early v. Owens, 109 Cal.App. 489, 293 P. 136; Anderson v. George L. Barney Co., Inc., 1 Cal.App.2d 340, 36 P.2d 717; Smith v. Brown, 1 Cal. App.2d 492, 36 P.2d 1081, and Ryder v. Young, 9 Cal.App.2d 545, 50 P.2d 495.

While it clearly appears that the respondents had no knowledge of the fact that a

commission was paid by the former owner of the land they bought, it also appears that the former owner of the land signed separate escrow instructions which directed the escrow agent when the deal was closed to pay to E. C. Hurlbert "real estate broker's commission of $75", and that E. C. Hurlbert wrote a letter to the escrow agent, asking him to have the respondents execute a deed to a one-fourth interest in the oil and mineral rights in this land, making the deed to his son as trustee, "after the title to the said land has passed" to the respondents, and in which he asked the escrow agent to mail him the check for the commission, as stated in the instructions of the former owner. However, in the instructions signed by the respondents it is set forth that the respondents are handing the escrow agent the balance of the purchase price which the escrow agent is authorized to use when it could issue its usual policy of title insurance, showing full title in the respondents, with certain exceptions not material here. In these instructions the respondents further stated that they also handed the escrow agent a deed conveying an undivided one-fourth interest in and to all oil and petroleum substances underlying this land, with instructions to deliver this deed "to E. C. Hurlbert upon the completion of this escrow without consideration or adjustment whatsoever paid to the grantors therefor through your company."

The escrow holder was the agent of the former owner of the land and of the respondents for the purpose of seeing that a good title was conveyed and the purchase price paid to the former owner, and in accordance with his order. The escrow holder was authorized by the respondents to act for them to that extent at least. Incidentally, the respondents left with the escrow holder the deed to the one-fourth interest in the oil and gas underlying this land, which is here in question, with instructions to deliver this upon the completion of the escrow. The escrow holder was expressly instructed, however, that it had nothing to do with the consideration for this deed, and that it was not to collect anything for the respondents on account of said deed. Although the papers were included in the same escrow, in a very real sense the transfer of this deed to the appellants was a separate matter from the other part of the escrow which involved a conveyance of the land from the former owner to the respondents. That this was so was recognized by the appellant E. C. Hurlbert who, after the escrow instructions had been signed by the respondents and the former owner of the land, gave the escrow holder a written request to have a deed to a one-fourth interest in the oil and mineral rights signed by the respondents "after the title to the said land has passed to them from" the former owner. Assuming that the escrow holder was the agent of the respondents in the passing of the deed conveying a one-fourth interest in the oil rights to the appellants the authority and scope of its agency for that purpose was limited, the entire matter of the consideration for that deed being excluded from the escrow agent's duty and from the sphere of its agency in that regard. That consideration was the services of the appellant E. C. Hurlbert in buying the land as cheaply as possible. Not only did the escrow holder have no knowledge of that consideration or the obligation of the appellants to perform that service, but if it had had such knowledge the same would not have been within the scope of its agency. If the escrow agent had knowledge of facts which would otherwise affect this consideration, that knowledge related to a matter which was not within the scope of its agency. It follows that the respondents would not be bound by any such knowledge, and the evidence amply supports the court's finding that nothing concerning that matter was communicated to the respondents and that they had no actual knowledge of any such fact.

[5] A further consideration is that a real estate broker should not be relieved from the consequences of a plain fraud and violation of his duty to his employer, such as was found by the court here, on a technical constructive notice unless this is necessary in order to conserve established rules which, in some cases, are most salutary. The rule here in question, as laid down in cited cases and others, has been invoked in order to do equity and to prevent fraud, and it is not necessary that this rule be so extended, under the circumstances of this case, as to permit it to be used in perpetuating a fraud and in protecting an agent in the violation of his duty to his employer.

In view of what has been said, it is unnecessary to consider a further question raised as to whether the deed conveying a one-fourth interest in the oil and gas under this property to the appellants was void, since it was issued without obtaining

a permit from the commissioner of corporations.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



38 Cal.App.2d 284

Ex parte FORTENBURY.

Cr. 3317.

District Court of Appeal, Second District, Division 1, California.

April 3, 1940.

1. Habeas corpus ⇐6

The question whether resort to writ of habeas corpus is the appropriate remedy is always addressed to the sound discretion of the court.

2. Habeas corpus ⇐6

A court is liberal in granting writ of habeas corpus as well as in considering petitions therefor.

3. Habeas corpus ⇐1

The writ of "habeas corpus" does not afford an all-inclusive remedy available at all times as a matter of right, but it is generally regarded as a special proceeding.

See Words and Phrases, Permanent Edition, for all other definitions of "Habeas Corpus".

4. Habeas corpus ⇐1

Where one restrained pursuant to legal proceedings seeks release upon "habeas corpus," the function of the writ is merely to determine the legality of the detention by an inquiry into the question of jurisdiction and the validity of the process on its face, and whether anything has transpired since the process was issued to render it invalid. Pen. Code, § 1473 et seq.

5. Injunction ⇐219, 229

Where trial court had jurisdiction of subject matter and of person, proceedings were legal in every respect, neither original restraining order against picketing for violation of which petitioner was adjudged guilty of contempt, nor commitment of petitioner following hearing of contempt proceedings, violated any constitutional rights, and orders of court finding petitioner guilty of contempt were orderly processes of legally constituted authority, action of court was valid and could be enforced by lawful and appropriate means. Pen.Code, § 1473 et seq.; Const. Cal. art. 1, §§ 1, 9, 13; U.S.C.A. Const. Amend. 14.

6. Habeas corpus ⇐3

Where petitioner decided for himself that temporary restraining order was invalid and violated the order, after being adjudged guilty of contempt petitioner could not obtain by means of writ of habeas corpus a determination of questions regarding validity of order, which properly would have been adjudicated at hearing of order to show cause.

7. Injunction ⇐230(4)

Where temporary restraining order was ignored and violated, the outcome of hearing on order to show cause would not affect validity of contempt proceedings for violation of the order, or judgment in connection therewith.

WHITE, J., dissenting.

Proceeding in the matter of the application of Carl D. Fortenbury for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Gallagher, Wirin & Johnson, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

DORAN, Justice.

Duly cited with contempt of court for the violation of a temporary restraining order, the petitioner herein, after a hearing on such citation, was adjudged guilty and fined five dollars with the alternative of one day in the county jail for each two dollars of said fine remaining unpaid.

Petitioner seeks a writ of habeas corpus.

The temporary restraining order and order to show cause were based upon a verified complaint in an action wherein Edward Chiate and Hazel I. Chiate, doing business under the fictitious name and style of Sunset Poultry Market, were plaintiffs, and the United Cannery Agricultural Packing and Allied Workers of America, C. I. O., an unincorporated association, Valley

Poultry Workers Union, Local No. 17, an unincorporated association, and others, were defendants.

A memorandum opinion was filed by the trial judge in connection with the disposition of the contempt proceedings; excerpts therefrom which follow contain the pertinent facts revealed by the record:

"This action was brought to enjoin picketing of plaintiffs' markets by members of the defendant unions. After an informal conference in chambers with counsel for plaintiffs and defendants, at which it was conceded that no labor dispute existed between plaintiffs and their employees, a temporary restraining order was issued prohibiting picketing. Subsequently defendants moved to vacate the restraining order for reasons hereinafter appearing.

"Plaintiffs are engaged in the business of selling poultry and eggs at retail and wholesale, at two places of business in the City of Los Angeles. None of plaintiff's employees are members of any of the defendant unions and there is not and never has been any labor dispute between plaintiffs and their employees. Plaintiffs purchase poultry and eggs for resale purposes throughout California, Utah, Colorado, and Oregon, a portion thereof being produced by the Runnymede Farms, located at Reseda, California. The Runnymede products are not separated from poultry and eggs purchased from others, but are commingled with various producers, and the commingled produce is sold to plaintiffs' customers.

"For some time past the employees of the Runnymede Farms, who are members of one or more of the defendant unions, have been involved in a labor dispute with their employer and have been on strike. The defendant unions demanded that the plaintiffs cease purchasing merchandise from the Runnymede Farms because of the labor dispute there existing. Upon the refusal of plaintiffs to accede to that demand the defendants stationed picket lines in front of plaintiffs' markets.

* * * * * *

"In the instant case, while plaintiffs have had no dealings with the defendant unions, they cannot be classed as strictly neutral for the reason that they are purchasing and selling merchandise produced by the persons with whom the unions are in dispute. If Runnymede Farms is paying less than the union scale of wages or is requiring its employees to work longer than union hours, the plaintiffs, by purchasing Runnymede products, may have an advantage over other dealers in that they may be able to sell at a lower price than their business rivals, or may sell at the same price and make a greater profit than others. To this extent, at least, there is a unity of interest between Runnymede Farms and the plaintiffs, and the plaintiffs are in a more favorable position than those who are dealing in union merchandise. The strategy of the unions is to prevent the sale of non-union merchandise. The Runnymede poultry and eggs come in contact with the public at retail stores, not at the farm. If the defendants cannot follow the product and, by means of picketing the same wherever it may be sold at retail, request the purchasing public to refrain from buying it, they will be unable to make known their grievances to the public in the only manner available to them. Such a request, lawfully and peacefully made by picketing the product at the place at which the request will reach the purchaser, if pointed solely at and limited to the product and not aimed at the plaintiffs, will be a primary boycott against the merchandise and against the producer, the Runnymede Farms. Punishment will not thereby be visited upon third persons, the plaintiffs, who are without interest in the existing dispute. But picketing directed in any manner at the plaintiffs personally, at their markets as such, or at the collective produce sold generally by them, will constitute an illegal act and will be enjoined for the reasons hereinbefore stated.

"Other questions than those herein discussed might be presented if the Runnymede Farms were the sole source of supply of the poultry and eggs sold by plaintiffs. Such questions cannot arise in this case because plaintiffs may obtain ample quantities from hundreds of producers and, in fact, according to their own allegations, they have been and are procuring merchandise from several states.

"After the service of the temporary restraining order two affidavits were filed charging four pickets with contempt of court in that they continued picketing after service of the order. One affidavit charged them with having picketed during the remainder of the day after service, the other charged violation of the order on two subsequent days. The latter affidavit was not served with the citation and the court will

therefore consider only the charge contained in the one affidavit. The persons cited admit that they continued picketing during the remainder of the day after they were served, but their counsel argued that they should be excused because they had not received legal advice as to their duties. The temporary restraining order was plainly titled and was couched in unambiguous language. The deputy sheriff who served the order states in an affidavit that he read and explained the order to the pickets and they admit that he did so. It was their duty to cease their activities immediately upon service of the order without awaiting legal advice."

In addition to the foregoing it should be noted that the complaint in the action, among other things, alleged in substance that defendants and each of them combined and confederated, conspired and agreed among themselves and with each other to compel the plaintiffs to refrain from fulfilling their obligations with Runnymede Farms, namely, in accepting poultry and eggs therefrom; that in furtherance thereof defendants declared a boycott against plaintiffs and maintained a picket line in front of plaintiffs' place of business; that in furtherance of said plan and in an endeavor to effect the objects and purposes thereof and with such common intention and design, the defendants and each of them did and caused to be done certain acts, briefly, as follows:

1. That defendants maintained a large number of pickets at, upon and near the premises of plaintiffs and upon the public highway near and adjacent to said premises, and by intimidation and threats endeavored to stop customers and patrons of plaintiffs from entering said place of business;

2. That defendants followed, harassed, spied upon and intimidated the customers and patrons of plaintiffs in an attempt to prevent said customers and patrons from purchasing from said plaintiffs;

3. That said pickets and representatives so stationed near and about the place of business of plaintiffs, wearing badges with inscriptions thereon, "C. I. O.", walked back and forth upon the sidewalks and premises of plaintiffs' place of business;

4. That said defendants followed a truckload of merchandise of plaintiffs to be delivered to plaintiffs' customer and upon its arrival informed plaintiffs' customer that said merchandise was "hot cargo"; that when customers were about to enter the place of business of plaintiffs said customers were approached and told not to purchase merchandise from plaintiffs for the reason that said market was unfair to organized labor;

5. That defendants followed a truckload of merchandise to be delivered to plaintiffs' customer, namely, the Thrifty Drug Stores, and upon the arrival of said merchandise defendants entered the Thrifty Drug Store, displayed and distributed pamphlets and leaflets which in substance urged the readers thereof not to patronize the Thrifty Drug Stores, whereupon the management of said stores refused to take merchandise from plaintiffs and their representatives; that several persons called the plaintiff, Edward Chiate, by telephone and after refusing to give their names stated that if he (referring to plaintiff) did not refrain from buying chickens from Runnymede they "would get him and his family."

The restraining order in part was as follows: "Upon the reading and filing of the verified complaint in the above entitled matter, it appearing to the satisfaction of the court that this is a proper case for a temporary restraining order, and that plaintiffs and their counsel desire in good faith to present to the court a bona fide contention respecting the rights of said plaintiffs as contended for in said complaint, and that unless the temporary restraining order prayed for in said complaint is granted, the effect of the decision of the court upon the order to show cause, if favorable to plaintiffs, would be largely frustrated, and great and irreparable injury and damage would ensue to the plaintiffs before the matter could be heard on notice. * * *" Wherefore it was ordered in substance that defendants and each of them should appear before the court on November 13th and show cause why they should not be enjoined pending the final determination of the action, and, pending the hearing of the order to show cause were enjoined, from doing certain things and engaging in certain activities, which injunctions approximated the allegations of the complaint. Subdivision "(i)" thereof was as follows: "From stationing, placing or maintaining any picket, or pickets, or person or persons, in front of or in the immediate vicinity of the said markets of the plaintiffs." It is argued by petitioner that by reason of this last-mentioned injunction the restraining order was void.

It is contended in substance by petitioner that the restraining order and judgment violate the constitutional guaranties of freedom of speech and freedom of the press. It is also contended that either a primary or a secondary boycott is legal. Petitioner's closing brief sums up and sets forth these contentions as follows: "The central issue in the instant Petition for Writ of Habeas Corpus is: 'Is peaceful secondary picketing legal?'", and, "Whether an order enjoining all peaceful picketing abridges constitutional right, and Whether habeas corpus is an appropriate remedy procedurally."

[1-4] A liberal portion of petitioner's briefs is devoted to the subject of habeas corpus. It may be conceded that the question as to whether resort to the writ of habeas corpus is the appropriate remedy, is always addressed to the sound discretion of the court. In that regard it may be conceded, also, for reasons which abound in the numerous decisions on the subject, that courts uniformly have been liberal in the granting of the writ and as well in a consideration of petitions therefor. It is necessary to observe, however, in that connection that such liberality has not been without valid limitation. Thus, it is well settled that the writ of habeas corpus does not afford an all-inclusive remedy available at all times as a matter of right. It is generally regarded as a special proceeding. "Where one restrained pursuant to legal proceedings seeks release upon habeas corpus, the function of the writ is merely to determine the legality of the detention by an inquiry into the question of jurisdiction and the validity of the process upon its face, and whether anything has transpired since the process was issued to render it invalid." 13 Cal.Jur., p. 217. Chapter I of part II, title XII, of the Penal Code, contains the statutory law with regard to the writ of habeas corpus, and determines the power of the court to discharge under the writ.

[5] From a review of the record it is at once evident that the trial court had jurisdiction of the subject matter and of the person of the petitioner, and that the proceedings were legal in every respect. Neither the original restraining order, which was not void ab initio, nor the commitment of petitioner following the hearing of the contempt proceedings violated any constitutional rights of petitioner. The orders and as well the judgment of the trial court finding petitioner guilty of contempt were the orderly processes of legally constituted authority. The action of the trial court being valid, it may be enforced by lawful and appropriate means.

[6, 7] The record reveals that the original restraining order was issued on the 3d day of November, 1939; that the order directed the petitioner and others to appear before the court on the 13th day of November, 1939, and show cause why they should not be enjoined and restrained from doing the acts specified in said restraining order. It should be emphasized that the contempt was based on the original order and resulted from acts committed between the 3d day of November and the 13th day of November. In other words, the petitioner elected to ignore the temporary restraining order issued by the court, decided for himself that the order was invalid, and violated the same. It was petitioner's plain duty to obey the order. Petitioner now seeks to obtain—by means of a writ of habeas corpus—a determination of questions which properly would have been adjudicated at the hearing of the order to show cause on November 13th. In the circumstances, the law affords no such expedience at the expense of respect and due regard for its orderly processes. Incidentally, the outcome of the hearing on the order to show cause, whether favorable to the plaintiffs or to the defendants, would not affect the validity of the contempt proceedings, or the judgment in connection therewith. See In re Charles Valterza, Cal. App., 100 P.2d 337.

Summing up the contentions of the parties to the action, each relies on that article of the Constitution which provides as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." Art. I, sec. 1, Cal.Const.

The defendants, and petitioner herein, also rely upon the provisions of sections 9 and 13 of article I of the Constitution of California, and as well upon the fourteenth amendment to the Constitution of the United States.

Thus a legitimate dispute exists between the parties to the action with regard to the claims of each under the Constitution. The judicial branch of the government was created for the purpose of settling such disputes. Plaintiffs sought a determination of the questions involved, in the courts: the governmental agency established to meet

such needs. The right to appeal for relief to the judicial branch of the government, together with the power in the judicial branch of the government to hear, consider and adjudicate, according to the orderly procedure of the law, any and all issues raised by such appeal for relief, are products of the Constitution. Such resort to the remedy provided for by law, although a right, was no less a duty. It was likewise defendants' plain duty to abide the outcome. Each is bound to yield to legally constituted authority. To hold otherwise would in effect accord to each the privilege to settle such disputes by any manner or means each might choose to adopt.

Having elected to ignore the orderly processes of the law, petitioner has no alternative but to accept the consequences.

Finally, it should be noted that nowhere in the record or in the petition for the writ of habeas corpus does it appear that the petitioner is a citizen of the United States. It is suggested in Hague v. Committee for Industrial Organization et al., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, that the constitutional guaranties there considered are possessed by citizens of the United States but do not extend to aliens. Inasmuch as the subject is not mentioned by either respondent or petitioner, it has received no consideration in the opinion.

For the foregoing reasons the writ is discharged and the petitioner remanded.

I concur: YORK, P. J.

WHITE, Justice.

I dissent. I fail to perceive the materiality in this proceeding of the fulsome allegations copied from the complaint and set forth in the main opinion. It is obvious that the superior court possessed jurisdiction to restrain picketing by coercive, violent and illegal means. However, we are not here concerned with those phases of the complaint, but are confronted with the question of whether the court was possessed of jurisdiction to issue that part of the temporary restraining order which forms the foundation of the citation for contempt and the violation of which forms the basis of the judgment and commitment here under attack. It is the validity of the judgment pronounced and not the allegations of the complaint, which demands our attention. In that connection, I am unable to agree with the statement of my associates as contained in the main opinion that "from a review of the record it is at once evident that the trial court had jurisdiction of the subject-matter and of the person of the petitioner, and that the proceedings were legal in every respect", because, as I shall endeavor to point out, the order as made by the superior court was void upon its face. Conceding the correctness of the rule announced in the main opinion that when the court has jurisdiction of both the subject matter and the parties no order made therein, however erroneous, may be defied by a party affected thereby, but that relief therefrom must be sought by appeal or a writ of certiorari, nevertheless, it has never been seriously contended that where lack of jurisdiction to make the order appears upon the face of the latter, disobedience thereof constitutes contempt. This last-named principle is clearly and concisely enunciated by the supreme court of Illinois in Clark v. Burke, 163 Ill. 334, 45 N.E. 235, 236, quoted with approval in Re Valterza, Cal.App., 100 P.2d 337, 338, wherein it is said: "It is well settled that, in a proceeding for contempt in failing to obey an order of the court, the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void."

Let us now examine the record in the instant case and therefrom advise ourselves with exactness as to the order for the violation of which petitioner was adjudged in contempt. I quote from the "judgment of contempt and commitment" issued by the superior court and pursuant to which petitioner is held in custody. It reads: "That on the 3rd day of November, 1939, the court issued a restraining order returnable on the 13th day of November, 1939, restraining and enjoining the United Cannery Agricultural Packing and Allied Workers of America, Congress of Industrial Organizations, Valley Poultry Workers, Local No. 17, an unincorporated association, and others from, amongst other things, 'stationing, placing or maintaining any picket, or pickets, or person or persons, in front of or in the immediate vicinity of the said markets of the plaintiffs'." The order just quoted squarely presents the question of liberty of speech and of the press. While so far as petitioner is concerned the penalty involved may be of minor consequence, nevertheless the principle here present is of extreme importance to a people bent upon preserving their government as a

democracy. That the court is without jurisdiction to issue a restraining order prohibiting every form of picketing is firmly established by decisions in this state and of the Supreme Court of the United States, because such an order abridges constitutional rights. It is my firm belief that jurisdiction never existed in any court to make an order, or to punish as a contempt the violation of an order, which contravenes constitutional guaranties or inalienable rights of the individual.

It is the law of this state, established and re-established in numerous decisions, that in the absence of contractual obligations a union, besides having the right to declare a strike, possesses also the legal right to carry on in connection therewith a boycott, both primary and secondary. Lisse v. Local Union No. 31, 2 Cal.2d 312, 41 P.2d 314; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; In re Lyons, 27 Cal.App.2d 293, 81 P.2d 190, and many others too numerous to cite. In California this right to peacefully picket (and it is conceded in the case at bar that the picketing was peaceful) is grounded upon the constitutional guaranty of the right of free speech and the freedom of the press. The court lacked jurisdiction to make the order here in question because the same was an attempted infringement upon the rights guaranteed to every citizen by section 9, article I, of the Constitution of this state. The pertinent portion of the constitutional section provides: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The mandate contained in this section is clear and unequivocal, and its meaning so plain that construction is not required. It does not admit of judicial encroachment any more than it permits legislative impairment. Recent decisions of the Supreme Court of the United States and of the highest judicial tribunals of the several states all definitely determine and settle the fact that the right of freedom of speech and of the press which is protected from abridgement both by the federal and state Constitutions is among the fundamental rights and liberties guaranteed to our citizens. The rule in that regard is thus stated in 11 American Jurisprudence, pages 1108, 1109, and 1117:

"The Constitution of the United States and the Bill of Rights of many of the states contain prohibitions against the enactment of laws which would abridge the freedom of speech or of the press. * * * By virtue of later decisions of the Supreme Court, the rule has become firmly settled that the right of freedom of speech and of the press, which is protected by the First Amendment from abridgement by Congress, is among the fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states. * * *

"Not only is the freedom of speech and of the press protected from infringement by the legislative department, but it is also safeguarded from judicial abridgement. An essential element of the liberty of the press is its freedom from all censorship over what shall be published and exemption from control, in advance, as to what shall appear in print. Consequently, it has been asserted that the right of freedom of speech and the press cannot co-exist with the idea of preventing such freedom of speech or of the press by injunction. Thus, the right to boycott has been asserted under the constitutional guaranty of freedom of speech and of the press, and an instance is given where the authority to enjoin persons from exercising freedom of speech peaceably in assistance of a boycott has been vigorously denied. * * *"

Respondent in the case before us argues that constitutional guaranties extend to the enjoyment of property as well as the right to freely speak and write one's views. That is true, as it is also true that courts have always been zealous in guarding the rights of the people to acquire, possess and enjoy property. Sec. 1, art. I, Calif.Const. The two principles enunciated in constitutional safeguards, that is, the right of freedom of expression and of the press, and the right to own and enjoy one's property, are each entitled to be maintained. There are, however, times when these principles may appear to conflict one with the other. In such cases it seems to me it becomes the duty of the courts to so construe such conflict that by such construction, even though one may seemingly yield in part to the other, that such deference will result in the preservation of both. I make bold to assert that the ownership and enjoyment of property cannot exist if liberty of speech and of the press, as well as the right of peaceable assemblage, is throttled. The

history of tyrants, despots and dictators through the ages and even in our own time is replete with overwhelming proof that preceding the confiscation of property these ruthless characters have first outlawed freedom of speech and the press, as well as the right of assemblage. The reason therefor is obvious. Take away the rights just mentioned and you have destroyed the last vestige of defense by the citizen against spoliation of property and the rights incidental to ownership thereof. Rob a people of the liberties of speech and of the press and of assemblage, and you have stripped them of the only weapons available to them with which to protect and preserve their property or to prevent the destruction of their rights therein.

In the case at bar there is no claim that the order sought to prevent picketing by the use of force, coercion or violence. In fact, it is conceded that the picketing was peaceful and that petitioner was merely displaying a placard upon which was inscribed or printed his claim that the Sunset Market was "unfair" to his local union. In the claim that the order here under review did not foreclose "peaceful picketing" respondent cannot be sustained. That is precisely what the ex parte temporary restraining order, for the violation of which petitioner was found guilty of contempt, sought to do, and which, it is my contention, the court had no right to do. The right of peaceful picketing—that is, publicizing the fact that a place of business is "unfair" to organized labor—is the offspring of the constitutional guaranty of freedom of speech and of the press. The injunctive power of a court does not extend so far as to authorize an infringement of these constitutional rights, and that is exactly what was done in the instant case when the court enjoined petitioner from his right to speak or publish his views.

Petitioner does not deny the right of Sunset Market to sell the products of Runnymede Farms, with which last-named concern his union is having labor difficulties; but he does claim that under his constitutional privilege of freedom of speech and freedom to publish his views, he had a right to advise the public that in selling Runnymede products Sunset Market was doing that which was regarded as "unfair" to him and his associate members of Local Union No. 17. The court was therefore without jurisdiction to issue the order or to punish for a violation thereof. Upon its face the order is void because it contravenes a constitutional right of the petitioner. Where abridgement of constitutional rights commences, there jurisdiction ends. The state, it is true, may protect itself against the abuses of constitutional rights, such as using speech, press, or assembly to foment riots, violence, or crime, but the rights thereunder are immune from curtailment. It is the abuse, and not the right, which the state may control. De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278. As was said by Justice Brandeis in Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 647, 71 L.Ed. 1095, and reaffirmed by the United States Supreme Court in Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1337, "The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. * * * These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral."

In the case of Kim Young v. People of the State of California, and two similar cases decided in connection therewith by the United States Supreme Court, 308 U.S. 147, 60 S.Ct. 146, 150, 84 L.Ed. 155, where the court had before it the question of the power of municipalities to make regulations in the interests of public safety, health, welfare or convenience, in connection with which the municipalities there involved passed ordinances restricting the distribution of pamphlets and leaflets, the Supreme Court says: "So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets." The court then proceeds to point out that the abuse of this lawful right, such as where a group of distributors formed a cordon across the street so as to interfere with pedestrians who were passing and who did not accept a tendered leaflet, may be made the subject of legislation and be restricted by the municipality. In the case at bar there is no claim that petitioner interfered with traffic or intercepted pedestrians or did anything other than publish his views of and con-

cerning the relations existing between his local union and the Sunset Market. With reference to these fundamental rights, the Supreme Court in the last-cited case says: "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties. In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

Further in the same case the court says, with reference to its opinion in Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, that it had there held that "whatever the motive, the ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censorship; and that the ordinance was void on its face, because it abridged the freedom of the press".

If "the ordinance was void on its face" for the reasons stated by the Supreme Court, then I contend the order here under review was "void upon its face", because if the legislative branch of the government cannot impinge upon the constitutional guaranties nor abridge the right of freedom of speech and of the press, then certainly the judicial department of the government is not clothed with any such authority.

It is suggested by respondent that petitioner was guilty of contempt because he carried a placard announcing that the Sunset Market was "unfair to organized labor—Local No. 17, C. I. O.", for the reason that, as stated in the memorandum opinion of the superior court in adjudging petitioner guilty of contempt, "a place of business may not be picketed if there be no labor dispute between the owner and his employees". Concededly there was no dispute here between the employer and his employees, but the union was carrying on a secondary boycott against such employer, that is to say, there was a labor dispute between certain employee members of Local No. 17 and their employer, Runnymede Farms. The latter concern was selling its products to Sunset Market, and Local No. 17 placed Sunset Market on its "unfair list" because such market refused to accede to the demand of the union that it discontinue the sale of Runnymede products. Such secondary boycott is legal in this state. Parkinson Co. v. Building Trades Council, supra. Being legal, what "offense" was petitioner, a member of Local No. 17, committing when he published the fact that Sunset Market was on the union's "unfair list"? Again let me emphasize that courts cannot enjoin one from doing that which he has a legal right to do. As early as 1908, in the case of Parkinson Co. v. Building Trades Council, supra, it was pointed out that the word "unfair", as used in labor controversies, is not suggestive of fraud, breach of faith, or dishonorable conduct, but simply indicates that the person or corporation characterized as "unfair" has refused to yield to a demand made by the union. The language of Chief Justice Beatty at page 592 of 154 Cal., at page 1031 of 98 P., 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165, of the case just cited is peculiarly applicable to the present controversy: "In reference to the word 'unfair,' it clearly appears that, as employed by the defendants and labor organizations generally, it has a technical meaning well understood by the plaintiff and by all the persons to whom the council sent notices that plaintiff had been declared unfair. Such declaration means, and in this instance was understood by all parties concerned to mean, not that the plaintiff had been guilty of any fraud, breach of faith, or dishonorable conduct, but only that it had refused to comply with the conditions upon which union men would consent to remain in its employ or handle material supplied by it."

I take the position, therefore, that it is not necessary that a direct labor dispute exist between a union and an employer before the union may maintain a boycott and in the exercise of the constitutional rights of its members afford the latter the privilege of speaking and publishing their views with reference to

such boycott. This right to boycott is asserted under the constitutional guaranty of freedom of speech and of the press. As was said in Re Lyons, supra, 27 Cal. App.2d at page 298, 81 P.2d at page 193:

"* * * Of course we have here no labor dispute as that term is generally understood. However, we cannot conclude that fact sufficient to distinguish the cases in principle. In California there is no statute either prohibiting or permitting peaceful picketing, under the circumstances here involved, as is now the case in some jurisdictions. [Citing cases.]

"In this state the right to peacefully picket rests upon the constitutional guaranty of the right of free speech. We cannot see how the right to peacefully picket, under the guaranty of free speech, could be confined to cases in which there exists a dispute between an employer and organized labor over hours or conditions of employment, rate of pay, unionization of employees or employment of non-union men and not extended to a dispute between a business man and any citizen or group of citizens who may differ with him on a question of business policy. The guaranty of the right of free speech is general and extends to every class or group of citizens. * * *"

Again, in the Matter of the Application of Bell et al., for a writ of habeas corpus, decided by the Third District Court of Appeal, March 1, 1940, reported in 100 P.2d 339, 340, it is said: "The right to picket by lawful means is not confined to particular groups or unions, but may be enjoyed by all individuals or classes who desire to thereby convey to the public their opinions regarding labor controversies or to promote their causes by presenting persuasive facts to other workmen, in a legitimate manner, free from force, violence, intimidation or threats. * * * It is guaranteed to all on the same basis, upon the theory that it is a lawful exercise of the constitutional guaranty of freedom of speech, press and assemblage." In Schuster v. Int. Ass'n of Machinists, 293 Ill.App. 177, 12 N.E. 2d 50, the doctrine just enunciated is approved.

It follows, therefore, that in the absence of any legislation in this state prohibiting peaceful picketing in support of either a primary or secondary boycott except when a labor dispute arises, that the existence of a labor dispute is not necessary to authorize peaceful picketing in either a primary or a secondary boycott. The right is not one exclusively for use in labor cases, but is open to any individual or class, because it constitutes the lawful exercise of the constitutional guaranties heretofore mentioned.

In Senn v. Tile Layers Protective Union Local No. 5, 301 U.S. 468, 57 S.Ct. 857, at pages 859–864, 81 L.Ed. 1229, the Supreme Court of the United States points out that though none of the employees of the employer belonged to defendant union, nevertheless the latter had the right by legal means to seek to induce the employer to unionize his shop by employing members of such union; and with reference to the right of petitioner herein to exercise his right to peacefully advise the public of the fact that Sunset Market refused to accede to the demands of Local No. 17, we might epitomize such right in the closing language of the opinion, that: "One has no constitutional right to a 'remedy' against the lawful conduct of another."

We come now to a consideration of the holding in the majority opinion that when the temporary restraining order was issued on November 3d pending a hearing on an order to show cause returnable before the court on November 13th, "it was petitioner's plain duty to obey the order. Petitioner now seeks to obtain—by means of a writ of habeas corpus—a determination of questions which properly would have been adjudicated at the hearing of the order to show cause on November 13th. In the circumstances, the law affords no such expedience at the expense of respect and due regard for its orderly processes." I am not in accord with that statement of the law. In my opinion, it might be a correct statement of the law if the court had jurisdiction of the subject matter and the parties and the restraining order amounted only to an erroneous application of the court's injunctive powers. But where, as here, the order itself was absolutely void, there is no requirement of obedience thereto. It does not amount to an "orderly process" of the court, but is in fact no process at all. Having in mind the provisions of the first amendment to the Constitution of the United States, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"—let us assume that a court should issue a temporary restraining order pending hearing on an order to show cause and which restraining order, issued on a Saturday, should prohibit the holding of religious services on the Sabbath day following: or that the court should in like manner issue a restraining order prohibiting the publication of a newspaper pending hearing on an order to show cause because, according to such restraining order, the newspaper in question was threatening to publish therein a libel against the plaintiff in the action. Would it be contended that the religious group should refrain from the free exercise of its religious services, or that the newspaper should withhold its publication, when the judicial orders were violative of constitutional guaranties and therefore void? The question answers itself. The restraining order, contravening constitutional privileges, need not be obeyed; and the unconstitutionality thereof, appearing on its face, would furnish a complete defense to a contempt citation based upon a violation of such void order. So in the case at bar, when the temporary restraining order was void on its face because it abridged constitutional guaranties and liberties in that it prohibited peaceful picketing, which is lawful in this state, the petitioner was not required to obey it, and its illegality appearing on the face of the order furnished a complete absolution for disobedience thereof. In such circumstances, it seems to me that it matters not what the proceeding may be denominated—whether as a temporary restraining order, injunction pendente lite, or by whatever other name—if it is void on its face the person named therein may disregard it and defend against a contempt charge based on a violation of the terms thereof on the ground that the order was void. If such be the case the person adjudged in contempt for a violation of such order is entitled to his discharge from custody through the medium of a writ of habeas corpus. As was said by the Supreme Court of the United States in Bowen v. Johnston, 306 U.S. 19, 25, 59 S.Ct. 442, 444, 83 L.Ed. 455: "But if it be found that the court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights have been denied, the remedy of habeas corpus is available." In Matter of Johnson, 9 Cal.App.2d 473, 50 P.2d 452, this division of our court granted a writ of habeas corpus when the order of the lower court abridged petitioner's constitutional rights under section 15 of article I of the Constitution of this state.

Concerning the evils arising out of the increasing tendency of courts to resort to injunctive proceedings rather than to permit the exercise of constitutional rights and to allow a determination of the alleged abuse thereof in a trial proceeding, I quote from the dissenting opinion of Justice Kinkead in McCormick v. Local Union, 1911, 13 Ohio Cir.Ct.R., N.S., 545, at page 553:

"It is a fact that practically all of the encroachments upon the right of free speech and a free press, up to date, have been made by the courts themselves—the sworn defenders of the Constitution. Doubtless they have regarded the urgency of the ends sought as a justification of the extraordinary means employed, even to the extent of denying the right of trial by a jury; but to these extremes I must respectfully decline to go.

"No greater mistake can be made than to underestimate the importance of free speech and of a free press. These rights are among the strongest bulwarks of liberty. It is our duty to guard them with jealous care, and this duty should appeal with peculiar force to the courts. They should never lend their assent or assistance to the weakening or paralyzing of those constitutional rights, without which liberty can not long exist.

"The Supreme Court of the United States, in a case involving the boundary line of states where marked by rivers, discussed the question of the shifting of the boundary line by reason of the bank of the river slowly wearing away on one side and accumulating on the other. They held that land thus accumulated, by accretion, upon one side of a river belonged to the state upon that side, and that the boundary line between the states shifted accordingly (not so where the river changed its course suddenly, as by a freshet. In such case the boundary line is not altered). In that case the Supreme Court defined the word 'accretion' as meaning 'something which you can see has taken place, but which you can not see take place.'

"If some of the courts which have issued injunctions in labor troubles were inquired of as to the source of their power to go to the lengths they have gone in some cases in restraining, by injunction, breach-

es of the peace and violations of the criminal law generally, they might be compelled to answer 'we got it by accretion—by the gradual wearing away of the power of the executive branch of the government as aided by the regular criminal courts, and a corresponding increase in power, by accretion, on the part of courts of equity, to substitute the injunction for the neglect of duty on the part of executive officers and in the place of jury trials in the regular criminal courts.' They might add 'of course no one saw us get this power, but all now know that the ancient boundary lines have shifted and that we are now exercising the power.'

"We may admit the existence of a power, and still deny the wisdom of exercising it except in extraordinary cases, and then only with very great caution. It is very easy to issue an injunction, and it is a very ready and summary method for the court to determine, without the aid of a jury, whether there has been a violation of the order. No one doubts the simplicity or efficiency of injunction procedure; these are the qualities that render it attractive to people who prefer, when it better suits their own purposes, to omit the limitations and restraints incident to jury trials. Were these same people themselves on trial for a violation of the criminal law, they would stand aghast if any one suggested that the jury be dispensed with and that they be tried by the court—they would be amazed, and justly so, at both the ignorance and the effrontery of any one who would thus seek to deny them their constitutional rights."

As was said by this division of the court in People v. Braun, 31 Cal.App.2d 593, 603, 88 P.2d 728, 733:

"The doctrine that respect for the law cannot be inspired by withholding the protection of the law is one which recognizes no exceptions.

"Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from established legal modes of procedure. In a strong dissenting opinion delivered by Mr. Justice Sutherland of the Supreme Court of the United States, in Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 659, 81 L.Ed. 953, we are counseled to 'withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.' The acquittal of a guilty person is truly a miscarriage of justice, but the conviction of an innocent person through relaxation of those fundamental legal principles such as the one with which we are here concerned, would be a tragedy. It is the duty of the courts to be watchful for the constitutional and individual rights of the citizen and against any stealthy encroachments thereon."

Let us not alone boast of the priceless heritage that is ours in the constitutional guaranties and liberties we enjoy, but let us as well uphold and defend them. When tempted by the alluring but fallacious philosophy that "the end justifies the means", let us remember the salutary words of Thomas Jefferson in his first inaugural address, when he said, "* * * freedom of religion, freedom of the press, and freedom of person, under the protection of the habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our step through an age of revolution and reformation. The wisdom of our sages and blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our step to regain the road which alone leads to peace, liberty and safety."

Because the order made by the superior court, for the violation of which petitioner was adjudged in contempt, was an attempted restraint upon his rights and liberties as guaranteed by the Constitution of this state and therefore void, I am of the opinion that petitioner should be discharged from custody.

38 Cal.App.2d 219

SHANNON v. WILSON et al.

Civ. 2522.

District Court of Appeal, Fourth District, California.

March 29, 1940.

Hearing Denied May 27, 1940.

1. Municipal corporations ⇐529

A railroad "right of way", as respects its liability to be sold under foreclosure of a street improvement bond is not confined to the mere right to operate trains over tracks and cannot arbitrarily be confined to an easement over just enough land for running trains, but includes all adjoining grounds covered by easement and reasonably necessary for such use. St.1911, p. 730, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Right of Way".

2. Municipal corporations ⇐479

Under Improvement Act of 1911, a railroad right of way easement, in order to become subordinated to street improvement bonds, must be separately assessed in the same manner as the lots and portions of lots within the district. St.1911, p. 730, as amended; p. 742, § 20, subd. 11.

3. Municipal corporations ⇐579

Land sold under foreclosure of street improvement bond was not sold free of a railroad right of way easement, which was not separately delineated, described, assessed, or numbered in the assessment roll and diagram as prescribed by Improvement Act under which bond was issued. St.1911, p. 730, as amended; pp. 742, 743, 744, § 20, subds. 10, 11, §§ 21, 23.

4. Municipal corporations ⇐579

In view of provision of Improvement Act relating to assessment of a railroad right of way, such a "right of way" cannot be classed as a "lien" or "incumbrance" within provisions of Improvement Act that purchaser's deed upon sale under foreclosure of street improvement bond conveys to grantee absolute title to lands described therein free of all incumbrances, except the lien for state, county, and municipal taxes. St.1911, pp. 742, 760, 762, 763, § 20, subd. 11, §§ 66, 75, 76.

See Words and Phrases, Permanent Edition, for all other definitions of "Lien" and "Incumbrance".

5. Municipal corporations ⇐488(5)

No duty devolved upon railroad to see that city council assessed its right of way easement in manner prescribed by provision of Improvement Act relating to assessment of a railroad right of way, since necessity of following such method was a prerequisite to acquiring jurisdiction to make the assessment. St.1911, p. 742, § 20, subd. 11.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by E. M. Shannon against Jerrie Wilson and the Los Angeles Railway Corporation to foreclose a street improvement bond. From judgment entered, the plaintiff appeals.

Affirmed.

Harmel L. Pratt, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (Woodward M. Taylor and Keith Bullitt, both of Los Angeles, of counsel), for respondents.

GRIFFIN, Justice.

This is an action to foreclose a street improvement bond which was issued in November, 1927, under the Improvement Act of April 27, 1911, St.1911, p. 730, as amended. The lot in question, lot B of tract 6116, is located in the city of Los Angeles, is rectangular in shape, being approximately 80 feet wide and 30 feet deep. Adjoining the lot on the rear and along its 80-foot width is the right of way of the respondents Los Angeles Railway Company and Los Angeles Railway Corporation, over which street cars are operated. The right of way is 30 feet wide and is atop an embankment approximately 14 feet high. The slope supporting the railway right of way extends over practically the entire surface of lot B. The respondents' right to erect and maintain such embankment over lot B arises from the provisions of two deeds. One is dated October 23, 1903, and grants to respondent Los Angeles Railway Company the right of way just south of lot B "together with the right to construct and maintain on land adjoining the above described strip of land on the Northerly and Southerly sides thereof such additional lands as may be necessary to occupy in the construction of a road bed twenty seven feet in width with side slopes of one and one-half feet horizontal to one

foot vertical". The other deed is dated October 17, 1913, and among other things, conveys "The right and easement to retain and maintain the fill and embankment which second party has heretofore constructed and which now exists * * *", referring to the embankment upon lot B in question.

The complaint is in the usual form for the foreclosure of street improvement bonds. It contains allegations of default in payments provided in the bond; that defendant Jerrie Wilson is the owner of lot B, and that the respondents claim some right, title or interest therein, but that such claims are subject and subordinate to the lien of the bond.

An answer was filed by the respondents which admitted all of the allegations of the complaint, except that it denied that the bond is a lien upon lot B or upon the interest or estate of said respondents in said lot. The answer further set forth that the defendants' interest in that lot "is an easement and right of way for an electric street railway and for the retention and maintenance of the fills and embankments upon said land, all of which are created". There is a further allegation that such "interest and estate is prior and superior to the alleged lien of said street improvement bond".

The court made findings in which the deeds above referred to were set out in full except for the descriptions of property, and the interest and estate of said answering defendants was found to be superior to the lien of the bond. It was further found "that upon the assessment roll and diagram * * * the real property described in said complaint and in said bond, is separately delineated, described and assessed as Lot B, Tract No. 6116. * * * Said interest and estate and slope embankment was not nor was said southerly 25 feet of said Lot B upon which was located and maintained said slope embankment separately delineated, described, assessed or numbered in said assessment roll and diagram"; that respondents "did not, * * make any objection to said assessment * * prior to or at the time and place set for hearing objections to said assessment roll and diagram, or at any other time or place, nor did said defendants * * * appeal to the City Council of the City of Los Angeles * * * in regard thereto, as provided in the Act of the Legislature under which said bond was issued". In addition thereto the court further found "said slope was constructed in 1903, is approximately 10 feet in height, and ever since its construction has extended over, upon and covered the southerly 25 feet of said Lot B, and said slope is cleary visible and has been maintained and used to support the said right of way since the time of its construction in 1903".

The decree of foreclosure of the bond was entered and the property ordered sold "subject to the lien, claim or easement" of the respondents. The appeal is from this latter provision of the decree of foreclosure.

The whole question involved is whether, upon the sale under foreclosure of a street improvement bond, where no question is raised as to the legality of the bond the land described in the bond is sold free and clear of easements and physical servitudes when the easement and physical servitude in question is an integral part of a railroad right of way, consisting of the right to construct and maintain a slope embankment for the support of the adjoining railroad right of way atop the embankment created in the year 1903 and which has been maintained and used and has been perfectly visible ever since that date and which was not separately delineated, described, assessed, or numbered in the assessment roll and diagram as prescribed by the improvement act under which said bond was issued. It is thus seen that the easement for the construction and maintenance of the embankment slope on lot B is an integral part of the respondents' railroad right of way easement atop the adjoining embankment upon which the tracks are laid and should be considered as such.

[1] The term "right of way", as applied to railroad easements, is not confined to the mere right to operate trains over tracks and cannot arbitrarily be confined to an easement over just enough land for running trains. The term includes all adjoining grounds covered by the easement and reasonably necessary for such use. Wilson v. Pacific Ry. Co., 176 Cal. 248, 253, 168 P. 128.

Appellant argues that as a taxing power operates not upon any interest in real property, nor against any person or corporation, but on the res, the land itself, it necessarily follows that in the case of a sale of real property upon foreclosure of a tax or assessment lien, the property must be sold freed of all encumbrances, liens, and interests of whatever nature, and that the purchaser obtains a paramount title, citing

California L. & T. Co. v. Weis, 118 Cal. 489, 50 P. 697; German Savings, etc., Soc. v. Ramish, 138 Cal. 120, 69 P. 89, 70 P. 1067; O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020; Chase v. Trout, 146 Cal. 350, 80 P. 81; Woodill & Hulse Elec. Co. v. Young, 180 Cal. 667, 670, 182 P. 422, 5 A.L.R. 1296; Lee v. Silva, 197 Cal. 364, 372, 240 P. 1015, and that accordingly in applying the principles of these cases to the case at bar the trial court erred in ruling that the easement or right of way of the respondents was not subject to the lien of the bond. It is further contended that respondents' failure to appeal to the city council, if it ever had any objection to the correctness of the assessment or diagram, was fatal and was in fact an acceptance of the assessment as levied, and that respondents might well have had the city council assess separately, not the easement, but the 25 feet of lot B which is covered by their embankment, had they made a timely appeal to the city council; and that not having done so, they may not now make such an objection, citing sections 21, 26 and 66 of the Street Improvement Act of April 27, 1911; Hollywood Cemetery Ass'n v. Powell, 210 Cal. 121, 129, 291 P. 397, 71 A.L.R. 310, and Chase v. Trout, supra.

Respondents, in answer to appellant's contention, maintain (1) That their easement is an integral part of their public utility street railroad right of way and as such has become impressed with a public use and cannot be sold for a delinquent assessment unless it has been assessed in the manner and form prescribed by the Improvement Act of 1911, under which appellant's bond was issued, citing section 20, subdivision 11, and section 23 of the Improvement Act of 1911 (Stats.1911, 730, at pp. 742 and 744); McNeil v. City of South Pasadena, 166 Cal. 153, 155, 135 P. 32, 48 L.R.A.,N.S., 138; Wilson v. Pac. Elec. Ry. Co., 176 Cal. 248, 253, 168 P. 128; Schaffer v. Smith, 169 Cal. 764, 770, 147 P. 976; Los Angeles Pacific Co. v. Hubbard, 17 Cal.App. 646, 651, 121 P. 306; Rutledge v. City of Eureka, 195 Cal. 404, 234 P. 82; Cowart v. Union Paving Co., 216 Cal. 375, 383, 14 P.2d 764, 83 A.L.R. 1185. (2) That respondents' easement is neither a "lien" nor an "encumbrance" upon lot B, but is a visible, physical servitude attached to the lot and cannot be extinguished except in the manner prescribed by law and which, until so extinguished, constitutes a specific estate and species of property transferable like any other property, citing sections 2872, 2873, 2874 and 2875 of the Civil Code; section 1180 of the Code of Civil Procedure; section 1114, Civil Code; Weber v. McCleverty, 149 Cal. 316, 320, 86 P. 706; Sisk v. Caswell, 14 Cal.App. 377, 112 P. 185; Ferguson v. Edgar, 178 Cal. 17, 171 P. 1061; McCarty v. Wilson, 184 Cal. 194, 193 P. 578; Jaques v. Tomb, 179 Cal. 444, 446, 177 P. 280; Wetzler v. Patterson, 73 Cal.App. 527, 537, 238 P. 1077; Baldwin v. Stewart, 218 Cal. 364, 370, 23 P.2d 283; Smith v. Smith, 21 Cal.App. 378, 131 P. 890; Tide Water Pipe Co. v. Bell, 280 Pa. 104, 124 A. 351, 40 A.L.R. 1516; Tax Lien Co. of New York v. Schultze, 213 N.Y. 9, 106 N.E. 751, L.R.A. 1915D, 1115, Ann.Cas.1916C, 636; Blenis v. Utica Knitting Co., 73 Misc. 61, 130 N.Y.S. 740, 747, 748; Jackson v. Smith, 153 App.Div. 724, 138 N.Y.S. 654; Poetzsch v. Mayer, 115 Misc. 422, 189 N.Y.S. 695; Hutchings v. Campbell, etc., 1924, 2 Dom. L.R. 299; Crawford v. Senosky, 128 Or. 229, 274 P. 306; Thompson v. Clark, 6 Cal. 2d 285, 57 P.2d 490.

Prior to the enactment of the 1911 Improvement Act practically all street improvement work was done and assessments therefor were levied under the Vrooman Act (Stats.1885, p. 147), and bonds to secure such assessments were issued under the Improvement Bond Act of 1893 (Stats. of 1893, p. 33). Up to 1911, neither of those acts contained any express authority to levy an assessment upon or issue a bond against railroad property. In Southern California Railway Co. v. Workman, 146 Cal. 80, 79 P. 586, 587, 82 P. 79, 2 Ann.Cas. 583, decided in 1905, the Supreme Court said: "There is no authority for making an assessment upon a right of way, or for selling the same." See, also, Fox v. Workman, 1909, 155 Cal. 201, 100 P. 246. It therefore seems quite apparent that as a result of the decisions in the two Workman cases, supra, the Improvement Act of 1911 was enacted with section 20, subdivision 11 (now sec. 20j, Deering's Gen.Laws 1931, Act 8199, p. 4537) expressly authorizing and directing the separate assessment of railroad right of way easements in the same manner as other property. Section 20, subdivision 11, in addition to providing that wherever the words "lot, lots, lands, piece or parcel of land" are mentioned in the act, they shall be deemed also to include a street railroad right of way, further provides that: "whenever a railroad, street or interurban railroad right of way shall * * be included within any district to be as-

sessed for the cost of any improvement provided in this act, such railroad right of way (whether the same is owned in fee or as an easement) shall be included in the warrant, assessment and diagram and shall be assessed in the manner and with the same effect as other lots, lands or pieces or parcels of land are assessed as provided in this act, and such railroad, street or interurban railroad right of way shall be subject to sale for nonpayment of assessments as in this act provided."

[2] At the same time the Improvement Act of 1911 was enacted, the Vrooman Act was amended (Stats.1911, p. 626, 630) by adding subdivision 11 to section 7, thus making that section of the Vrooman Act read substantially the same as section 20 subdivision 11, of the Improvement Act of 1911. Therefore, there can be little doubt under the Improvement Act of 1911 that a railroad right of way easement, in order to become subordinated to the bonds, must be separately assessed in the same manner as the lots and portions of the lots within the district. That a railroad right of way may be separately assessed and sold under foreclosure sale is no longer open to conjecture. Rutledge v. City of Eureka, supra; Cowart v. Union Paving Co., supra; Wilson v. Pac. Elec. Ry. Co., supra; Los Angeles Pacific Co. v. Hubbard, supra. Subdivision 10, section 20, of the 1911 Improvement Act provides that the city engineer shall make a diagram of the property benefited by the improvement and to be assessed and shall "show each separate lot, piece or parcel of land * * * within the limits of the assessment district".

As section 20, subdivision 11 provides that the term "lot, lots, lands, piece or parcel of land" shall include a railroad right of way and that such right of way shall be assessed in the same manner and with the same effect as other lots, etc., said right of way must be read into the above-mentioned section 20, subdivision 10, which prescribes that where an assessment is to be placed upon a district each "lot, piece or parcel of land" within the district must be included in the diagram and be assessed.

As section 23 of the act provides that the several amounts assessed shall be a lien upon the "lands, lots, or portions of lots assessed" and as the term "lands, lots, etc.", includes railroad rights of way it seems clear to us that in order to impress the lien upon either lots or railroad rights of way over lots or portions of lots it is obligatory that said lots and rights of way, respectively, shall be separately assessed and the warrant, assessment, and diagram showing the assessments shall be recorded in the office of the superintendent of streets and that when so recorded the lots, portions of lots and railroad rights of way become impressed with the lien and are subject to the bonds. Accordingly, the plain intent, purpose and meaning of section 21 and subdivisions 10 and 11 of section 20 is that when either lots or railroad rights of way (whether owned in fee or as an easement) are included within the assessment district each must be separately assessed, given a separate assessment number, both on the diagram and on the assessment roll, and must be given a separate description and a separate assessment on the roll in order that said lot or right of way may become impressed with the assessment lien. Otherwise there is no compliance with the requirement of subdivision 11 that the railroad right of way "shall be assessed in the manner and with the same effect as other lots".

[3] It therefore follows in accordance with the findings of the court that the lien described in section 23 of the act never attached to said right of way easement, and as there was no assessment placed upon the easement involved herein, the conclusion is irresistible that the lien of plaintiff's bond is not impressed thereon, and upon a foreclosure of the bond the sale must be made subject thereto.

[4] In view of the statutory provision relating to the assessment of a railroad right of way and the cases cited by respondent, we are convinced that such a right of way as here described may not rightfully be classed as a lien or incumbrance under sections 66, 75 or 76 of the act which read in part as follows: The purchaser's deed "conveys to the grantee the absolute title to the lands described therein free of all incumbrances, except the lien for state, county, and municipal taxes", and that the assessment "shall be a first lien upon the property affected".

[5] No duty devolved upon respondents to see that the city council assessed their right of way easement in the manner prescribed by subdivision 11 of section 20 of the act because the necessity of following that method was a prerequisite to acquiring jurisdiction to make the assessment. Consequently, the respondents were entitled to rest secure in the knowledge that until

such jurisdiction had been obtained by the assessing authorities following the requirement of the act, their easement could not be subjected to the assessment. The cases cited by appellant to the effect that a failure to appeal to the city council and object to the correctness of the assessment or diagram constitutes an acceptance of the assessment as levied are not applicable. The contentions of respondent as presented are approved and the determination of the trial court was judicious and must be upheld.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.



38 Cal.App.2d 194

SEBASTIAN v. CROWLEY et al.
Civ. 2087.

District Court of Appeal, Fourth District, California.

March 28, 1940.

As Modified March 30, 1940.

Rehearing Denied April 27, 1940.

Hearing Denied May 27, 1940.

1. Malicious prosecution ⇐71(2)

In action for malicious prosecution, the question of what circumstances amount to probable cause is a pure question of law for trial court, and jury may be called upon to determine whether such circumstances exist when there is a substantial conflict in evidence bearing upon the issue, but in absence of substantial conflict in evidence, it is the court's province to determine whether such circumstances establish a want of probable cause.

2. Malicious prosecution ⇐38

Actions for malicious prosecution are not favored.

3. Malicious prosecution ⇐56

In order to sustain an action for malicious prosecution, plaintiff has burden to establish that defendant acted without probable cause and was actuated by malice.

4. Malicious prosecution ⇐19

In an action for malicious prosecution, existence of probable cause is not negatived merely by a showing that no crime was committed or that the accused was innocent.

5. Malicious prosecution ⇐24(1)

Although an action for malicious prosecution cannot be maintained unless it is shown that the proceedings alleged to have been prosecuted maliciously and without probable cause have been terminated in favor of party claiming to have been injured thereby, a mere showing of such favorable termination is insufficient, and evidence of favorable termination does not create a conflict on issue of probable cause.

6. Malicious prosecution ⇐24(3)

An action for malicious prosecution on ground that codefendant, acting on defendant's behalf, swore to criminal complaint charging plaintiff with defrauding an innkeeper could not be maintained against defendant under evidence that complaint was issued by district attorney after defendant had given district attorney a full statement of defendant's information respecting facts upon which complaint was based, and that district attorney acted upon additional independent knowledge of his own, since there was "probable cause" for prosecution, although prosecution was dismissed as to plaintiff for want of evidence. Pen.Code, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

7. Malicious prosecution ⇐56

In action for malicious prosecution, burden of proving malice and want of probable cause rests on plaintiff, and to sustain such burden plaintiff must prove that complaining witness did not have reasonable grounds for believing that material facts alleged in criminal complaint were true.

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Action by Dorothy Sebastian against George Crowley and others for malicious prosecution, wherein defendant George Crowley counterclaimed and cross-complained. From a judgment for plaintiff as to defendant George Crowley, and from orders denying such defendant's motions to vacate the judgment, to order entry of judgment in his favor, and for judgment notwithstanding the verdict, defendant George Crowley appeals, and from an order granting a motion for new trial in behalf of defendant George Crowley, plaintiff appeals.

Judgment in accordance with opinion.

Hearing denied; CARTER, GIBSON, and PETERS, JJ., dissenting.

William M. Rains, of Los Angeles, for plaintiff, appellant and respondent.

Herbert C. Kelly, of San Diego, for defendant, respondent and appellant.

GRIFFIN, Justice.

This is an action for malicious prosecution. The case was tried before a jury which returned a verdict in favor of the plaintiff Dorothy Sebastian in the amount of $10,000 against the defendant George Crowley. The jury also returned a verdict against the plaintiff in favor of the defendant C. D. Calkins, who was an employee of the defendant George Crowley. No appeal was taken from this judgment in Calkins' favor. Motions in behalf of the defendant George Crowley to vacate the judgment, to order entry of judgment in his favor, and for judgment notwithstanding the verdict were denied. From these orders, as well as from the judgment, defendant Crowley has appealed. A motion for a new trial in behalf of the defendant George Crowley was granted, from which order plaintiff has appealed.

The appellant Dorothy Sebastian urges that the trial court abused its discretion and committed error in granting the new trial because there was no justification for it either in the law or on the facts and argues that the court stated no grounds in its order granting the new trial, and contends that it is to be presumed therefore that it was not granted upon the ground of insufficiency of the evidence; that there were no errors of law; and that there was no justification on that ground for the order.

Appellant Crowley contends that the judgment against him should be reversed and that he was entitled upon the evidence, as a matter of law, to a directed verdict or judgment notwithstanding, and that the verdict and judgment in favor of his co-defendant and alleged agent necessitated a judgment for the appealing defendant and that the trial court's order granting a new trial should be affirmed.

The amended complaint herein charges that "C. D. Calkins, acting on behalf of the other defendants herein", swore to a criminal complaint charging plaintiff Dorothy Sebastian and one Sam Hoffman jointly with the crime of defrauding an inn keeper. This is the only overt act charged and is the sole basis for the present action. No conspiracy is charged.

During the course of the trial the suit was dismissed as to all defendants except-

ing C. D. Calkins and George Crowley. The complaint therefore apparently alleges liability of Crowley for this act as principal of his agent Calkins. Defendant Crowley counterclaimed and cross-complained for $103.31. Several written interrogatories were submitted to the jury for determination and were answered.

It was stipulated "that inasmuch as cross appeals have been filed * * * that said appeals may be deemed consolidated for hearing * * * and that a single reporter's transcript may be used for both of said appeals".

A brief synopsis of the evidence discloses that on January 20, 1937, one Sam Hoffman, a theatrical producer, came to the New Plaza Hotel in San Diego and had a conversation with the defendant and respondent, George Crowley, who was the lessee and proprietor of the hotel, and the defendant C. D. Calkins, who was an employee of Crowley and the chief clerk of the hotel. Hoffman stated to Crowley and Calkins that he was producing a show called "Top Billing" and was going to give a performance of the show in San Diego for the benefit of the Red Cross flood relief. He further stated that the plaintiff and appellant, Miss Dorothy Sebastian, was going to be the star. At this time arrangements were made between Crowley, Calkins, and Hoffman for hotel accommodations for the troupe, but the rates were left open because Hoffman did not know how many would double up and how many would have separate rooms. Hoffman further stated that he would be responsible for the hotel bill. At this same conversation there was some discussion as to the troupe taking their meals at the Savoy restaurant, a near-by eating place. Subsequent to this first meeting, Hoffman told Crowley that before the troupe came to town he would put up enough money to cover their entire bill. The defendant Crowley testified that he discussed with Hoffman nearly every day the question of when he was going to pay the money for the accommodations for the troupe. Miss Sebastian was to appear in the play for the benefit of the Red Cross and to acquire or regain self-confidence, as she did not feel that she was ready to go back into pictures, she having been away from the screen so long she needed experience to give her self-assurance. She was to receive no remuneration for her appearance. Miss Sebastian arrived in San Diego with another member of the troupe. She was greeted in the

lobby of the hotel by Mr. Crowley. She was shown to her room and did not sign the hotel register. At that time and in Mr. Crowley's presence, she was told by Mr. Hoffman that arrangements had been made for the company to eat at the Savoy Grill and all they had to do was sign "Sam Hoffman, Top Billing".

The next evening Mr. Crowley came up to Miss Sebastian's room and there had a conversation with Miss Sebastian and other members of the troupe. Subsequently there was a discussion as to how the members of the troupe should double up in the rooms of the hotel. During this discussion Miss Sebastian wrote on the back of the telephone book the names of the members who were to pair off. The show was billed to go on Sunday night but was postponed until Monday night, February 8th. The show was a financial failure.

On Tuesday morning Miss Sebastian called a bell boy and had him take her baggage downstairs into the lobby of the hotel where she had a conversation with Mr. Calkins in Mr. Crowley's presence. Miss Sebastian stated that she wanted to pay her personal bills. There was shown to her a statement as follows: "Room rent $61.50; telephones and telegrams $12.17; laundry $1.05; Dr. Holden $5.00; Savoy Restaurant (meals) $21; misc. and cash advanced $2.59; totaling $103.31. She paid a portion of the telephone charges on the bill and her garage bill. Mr. Calkins showed her a number of other bills and stated that Mr. Crowley had requested that he show them to her. Her baggage was being taken out by the bell boy during the above conversation and placed in her car which had been brought by the hotel service to the front door of the hotel. At that time there was some further conversation in which Miss Sebastian stated that she would try and see that Mr. Hoffman made an honest effort to pay the bill. Mr. Hoffman never returned from the theatre after the show nor did he leave any baggage at the hotel.

The registration card which was kept by the hotel for Miss Sebastian showed that the charge for her room, 501, was charged to room 329, which was Hoffman's room number.

On February 12, Mr. Crowley sent the following letter to Miss Sebastian at Hollywood:

"Dear Miss Sebastian:

"The matter of your account and that of the Company was taken up by the Committee of Stockholders who represent the owners of the New Plaza Hotel with their attorney and they state that all telephone messages coming from your room should be charged to you, all meals charged by you should be paid by you; that Hoffman agreed to deposit the amount of the rooms with the hotel before the Company arrived, which he did not, * * * and that you called the manager to your room and asked him what arrangements were made for rooms for the Company, and that you arranged for their doubling up. We have the telephone book where you wrote the names of the Company and stated how many rooms you would require and that everything would be O. K. You also ordered a doctor for Hoffman and charged same to us. We are willing to waive the room rent but insist on the $50 cash we paid out. If it is not paid we will ask the district attorney for a warrant for defrauding an Inn Keeper by Monday, February 15, 1937.

"New Plaza Hotel.
"(signed) George Crowley,
"Manager."

Immediately on receipt of the letter Miss Sebastian telephoned Mr. Crowley from Los Angeles and told him that Hoffman and not she was responsible for the hotel bills. Crowley was the proprietor and directed the writing of the letter. On February 19, Mr. Crowley consulted Mr. Whelan, the then district attorney of San Diego county. Mr. Whelan testified that: "The circumstances of the complaint made to me about the hotel bill of either Mr. Hoffman or Miss Sebastian, or both, were these. Mr. George Crowley called at my office. * * * After Mr. Calkins had brought the bill down, and I had decided to issue a complaint against both Miss Sebastian and Mr. Hoffman or either of them, to be turned over to whoever might try the case, I dictated * * * a brief statement of facts. * * * My best recollection of my conversation with Mr. Crowley on that day is that he told me that Mr. Hoffman, had come down to see him, and he had not known Mr. Hoffman at all; * * * and stated that he and Dorothy Sebastian were putting on a show called 'Top Billing'; that they had made arrangements to produce the play in Los Angeles at the Biltmore, * * *; that Warner

Brothers' studio was interested in the play to the extent that they were going to have a representative there to see how it went over, and if it went over well, that Warner Brothers were going to make a picture out of it, and star Miss Sebastian. * * * Mr. Crowley told me that the show had not proven successful, and that during the night Mr. Hoffman had left and removed his baggage, and presumably took the midnight * * * train to Los Angeles. That the next morning Miss Sebastian came down and refused to pay for anything except two personal long distance calls she had made, and she left; they owed him something around $100, * * *; that he had made an attempt to contact Miss Sebastian and had contacted her in Los Angeles and she refused to pay the bill; that he could not get any satisfaction out of Mr. Hoffman; and he put the proposition up to me 'What can I do about it?' * * * He said he understood that the law protected him, and what about it? So I asked him quite a few questions. He said he had not known Hoffman previously and knew Miss Sebastian only by name and reputation; that if Mr. Hoffman had come in with a proposition of the kind he had put to him, without having people of a recognized name appearing in the show, that he would not have extended him any courtesies, would not have let him stay at the hotel without paying his bill. He said he expected that he would have his money from Miss Sebastian when the show proved a flop, and that it looked to him as though they were trying to exonerate Miss Sebastian, making Mr. Hoffman pay the money, but that Hoffman apparently did not have any. * * * I asked him to let me think it over and to send Mr. Calkins down * * * Mr. Calkins came down the next day and brought the itemized bill which has been introduced in evidence here. * * * I * * * had the chief clerk draw a complaint, and at that time I had Mr. Calkins sign the complaint. First I thought I would have Mr. Crowley sign it, but Mr. Calkins was there when we issued the complaint and he signed it. The complaint was signed by Mr. Calkins at my direction. I took into consideration a good many things. I took into consideration my independent knowledge as to the publicity connecting Miss Sebastian with this show. I also took into consideration the fact that Miss Sebastian had eaten meals that were furnished by the Savoy Cafe and which were charged to the hotel, most of the week before. I assumed that Miss Sebastian would have been responsible for the meals which she had received. I also took into consideration the fact that it looked to me as though both Mr. Hoffman and Miss Sebastian were on a joint venture in the production of this show. Miss Sebastian, if the show proved successful, had quite a bit to gain; Mr. Hoffman had told Mr. Crowley, so Mr. Crowley told me, that Mr. Bill Boyd, formerly married to Miss Sebastian, was quite interested in seeing her back in the pictures. It looked to me as though she must have known Mr. Hoffman's circumstances, financially, and entered into the deal with him to come down here when the cast was put up at this hotel; and taking into consideration section 31 of the Penal Code which makes all persons who directly commit a crime or aid or abet in its commission, principals, I figured she was responsible * * * Mr. Crowley did not at any time request that a criminal complaint be issued against Miss Sebastian, neither did Mr. Calkins. I think that both left it up to me. * * * Mr. Crowley told me he did not think it right that people should beat him out of a hotel bill, and left it up to me. There was no suggestion made in the course of either of these conversations, or otherwise, either by Mr. Crowley or by Mr. Calkins as to the form of complaint which should be drawn. * * * I understood they had written to Miss Sebastian * * * I don't believe that he said he had written to her threatening to have her arrested for failing to pay the bill, but that would not make any difference. If I thought she owed the bill I would have issued the complaint. * * * Most of this statement is largely my own conclusion based upon what they told me. It is supposed to contain the facts as I understood them, based upon what I was told * * * I caused the complaint to be issued upon the facts which I was told, and the feeling I had that the two were jointly responsible, and it would not do to permit Miss Sebastian to be absolved of responsibility, and let Hoffman, who probably would never pay, be responsible for the bill. My conclusion was based upon the statements Mr. Crowley and Mr. Calkins had given me and to a certain degree by the manner in which the thing was advertised, and in a measure by my own idea about what was the right and wrong of the thing. The only tangible facts were those given me by Mr. Crowley and Mr. Calkins, and seeing the handbill and advertisement

featuring Miss Sebastian in the show * * * I caused the complaint to be issued upon those facts and my feeling that it was the proper thing to do. My feeling arose from their statement of facts and the construction that I placed upon those facts. * * *"

Mr. Calkins' testimony in reference to the signing of the complaint is: "I signed the criminal complaint at the request of District Attorney Whelan; * * * Mr. Crowley did not ask me to sign the complaint * * * I testified in my deposition that no one advised me to sign this complaint; that Mr. Crowley asked me to go to the District Attorney's office and sign this complaint. * * * In my interview with Mr. Whelan I did not consciously conceal any fact known to me. I did not conceal anything."

Mr. Calkins' testimony, as well as the testimony of Mr. Crowley, while containing some variations as to the happenings, did not materially differ from the statement related by the district attorney.

A criminal complaint was sworn to February 19, 1937, by Mr. Calkins. The warrant for arrest of Miss Sebastian and Hoffman was issued on the same date. The Los Angeles papers contained several articles about the issuance of the complaint. Miss Sebastian testified she read these articles and surrendered herself and posted bail. After trial of the case, on motion of the defendant Miss Sebastian, the court dismissed the case as to her "for lack of evidence to support the complaint". Subsequently defendant Hoffman, after forfeiture of bail and issuance of a bench warrant, stood trial and was convicted. This action by Miss Sebastian for malicious prosecution followed.

[1-3] We will first consider the appeal from the order denying defendant Crowley's motion for judgment notwithstanding the verdict. It has been repeatedly held that the question of what facts or circumstances amount to probable cause is a pure question of law for the court. Booraem v. Potter Hotel Co., 154 Cal. 99, 97 P. 65; Holliday v. Holliday, 123 Cal. 26, 55 P. 703. The jury may be called upon to determine whether such facts and circumstances exist when there is a substantial conflict in the evidence bearing upon this issue, but in the absence of any substantial conflict in such evidence it is the province of the court to determine whether such facts and circumstances do or do not establish a want of probable cause. Moore v. Durrer, 127 Cal. App. 759, 16 P.2d 676; Johnson v. Southern Pacific Co., 157 Cal. 333, 107 P. 611. In the present case we find no substantial conflict in the evidence relating to the issue of probable cause. It may be stated that actions for malicious prosecution are not favored in the law. Dunlap v. New Zealand F. & M. Ins. Co., 109 Cal. 365, 42 P. 29; 16 Cal.Jur. p. 737, sec. 9. The reasons therefore are based on considerations of public policy and are set forth in the authorities cited. In order to sustain such an action it is well settled that the burden is upon the plaintiff to establish two indispensable elements, first, that the defendant acted without probable cause; and second, that defendant was actuated by malice. Griswold v. Griswold, 143 Cal. 617, 77 P. 672; Davis v. Pacific Telephone & Telegraph Co., 127 Cal. 312, 57 P. 764, 59 P. 698; Carpenter v. Ashley, 15 Cal.App. 461, 115 P. 268.

[4, 5] Probable cause has been defined as "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true". Johnson v. Southern Pacific Company, supra [157 Cal. 333, 107 P. 613]; Lee v. Levison, 173 Cal. 166, 159 P. 438. It is also clear that existence of probable cause is not negatived merely by a showing that no crime was committed or that the accused is innocent (Selvester v. Kennedy, 137 Cal.App. 250, 30 P.2d 63; McKenna v. Heinlen, 128 Cal. 97, 60 P. 668; Haydel v. Morton, 8 Cal.App.2d 730, 48 P.2d 709), and although an action for malicious prosecution may not be maintained unless it is shown that the proceedings alleged to have been prosecuted maliciously and without probable cause have been terminated in favor of the party claiming to be injured thereby, a mere showing of such favorable termination is, of course, totally insufficient under the authorities above cited. In fact, evidence of such favorable termination does not even create a conflict on the issue of probable cause. Moore v. Durrer, supra.

[6] We have set forth a fair résumé of the evidence bearing on that question. From that summary of the undisputed evidence, we are convinced that defendant's contention that there was probable cause for the prosecution of plaintiff must be sustained. It is quite apparent that defendant Crowley made a full and fair statement of all the information he possessed, and acting upon the advice of the district

attorney, plaintiff was made a party to the criminal complaint. It should be noted also that the district attorney acted not only upon the information given by defendants but upon additional independent knowledge of his own.

It was said in Richter v. Neilson, 11 Cal. App.2d 503, 54 P.2d 54, 56: "that if in addition to his own belief a defendant proves that before commencing the prosecution of the action alleged to be malicious he sought the legal advice of an officer selected by the people to prosecute offenders against laws and in good faith fully and fairly disclosed to that officer all of the information he possessed and was then advised that a crime had been committed, and the prosecution is based upon a complaint prepared by that officer, he has made out a complete defense to the action [citing cases], however erroneous the advice may have been (Potter v. Seale, 8 Cal. 217, 218, 226; 18 R.C.L. 45)."

See, also, Garfield v. Peoples Finance & Thrift Co., 24 Cal.App.2d 144, 74 P.2d 1061.

[7] The burden of proving malice and want of probable cause rests on plaintiff. To sustain this burden she must prove that the complaining witness did not have reasonable grounds for believing that the material facts alleged in the criminal complaint were true. The evidence, it seems to us, clearly establishes that the defendant instituted the prosecution in good faith and on advice of counsel, thus bringing the facts within the rule laid down in Richter v. Neilson, supra. Under the evidence presented the trial court should have granted the motion for judgment notwithstanding the verdict and entered judgment for the defendant George Crowley.

In view of this determination we see no necessity in passing upon the appeal from the order granting the new trial. However, had the motion for judgment notwithstanding the verdict not been made, we would have been impelled to uphold the trial court's order granting a new trial, at least for the reasons stated, if for no other additional reason.

In view of this conclusion it is ordered that the order denying the motion for judgment notwithstanding the verdict be reversed and the trial court is ordered to enter judgment for the defendant George Crowley notwithstanding the verdict, and against the said George Crowley, on his cross-complaint. Therefore, the order granting a new trial is reversed. All other attempted appeals are dismissed. Estate of Siemers, 202 Cal. 424, 261 P. 298.

We concur: BARNARD, P. J.; MARKS, J.



38 Cal.App.2d 231

PEOPLE v. COWAN et al.
Cr. 394.

District Court of Appeal, Fourth District, California.
March 29, 1940.

Rehearing Denied April 12, 1940.

Hearing Denied April 25, 1940.

1. Homicide ⇐29

If, in consummation of an express and unlawful purpose of conspiracy, one of conspirators goes outside of such express purpose and kills, the other conspirators cannot escape responsibility where killing is not an unreasonable result to be expected from acts of sabotage and violence which were contemplated.

2. Criminal law ⇐59(5)

Where persons are not actors in actual commission of crime charged, but aid and abet others in its commission or procure others to commit the crime, all are equally guilty.

3. Criminal law ⇐423(9)

Where conspiracy to control, by acts of sabotage, prices and practices of those in cleaning and dyeing industry, in the consummation of which deceased was killed, had as its purpose acts of sabotage and it lasted until 1938, acts and declarations of conspirators engaged in conspiracy between time of its inception in 1926 to its termination in 1938 were properly received in evidence in murder prosecution, although many of declarations were made after killing in 1931.

4. Homicide ⇐29

Where purpose of conspiracy was to control prices and practices of those in cleaning and dyeing industry, and killing of

watchman was unexpected result of unlawful acts contemplated, fact that on another occasion deadly weapons were used threateningly by two or more conspirators without knowledge of other conspirators did not make unlawful use of deadly weapon, or killing, a direct purpose of conspiracy and an acknowledged means of accomplishing its end, so as to include, within purpose, assault with deadly weapon or murder, both of which crimes are felonies.

5. Homicide ⇐29

Where certain person was active conspirator with those charged with murder for 6 of 12 years of existence of association formed to control prices and practices in cleaning industry, fact that he was a conspirator during certain years did not make him any the less a "conspirator" during time he was active in its undertakings.

See Words and Phrases, Permanent Edition, for all other definitions of "Conspirator".

6. Homicide ⇐29

One who was active conspirator for 6 of 12 years of existence of association, formed by some of other members charged with murder, to control prices and practices in cleaning industry, could not have been prosecuted for murder where he was not in city where murder occurred and had abandoned conspiracy at time of commission of murder.

7. Homicide ⇐228(1)

In murder prosecution the "corpus delicti" is established when it is proved that deceased met his end through criminal means used by criminal agency.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

8. Criminal law ⇐563

Proof of corpus delicti does not necessarily involve or require proof that crime was committed by defendant or a person charged with having committed it.

9. Homicide ⇐228(2)

In murder prosecution, evidence that deceased watchman was shot through the head when his head rested on or near cement floor and that he had not moved from position in which he died, together with fact that no weapon was found near him, showed that he came to death through criminal means or criminal agency and established "corpus delicti".

10. Criminal law ⇐511(2)

Evidence, corroborative of an accomplice's testimony, implicating a defendant in commission of crime, need not of itself establish guilt or extend to every detail included in accomplice's testimony, but it is sufficient to avoid inhibition of statute if, standing alone, it tends to connect defendant with commission of offense. Pen.Code, § 1111.

11. Homicide ⇐234(3)

In murder prosecution, evidence *held* sufficient to corroborate testimony of accomplices. Pen.Code, § 1111.

12. Criminal law ⇐742(3), 1160

In murder prosecution, weight to be given testimony of witness, who defendants claimed was impeached, was a convicted criminal, and was admitted perjurer in another case, was first a question addressed to jury and second to trial judge on motion for new trial.

13. Criminal law ⇐507(1)

To constitute a person an "accomplice" under statute, he must be properly liable to prosecution, that is, there must be probable cause for his prosecution for identical offense charged against defendant on trial. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

14. Criminal law ⇐507(1)

In prosecution for murder committed in consummation of conspiracy, witness, who left the conspiracy about 1930 or 1931 and did not return to it until 1934 and was not in city of murder in 1931 when murder occurred and had no connection with conspirators for some time prior to and after the killing, was not an "accomplice" of defendants in commission of crime of killing. Pen.Code, § 1111.

15. Criminal law ⇐338(1)

In prosecution for murder alleged to have been committed in consummation of conspiracy to control prices and practices in cleaning industry, evidence concerning person never employed by nor having any connection with association formed by defendants but who merely attended a meeting and who had received much unfavorable publicity in connection with a kidnapping case, was improperly admitted.

16. Criminal law ⇐780(4)

A defendant is entitled to have jury informed by proper instruction of legal ef-

fect of statute providing that corroboration is not sufficient if it merely shows commission of offense or circumstances thereof. Pen.Code, § 1111.

17. Criminal law ⇐823(12)

In murder prosecution, failure to instruct that corroboration is not sufficient if it merely shows commission of offense or circumstances thereof *held* not prejudicial error where court instructed jury there must be evidence independent of that of accomplices tending to connect defendant with crime charged and court gave another instruction on corroborating evidence. Pen. Code, § 1111.

18. Conspiracy ⇐30

Conspiracy, by members of association formed to control prices and practices in cleaning industry, to injure persons and property, *held* within definition of "crime" in statute defining and fixing punishment for criminal conspiracy. Pen.Code, § 182.

See Words and Phrases, Permanent Edition, for all other definitions of "Crime".

19. Conspiracy ⇐30

Conspiracy, by members of association formed to control prices and practices in cleaning industry, to injure persons and property, falls within classification of "other acts" in statute defining and fixing punishment for criminal conspiracy. Pen.Code, § 182.

See Words and Phrases, Permanent Edition, for all other definitions of "Other Acts".

20. Criminal law ⇐27
Homicide ⇐308(5)

Conspiracy, by members of association formed to control prices and practices in cleaning industry, to injure persons and property, was a felony, the killing in the course of which execution of conspiracy, could not have been regarded as manslaughter, and court, in murder prosecution, properly refused to submit that question to jury. Pen.Code, § 182; § 192, subd. 2.

21. Homicide ⇐142(1)

Where murder is charged, it is permissible to show that the killing was done in carrying out purposes of criminal conspiracy among defendants even though no conspiracy is charged.

22. Homicide ⇐336

Where indictment charged murder, not murder in consummation of conspiracy, but defendants were furnished transcripts of testimony given before grand jury and such transcripts disclosed that charge of murder was founded on evidence, and that it was committed in carrying out purposes of conspiracy, defendants were not prejudiced because not given time to secure evidence to rebut evidence of conspiracy offered, and especially since it was permissible to show killing was done in carrying out purposes of conspiracy under the charge of murder.

23. Criminal law ⇐730(2)

In murder prosecution, where prosecutor in opening statement argued in substance that state was not putting on certain witness and asking jury to believe that which he did not believe himself and that he was saturated with knowledge that witness had told truth, insertion of the single word "knowledge" into what was otherwise a harmless argument was not, when taken with context, misleading, especially in view of repeated instructions not to consider any statement of counsel as evidence nor give it any weight as such.

24. Criminal law ⇐1186(4)

Where there were errors of law in record, but District Court of Appeal studied entire reported transcript and was left with firm opinion of guilt of defendants and that no injustice had been done except in fixing degree of crime, court could not, under Constitution, reverse judgment. Const. art. 6, § 4½.

25. Homicide ⇐253(3)

In prosecution of certain members of association formed to control prices and practices in cleaning industry for murder of watchman, where there was no satisfactory evidence of premeditation in killing to support verdicts and judgments of murder in first degree, and circumstances surrounding actual act of killing were undisclosed, defendants should have been found guilty of murder of second degree. Pen.Code, § 189.

26. Homicide ⇐347

Where there was no satisfactory evidence of premeditation in killing to support verdicts and judgments of murder in first degree, judgments were modified and cause was remanded with directions to enter judgments of murder of second degree. Pen. Code, § 189.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Robert Cowan and others were convicted of murder in the first degree, and defendants except Patrick Rollins appeal.

Judgment modified and cause remanded with directions.

Hearing denied; CARTER and HOUSER, JJ., dissenting.

Jerry Giesler, of Los Angeles, Ward Sullivan, of San Francisco, and Thornwell Rogers, of Los Angeles, for appellant Robert Cowan.

Joseph W. Ryan, of Los Angeles, for appellant Edward Rollins.

Morris Lavine, of Los Angeles, for appellants George Gartler, Frank Fisher and Edward Freedman.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

MARKS, Justice.

On September 14, 1938, the defendants and Morris Malter were indicted by the grand jury of Los Angeles county and charged with murder by killing John Stockton on December 15, 1931. They were tried in 1939. The jury found them all, except Morris Malter, guilty of murder in the first degree and fixed punishment at imprisonment for life. The trial judge granted the motion of Patrick Rollins for a new trial but denied motions of the others. This appeal followed. During the trial the charge against Morris Malter was dismissed to permit him to become a witness against his codefendants. He testified at length for the People, becoming their most important witness.

We will omit any reference to any evidence concerning Patrick Rollins and will refer to the appellants as the defendants.

The killing grew out of and occurred in the course of a purported combination or association of cleaners and dyers in Los Angeles. The purpose of this association was to control, by unlawful means, the prices and practices of those engaged in that industry. The combination, amounting to a conspiracy, was first organized in 1925 or 1926, and lasted, under various names and with changing personnel, until 1938. Defendants Cowan and Gartler, wholesale plant owners, appear as active members of the various wholesale associations during the entire period. During this same period there were other associations in existence which consisted of retail cleaners and dyers, chain store dyers and cleaners, and tailors engaged in cleaning and dyeing.

The particular wholesalers' association in existence during 1931 and thereafter, is described in the record as the "Wholesale Plant Owners' Association", the "Cleaners and Dyers Plant Owners Association", and by other similar names. We will hereafter refer to each of the various wholesale plant owners' associations as "the association". Cowan was director and treasurer of the association and Gartler was one of its directors during the time particularly involved here, at least up to some time during the month of February, 1932, when Cowan resigned as treasurer. They are both pictured as very active in the affairs of the association and both demanded that it be strong and vigorous in the prosecution of its aims. (It should be understood that in our summary of the facts we are stating only such facts as tend to support the verdicts and judgments.)

The record is long and the briefs very voluminous. A multitude of purported errors are urged, many of them being repeated in the brief of each defendant. A few errors are urged as applying to an individual defendant or group of defendants. It is entirely unnecessary to detail or consider many of these alleged errors. We will only consider those we regard as most important. Generally speaking, they affect all defendants.

It is equally unnecessary to detail at any considerable length the great mass of testimony bearing on the activities of the various associations and the unlawful methods used to control the prices and practices of the trade. Our statement of these facts will be most general.

During the early history of these associations they attempted, by various unlawful acts, to control those wholesalers and retailers who were "out of line", that is, those who did not conform to the prices and practices prescribed by the association. Assaults were made on plant owners and their employees. Windows of their places of business were broken. Stink bombs were thrown. Clothes in the plants were damaged. These acts of sabotage were committed by hirelings, not by members of an association.

In 1927 or 1928, methods used in Chicago by racketeers in the same industry were investigated, Paul Mitchell going to that city to do so. It was found that metallic potassium could be concealed in clothes

sent to be cleaned and this would cause fires during the cleaning process; that indelible dye, soluble in cleaning solvent, could be concealed in clothes and as a result all cloths in a cleaning drum would be dyed; that acid could be sprayed from fire extinguishers or otherwise sprinkled on garments. Thereafter these methods of sabotage were added to those already being used.

Malter, a former resident of Chicago, came to Los Angeles in 1929 and purchased a cleaning plant. This plant was closed on orders of a fire marshall shortly after he failed to accept an invitation to join the association.

Edward Rollins came to Los Angeles in 1930, or early in 1931. He was accompanied, or followed, by Frank Fisher and Edward Freedman.

Rollins purchased a wholesale cleaning and dyeing plant. He later acquired other plants. Malter was employed as superintendent of his plants. Fisher and Freedman became associated with Rollins but did no regular work in the plants. Their work consisted of acts of sabotage in an effort to keep cleaners and dyers "in line".

Rollins' plants became members of the association though he attended but very few, if any, meetings. He and his plants were represented in these meetings by Malter.

In 1931 the members of the association, including Cowan and Gartler, wanted to form a strong organization to keep all cleaners and dyers "in line". Rollins was engaged to organize and head such an organization. Dues of two per cent of the monthly gross incomes of association members were levied to pay the expenses of this organization.

Actual acts of sabotage and assault were committed principally by Fisher, Freedman and other members of Rollins' "mob".

Malter's duties were largely confined to superintending Rollins' plants, attending association meetings, collecting money, and acting as a messenger and general utility man. Only on one occasion did he go with his associates to keep a driver of an association member "in line". The foregoing facts are drawn largely from the testimony given by Paul Mitchell, Stanley Stanton and Malter, who, by their own admissions, were active in the conspiracy to keep members of the trade "in line" by acts of sabotage.

The White Way Cleaners and Dyers was owned and operated as a wholesale and retail plant by W. J. Fairchild. He was a member of the association but was not always "in line". On ten or fifteen different occasions dye had been placed in clothes sent to his plant to be cleaned. He employed John Stockton as janitor and night watchman. Joseph P. Smith slept in the plant and acted as night watchman after Stockton left which was ordinarily around ten o'clock each night. Fairchild owned a .32 or .380 calibre Colt automatic pistol which Stockton carried for his protection while in the plant acting as night watchman.

Malter testified that on about December 12, 1931, Gartler called on Rollins at his plant; that Rollins complained to Gartler that "he has not been getting any money to amount to anything recently"; that "he has got quite an organization, that he has got several men that he has got to take care of"; that in reply Gartler told Rollins, "just as soon as he (Rollins) straightens out the White Way Cleaners that the plant owners will be more than glad to come across with their weekly pay checks of two per cent"; that Rollins asked Gartler for acid and that Gartler promised to furnish it to him.

On December 14, 1931, Gartler again appeared at Rollins' plant. He told Rollins that he (Gartler) had no acid but that he had "made the arrangements for Mr. Cowan to furnish the acid for the White Way Cleaners job". Rollins sent Malter for the acid which Cowan gave him. Malter took the acid to Rollins. Fisher and Freedman were with Rollins at that time. Rollins and Fisher obtained some old clothes and curtains from a box in Rollins' plant and made them into a bundle by wrapping them in an old coat and tying its arms together. Rollins, Fisher and Freedman left in an automobile taking the acid and bundle with them. (The foregoing particulars are all taken from the testimony of Malter.)

When Fairchild left his White Way Cleaners plant on the late afternoon of December 14, 1931, Stockton and Smith were there. Smith left during the early evening. Stockton was then engaged in emptying the pockets of clothes which had been brought in to be cleaned.

Smith returned to the plant at about one o'clock the next morning. He found Stockton lying dead on the cement floor near the

place where he had last seen him. He called his employer by telephone.

Fairchild and the police reached the scene at about the same time. They found Stockton's body lying on the floor with his head turned to the left so that the right temple was up. A bullet had entered his head through the center of the right temple, passed through his head, emerging through the left temple. A distorted lead pellet, evidently the bullet which had killed Stockton, was found under or very close to his head. No weapon of any kind was near the body and the Colt automatic pistol usually carried by Stockton at the plant has not been seen since Fairchild gave it to Stockton. A bundle of old clothes containing curtains was found on a counter in the plant near the body. It was wrapped in an old coat which had the arms tied together. The bundle was not on the counter when Fairchild left the night before. After the killing, and while the bundle was in the possession of the Los Angeles police department, the clothes had become moth-eaten and had been burned and therefore were not produced in evidence.

The bullet was so distorted that the weapon from which it had been fired could not be determined. However, there is positive evidence that the bullet could not have been fired from any Colt automatic pistol. There is also evidence that it might have been fired from a .38 special Smith & Wesson revolver.

A .38 special Smith & Wesson revolver with all but one of its numbers filed off was found by the Los Angeles police in 1932 in a filing cabinet in a cleaning plant operated by Malter who testified that it had been placed in a drawer of the cabinet by Rollins on the morning of December 15, 1931. That a package containing a gun had been in the drawer of this cabinet was established by the testimony of another witness who was not an accomplice.

Before proceeding to a consideration of the various questions of law involved here it should be remarked that the conspiracy which we have described lasted from 1926 to 1938 with various actors involved but with Cowan and Gartler always in the picture. The purposes of the conspiracy were to control, by the various acts of sabotage we have described, the prices and practices of those in the cleaning and dyeing industry.

[1, 2] Prior to the amendment of section 375 of the Penal Code in 1933 (Stats. 1933, p. 1168) the throwing of acid on clothes not being worn was a misdemeanor, as were other methods expressly used by the conspirators in carrying out the purposes of the conspiracy. The use of deadly weapons was not within the proven purpose of the conspirators. Of course, if in the consummation of an express and unlawful purpose of the conspiracy, one of the conspirators goes outside of such express purpose and kills, the other conspirators cannot escape responsibility where, as here, such killing is not an unreasonable result to be expected from the acts of sabotage and violence which were contemplated. Where persons are not actors in the actual commission of the crime charged, but aid and abet others in its commission or procure others to commit the crime, all are equally guilty. People v. Bond, 13 Cal.App. 175, 109 P. 150.

[3, 4] Since the conspiracy had as its purpose acts of sabotage, and as it lasted until 1938, the acts and declarations of the conspirators engaged in the conspiracy between the time of its inception in 1926 to its termination in 1938 were properly received in evidence even though many of those declarations were made after the killing of Stockton in 1931. There was no conspiracy to kill. The killing was a not-to-be unexpected result of the unlawful acts contemplated by the conspirators. Because, on one other occasion, deadly weapons were used threateningly by two or more of the conspirators without the knowledge of other conspirators does not make the unlawful use of deadly weapons, or killings, a direct purpose of the conspiracy and an acknowledged means of accomplishing its ends so as to include within its purposes, assault with a deadly weapon, or murder, both of which crimes are felonies.

[5, 6] Mitchell was an active conspirator for six of the twelve years of the existence of the association. From 1930 to 1934, and after 1936, he had withdrawn from the conspiracy. Because he was a conspirator until 1930 or 1931, and from 1934 into 1936, or thereabouts, does not make him any the less a conspirator during the times he was active in its undertakings. However, he could not have been prosecuted for the murder of Stockton because he was not in Los Angeles and had abandoned the conspiracy at the time of the commission of that crime.

[7-9] Defendants urge that there is a failure in proof of the corpus delicti. This contention is entirely without merit. In this character of case the corpus delicti is established when it is proved that the deceased met his end through criminal means used by a criminal agency. People v. Bollinger, 196 Cal. 191, 237 P. 25. "Proof of the corpus delicti does not necessarily involve or require proof that the crime was committed by the defendant or the person charged with having committed it." People v. Ward, 134 Cal. 301, 66 P. 372, 374. There is but one conclusion to be drawn from the evidence, namely, that Stockton came to his death through the criminal means of a criminal agency. He was shot through the head when his head rested on or near the cement floor. That he had not moved from the position in which he died is evident from the nature and direction of the wound and the condition and position of the bullet. These facts, together with the further fact that no weapon was found near him, eliminate the possibility of suicide and demonstrate that some person shot him to death.

[10, 11] Defendants argue that they were convicted on the testimony of accomplices which was not sufficiently corroborated to satisfy the requirements of section 1111 of the Penal Code. We have already summarized a few of the circumstances corroborating the testimony of the accomplices. We have read the entire record and have found therein many more circumstances and much testimony corroborating this evidence. We will not unnecessarily lengthen this opinion by detailing that evidence at this time. One attorney for three of the appellants strenuously argues the insufficiency of the corroborating evidence. In another portion of one of his briefs, while arguing another question, he aptly estimates the weight to be given the bundle of clothes found near the body of Stockton, as follows: "Also, if there were any attackers who left a bundle of clothes, as the prosecution claims, they would have taken away the clothes, because leaving such bundle would be like leaving a calling card."

The evidence sufficient to legally support the testimony of an accomplice is considered and clearly set forth in People v. Negra, 208 Cal. 64, 280 P. 354. See, also, People v. McLean, 84 Cal. 480, 24 P. 32; People v. Martin, 19 Cal.App. 295, 125 P. 919; People v. Barker, 114 Cal. 617, 46 P. 601; People v. Bunkers, 2 Cal.App. 197, 84 P. 364, 370; People v. Taber, 13 Cal.App.2d 27, 55 P.2d 1189; People v. Martinez, 19 Cal.App.2d 599, 66 P.2d 161, 162. In the last cited case it is said: "It is an established principle of criminal procedure that evidence corroborative of an accomplice's testimony implicating a defendant in the commission of a crime is not required of itself to establish guilt or to extend to every detail included in the accomplice's testimony but that it is sufficient to avoid the inhibition of section 1111 of the Penal Code if, standing alone, it tends to connect defendant with the commission of the offense charged." Measured by these rules the corroborating evidence in the record must be held to be sufficient.

[12] Defendants urge that Malter was impeached in almost every possible way; that he was a convicted criminal; that he was an admitted perjurer in another case; that he was a despicable character in every respect. They urge us to apply the rule announced in People v. Bacos, 14 Cal.App.2d 338, 58 P.2d 221, where Jose Gonzales, the witness who admittedly did the killing, testified in a first preliminary examination that defendants had not hired him to kill deceased, but in a second preliminary examination that they had hired him. At least twice during the trial of the defendants in that case, he testified that he had killed in self-defense and had not been hired to kill, and at other times in the same trial he testified that defendants hired him to kill. No such state of facts appears in the record before us, and, the evidence of Malter, although he is a much discredited witness, cannot be gauged by the same standards as that of Gonzales. The weight to be given Malter's testimony was first a question addressed to the jury, and second, to the trial judge on the motion for new trial.

[13, 14] Defendants complain because the trial court refused to instruct the jury that the witness Mitchell was, as a matter of law, an accomplice whose testimony must be corroborated by other evidence. We find no error in the refusal to give such an instruction.

As we have observed, Mitchell left the conspiracy about 1930 or early in 1931, and did not return to it until 1934. He was in San Francisco in December, 1931, and had no connection with any of the conspirators for some time prior to and after the killing of Stockton.

In 1915, section 1111 of the Penal Code was amended (Stats.1915, p. 760) by the addition of the following sentence: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." This amendment has changed the definitions of an accomplice appearing in earlier cases. It is now held that to constitute a person an accomplice under the present definition of that code section, he must be properly liable to prosecution, that is, there must be probable cause for his prosecution "for the identical offense charged against the defendant on trial" in the case in which the testimony is offered. See, People v. Howell, 69 Cal.App. 239, 230 P. 991. It is clear that Mitchell could not be charged with the murder of Stockton for reasons already given. Therefore, he was not an accomplice of the defendants in the commission of the crime of killing Stockton, even though he might have been an accomplice of some of them in other crimes committed while he was an active participant in the conspiracy.

[15] Defendants complain of evidence introduced over their strenuous objections concerning Ralph Sheldon who had received much unfavorable publicity in connection with the Caress kidnaping case. In that case Sheldon, with others, was subsequently found guilty and sent to the penitentiary. People v. Frank, 132 Cal.App. 360, 22 P.2d 792; People v. Baillie, 133 Cal. App. 508, 24 P.2d 528.

Malter testified that while Sheldon was under arrest and in jail he and Rollins went to the office of a bail bond broker and attempted to assist in securing bail for him. Evidence was also admitted consisting of records of the Los Angeles County jail showing the several dates of Sheldon's admission to and release from that institution including his last release when he was transported to San Quentin.

The only connection of Sheldon with the activities of the association was disclosed in Malter's testimony which we summarize as follows: That he took Sheldon to a meeting of the association directors or members; that the advisability of a strong and vigorous organization to keep cleaners and dyers "in line" was discussed; that Sheldon recommended himself as a suitable person to head such an organization and mentioned the names of known gangsters as references; that Sheldon demanded $25,000 in cash with which to start such an organization; that an association member (not a defendant) replied that all of the cleaners and dyers in California combined did not have $25,000 in cash; that Sheldon then left the meeting; that he had no further connection with the association.

It is clear that Sheldon never was employed by nor had any connection with the association. Giving bail for him, his various confinements in jail and his ultimate conviction and confinement in the penitentiary were not even remotely related to the charge on which defendants were being tried. It was error on the part of the trial deputy district attorney to even offer such evidence, knowing, as he must have known, that Sheldon could not have been connected with the charge against defendants. It was error on the part of the trial judge to admit such evidence over the objections of defendants. Defendants moved to strike the evidence from the record when all parties had rested. This motion should have been granted.

[16, 17] Defendants complain of the failure of the trial judge to incorporate in any of his instructions that portion of section 1111 of the Penal Code reading as follows: "And the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." They proposed such an instruction. It has been held that a defendant is entitled to have the jury informed by a proper instruction of the legal effect of this portion of the section. People v. Swoape, 75 Cal. App. 404, 242 P. 1067; People v. Brown, 25 Cal.App.2d 513, 77 P.2d 880.

The trial judge did, however, instruct the jury at least twice, in effect, that there must be evidence, independent of and apart from that of the accomplices, that in and of itself tended to connect a defendant with the particular and specific crime charged, which was the murder of Stockton. Another instruction was given on corroborating evidence. In view of the instructions given we cannot see how the jury could have been misled by the failure to incorporate in any of the others the quoted sentence of section 1111 of the Penal Code. While it was error to omit that sentence or its substance from an instruction we cannot regard such error as prejudicial here.

[18-20] Defendants requested but the trial judge refused to give an instruction

defining manslaughter, and also refused to submit to the jury the question of the guilt or innocence of the defendants of that crime. This is urged as serious error.

Defendants urge that the purpose of the conspiracy was sabotage, that is, the injury of personal property which is a misdemeanor; that as the killing was committed in the commission of a mere misdemeanor it comes within the definition of manslaughter contained in subdivision two of section 192 of the Penal Code.

This argument lacks proper foundation in law. The evidence is clear to the effect that defendants were engaged in a conspiracy to injure persons and property. Such actions come within the definition of "crime" as that word is used in subdivision one of section 182 of the Penal Code which defines and fixes the punishment for criminal conspiracy. The last paragraph of that section provides as follows: "When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, and cases of such conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done."

The particular crimes with which we are here concerned do not fall within the definition of the crimes defined in subdivisions two, three, four and five of that section. Therefore the crimes which we have grouped under the term sabotage fall within the classification of "other acts" described in the section. The punishment for a conspiracy to commit any of those "other acts" is imprisonment in the county jail or in the state penitentiary.

The question remains—Was the conspiracy in which the defendants were engaged a misdemeanor or a felony where the punishment could be either confinement in the county jail or in the penitentiary? This question was answered in the case of Doble v. Superior Court, 197 Cal. 556, 241 P. 852, 860, where a similar question was considered. The Supreme Court there said: "A fair construction of section 17, in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious, in that event, it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive effect so far as the statute of limitations is concerned."

As it seems clear that the conspiracy in which defendants were engaged must be defined as a felony, the killing in the course of the execution of that conspiracy could not have been regarded as manslaughter and the trial judge properly refused to submit that question to the jury.

[21, 22] In this connection, counsel for Gartler, Fisher and Freedman presents a novel argument. He urges that the indictment charges murder, not murder in the consummation of a conspiracy; that defendants had no knowledge that there would be an attempt to prove a conspiracy until they heard the opening argument of the deputy district attorney at the commencement of the trial; that as a result of surprise and because they were given no time to secure evidence to rebut evidence of a conspiracy offered by the People, they suffered serious prejudice. This argument has foundation neither in law nor fact. It is settled law that where murder is charged it is permissible to show that the killing was done in carrying out the purposes of a criminal conspiracy among the defendants even though no conspiracy be charged. The record discloses that defendants were furnished transcripts of the testimony given before the grand jury. Sufficient portions of that transcript were read into the record to show that it disclosed that the charge of murder was founded on evidence that it was committed in carrying out the purposes of such a conspiracy.

[23] Defendants complain of numerous acts of alleged misconduct on the part of the trial deputy district attorney during his arguments to the jury. It must be admitted that he was overzealous, not only in his argument but on occasions during the taking of evidence.

Without detailing all of the instances of alleged misconduct in the arguments it should be sufficient to say that on each occasion, except one, when objections were made to any prejudicial statement the trial judge promptly sustained the objections and instructed the jury to disregard the statements. This cured the errors as none of them were so serious as to be incurable by such instructions.

The statement which was allowed to stand occurred during the opening argument of the deputy district attorney when he was discussing the credibility of Malter, his most important witness. Among other things he stated: "I take this responsibility and say unto you, that we are not putting on that kind of a man before you and asking you to believe that that we do not believe ourselves, that we are not absolutely convinced of, and I will tell you I am saturated with the confidence and the knowledge that Morris Malter has told you the truth about what this conspiracy was about."

It should be admitted that the attorney should not have stated that he had *knowledge* that Malter was telling the truth. Otherwise the statement is nothing more than a summary of what should be common knowledge of the ethics to be used by a reputable prosecutor. No such official should attempt to convict defendants on evidence that he does not believe to be true. This portion of the argument was innocuous and could not be regarded as prejudicial. The insertion of the single word "knowledge" into what was otherwise a harmless argument hardly had sufficient emphasis, when taken with the context, to mislead the jury, especially in view of the many and often-repeated instructions to the jury that they could not consider any statement of counsel as evidence nor give it any weight as such.

[24] There are errors of law in the record. In accordance with the mandate of section 4½ of article VI of the Constitution, we have studied the entire reporter's transcript and are left with the firm opinion of the guilt of the defendants and that no injustice has been done to them except in fixing the degree of their crimes. Therefore, under section 4½ of article VI of the Constitution, we cannot reverse the judgment.

The evidence supporting the testimony of the accomplices was given by many witnesses. Some of it was supported by Rollins, Cowan and Gartler when they appeared as witnesses. We need to refer to but little of it.

A few days after Stockton was killed, Rollins moved from the apartment where he had lived for some time to another apartment where he lived for a number of months under an assumed name. He was arrested in Chicago and for a time resisted extradition. He swore to and his attorney filed an affidavit in which Rollins falsely denied being in California in December, 1931. It was proven that he owned revolvers and went armed, which fact he denied. His evidence and statements were proven false in other particulars.

There is much corroboration as to Cowan. Besides being a member, director and treasurer of the association and advocating a strong and vigorous organization to keep cleaners "in line", there are circumstances other than those to which we have already referred. In 1932 he engaged and paid an attorney to represent Malter on the hearing for violation of probation. When Malter was released from jail Cowan furnished his transportation to Chicago and money for expenses on the trip. He solicited a cleaner to raise his prices and told him he had better have his prices changed. This witness testified that Cowan said to him: "'You had better have your prices changed by Monday; if not, it will happen to you what happened to Fairchild.' Then at that point I asked him, 'What happened to Fairchild?' because I know that different things happened to Fairchild. One thing was that they put him out of business, and the second was that * * * killed the watchman. And then he says, 'You remember the watchman,' and as he said that I walked away and let him stand there, and I couldn't talk with him any more. That was the last conversation I had." The same witness testified to repeated acts of window breaking and acid throwing and that: "I would not say so, that he (Cowan) broke them, because it would be impossible for me to say, because I have not seen him breaking—anybody breaking the windows, but whenever I come down the windows they were broken, and it always happened, that it was after a threat."

Gartler was also implicated by much evidence, some of which we have already mentioned. Among several other circumstances we mention the following. He accepted appointment on an association committee to serve with Malter and others which, at the request of a plant owner, went to Pasadena to keep a driver "in line" who threatened to take his route to another plant. While there was no serious violence on this occasion, the attitude of the members of the committee towards the driver was so threatening that the driver left the plant and did not return, thus abandoning the route which he claimed as his

own. Further, Mitchell testified that he stored dye, metallic potassium and acid, which he obtained for the association to be used for purposes of sabotage, in the plant owned by Gartler and his partner, Jacob Hutner. Hutner testified that he buried these chemicals on the grounds of the plant because he was afraid of fire. He also testified that he told Gartler of the incident. No complaint was made to the authorities and the incident remained a secret until shortly before the indictment was returned in this case. Then the chemicals were dug up by officers at a place pointed out by Hutner. Gartler admitted full knowledge of these circumstances.

It seems clear that Fisher and Freedman were actually employed by Rollins and committed many of the acts of sabotage.

With this evidence before us we cannot consider the errors of law occurring during the trial as sufficiently prejudicial as to have resulted in a miscarriage of justice.

[25, 26] In our study of the record we have failed to find satisfactory evidence of premeditation in the killing to support the verdicts and judgments of murder of the first degree. (Sec. 189, Pen.Code.) The circumstances surrounding the actual act of killing are undisclosed. We know that it was not "committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem." Sec. 189, Pen.Code. Defendants should have been found guilty of murder of the second degree. This "injustice may now be righted without subjecting the state and the defendant[s] to the delay and expense of a new trial." People v. Kelley, 208 Cal. 387, 281 P. 609, 611.

The judgments of the lower court, of murder of the first degree, are modified. The cause is remanded to the trial court with directions to enter judgment against each who is an appellant here finding him guilty of murder of the second degree, and to thereupon pronounce judgments upon them and each of them as prescribed by law. The orders denying the motions for new trial are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

On Rehearing.

PER CURIAM.

Defendants have filed petitions for rehearings in which they attack the correctness of the statement of facts contained in the opinion filed in this case.

We have reviewed the record with these criticisms before us and are satisfied that, with one exception, all the facts set forth are supported by the testimony of one or more witnesses or reasonable inferences to be drawn from the evidence.

In speaking of the preparations made at the Rollins plant on the late afternoon of December 14, 1931, prior to the killing of Stockton at the White Way Cleaners plant, it was stated in the opinion that "Rollins, Fisher and Freedman left in an automobile taking the acid and bundle with them". There is no evidence supporting the statement that the three men left in an automobile and took acid with them. A bundle of old clothes, similar to the one made up by Rollins and Fisher at the Rollins plant, was discovered in the White Way Cleaners plant at the time Stockton's body was found. Just how this bundle was transported to the scene of the killing, whether by automobile or otherwise, does not seem of sufficient importance to require a rehearing.

Complaint is also made of our failure to consider in detail all of the multitude of purported errors urged by defendants. We still are of the opinion that it is unnecessary to discuss in detail errors and alleged errors occurring during the trial, other than those already considered, as those errors could not affect the final results of the appeals.

The petitions for rehearing are denied.

38 Cal.App.2d 204

AUSLEN v. THOMPSON et al.

Civ. 11044.

District Court of Appeal, First District, Division 1, California.

March 29, 1940.

Rehearing Denied April 27, 1940.

Hearing Denied May 27, 1940.

1. Licenses ⇐39

In action to recover money paid as purchase price of corporate stock on ground that sales thereof were made without permit from Corporation Commissioner in violation of statute, facts alleged in amended complaint and found by trial court to be true *held* sufficient to sustain plaintiff's contention that transactions relating to issuance and sale of stock contravened statutory provisions and constituted actionable fraud. Gen.Laws 1937, Act 3814, §§ 3, 16.

2. Licenses ⇐18½

Issuance of Nevada corporation's stock in such state to corporation director as corporation's trustee and agent and his sale of such stock in California without permit from Corporation Commissioner did not fall within exception, declared by provision of Corporate Securities Act, that requirements as to obtaining permit to sell securities shall not apply to sale thereof by or for bona fide owner for his own account and not for benefit of issuer or underwriter or promotion of any scheme or enterprise with intent to violate or evade such act. Gen.Laws 1937, Act 3814, § 2(c)3.

3. Commerce ⇐69(1)
Licenses ⇐7(1)

The statute, requiring permit from Corporation Commissioner to sell corporate stock in state, does not violate doctrine of comity and federal control of interstate commerce as interfering with exercise of foreign corporation's right to issue stock under laws of state in which incorporated and deliver shares to trustee for sale thereof to public in California. Gen.Laws 1937, Act 3814, §§ 3, 16.

4. Corporations ⇐636

A corporation can exercise none of functions or privileges conferred by its charter in any other state or country than that in which incorporated, except by comity and consent of such other state or country.

5. Corporations ⇐636

A state has right to prohibit foreign corporation from doing business therein entirely or to prohibit transaction of business thereby in state except on compliance with such terms or conditions and subject to such restrictions as state in its discretion may see fit to impose, unless such prohibition or restriction is so conditioned as to violate some provision of Federal Constitution.

6. Commerce ⇐10

State statutes prohibiting sale of securities, except on compliance with prescribed terms and conditions, are police regulations, affecting interstate commerce only incidentally, and not invalid as contravening commerce clause of Federal Constitution, in absence of action by Congress.

7. Licenses ⇐39

In action to recover money paid as purchase price of corporate stock sold without permit from Corporation Commissioner, facts found by trial court that defendant executrix' testator became director of corporation before any sales were made, that all directors knew purposes for which incorporation was accomplished in foreign state, that stock was issued to one director as corporation's trustee and agent with intention that he should sell it in California without permit, that such sales were made by him with directors' express knowledge, permission, aid, and consent, and that all of them participated in board meeting, at which issuance and sale of additional shares under same arrangement was authorized with intent to evade statute, were sufficient to charge each director with liability for such sales. Gen. Laws 1937, Act 3814, §§ 3, 16.

8. Licenses ⇐39

The rule that liability of defendant, in action to recover amount paid as purchase price of corporate stock sold without permit from Corporation Commissioner, on counts for money had and received is limited to amount actually received by him from such sales, does not apply, where recovery of amount of purchase price is sought by way of action for damages. Gen.Laws 1937, Act 3814, §§ 3, 16.

9. Licenses ⇐39

In seeking recovery of amount paid as purchase price of corporate stock sold without permit from Corporation Commissioner, buyer is not restricted to remedy of rescis-

sion, but may bring action for damages suffered.

10. Abatement and revival ⇐57
Assignments ⇐26

While action to enforce statutory penalty does not survive defendant's death and is not assignable, remedy measured by actual loss, as in action to recover money paid as purchase price of corporate stock sold without permit from Corporation Commissioner, as damages, is not to enforce penalty, and hence does not abate on defendant's death and is assignable. Gen.Laws 1937, Act 3814, §§ 3, 16.

11. Abatement and revival ⇐54, 55(1)
Assignments ⇐24(1)

Though actions for torts, founded on wrongs of purely personal nature, do not survive wrongdoers' deaths and are not assignable, in absence of statute, such rule does not apply to torts affecting property.

12. Licenses ⇐39

The pari delicto rule was inapplicable in action to recover money paid as purchase price of corporate stock, sold to plaintiff and his assignors without permit from Corporation Commissioner, where plaintiff did not know that no permit had been obtained and did not sell stock to assignors before assignment thereof to him, and buyers relied implicitly on genuineness of issue and believed that sales were made under authority granted by Corporation Commissioner. Gen.Laws 1937, Act 3814, §§ 3, 16.

13. Appeal and error ⇐714(5)

On appeal taken on judgment roll alone, evidentiary matters, narrated in statement of appellant's counsel in his closing brief, cannot be considered.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Harry Auslen against Mary E. Thompson, as executrix of the last will and testament of Clyde Lamb Thompson, deceased, and others, to recover money paid as the purchase price of corporate stock, in which named defendant filed a cross-complaint for money had and received. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Frank M. Carr, of Oakland, for appellant.

Leonard S. Lurie, of San Francisco, and Myron Harris, of Oakland, for respondent.

KNIGHT, Justice.

This is an action to recover certain sums of money paid as the purchase price for corporate stock. The cause was tried before the court sitting without a jury, and judgment was entered in plaintiff's favor for $14,150 and interest. The stock was issued by Oxford Consolidated Mines Co., a Nevada corporation, and sold in California to plaintiff and other persons who subsequently assigned their claims to plaintiff; and the ground upon which recovery is sought is that the sales were made in violation of the California Corporate Securities Act, Deering's Gen. Laws 1937, Act 3814, in that no permit was ever applied for or obtained from the Corporation Commissioner authorizing said sales. The parties defendant sued and against whom the judgment was rendered were J. A. Pizzotti as trustee, the Oxford Consolidated Mines Co., four surviving members of the board of directors thereof, namely, J. A. Pizzotti, Anson S. Bilger, E. J. Thomas, and Charles H. Wilson, and Mary E. Thompson, as executrix of the last will of her deceased husband, Clyde Lamb Thompson, who for a short period of time was a member of said board of directors. The executrix alone has appealed, and the appeal is taken on the judgment roll.

The second amended complaint contained 38 counts. The first 19 were for the recovery of damages, and the remaining 19 were for money had and received. Each group involved 19 sales transactions. Appellant, appearing separately, filed a demurrer to the complaint on numerous grounds, and it was overruled as to the first group and sustained as to the second group; whereupon appellant filed an answer denying generally and specifically the allegations of counts one to nineteen, inclusive, and as a special defense to the sixth to nineteenth causes of action inclusive, set up that plaintiff with full knowledge that no permit had been obtained from the Corporation Commissioner to sell the stock, and as an agent of said corporation, sold said shares of stock to the said purchasers therein named and thereafter had the said shares of stock so sold and issued assigned to himself. As a further defense and by way of estoppel she alleged that prior to the time appellant was named as a defendant, plaintiff told her in order to protect

her interest and that of the estate it would be necessary for her to pay plaintiff $100; that relying on these representations, which were known by plaintiff to be false, fraudulent and untrue, appellant paid plaintiff $100; and that thereafter plaintiff amended his complaint and joined appellant as one of the defendants. A demurrer was interposed to each special defense, and was overruled as to the first, and sustained as to the second, with leave to amend; whereupon appellant amended her second defense and set up a cross-complaint for money had and received for the recovery of the sum of $100. The court's findings were general in character, that is to say, it found merely that all the allegations of the complaint were true, and that none of the allegations of the answers or of the special defense or of the cross-complaint were true; and judgment was entered accordingly. The determinative question presented by the appeal is, therefore, whether the allegations of the first 19 counts of the complaint are legally sufficient to state causes of action against appellant.

[1] The first five thereof are identical except as to dates, amounts and names. It is alleged therein, in effect, that the Oxford Consolidated Mines Co. was organized under the laws of Nevada by defendants Pizzotti and Bilger in July, 1934, for the purpose of having conveyed to it certain mining property situate in Sierra county, California, and for the purpose of doing business within the state of California and of locating and establishing its principal place of business in Alameda county; that immediately following its incorporation there was conveyed to said corporation said mining property; that thereupon it located and established its principal place of business in Alameda county, and except for the initial organization meeting, has transacted all its business therein. It is then alleged that said company was incorporated in Nevada for the purpose of circumventing, evading and avoiding the California Corporate Securities Act in the sale of said stock to the public in California; that it was the intention to issue the stock in Nevada and thereafter sell it to the public in California through the defendant J. A. Pizzotti, acting as trustee for the benefit of and as agent for and on behalf of the corporation, without securing the permission of the Corporation Commissioner of California for the issuance or sale thereof in California; also that at its first organization meeting in Nevada the board of directors (Pizzotti and Bilger) issued all the capital stock, 250,000 shares, to Pizzotti, upon the express understanding and agreement that as trustee for the benefit of and agent of the corporation he would sell said stock to the public in California and would construct and develop the mining property of the corporation with the proceeds; that the purpose of the issuance and delivery of the stock to him, as such trustee and agent, was to evade the California Corporate Securities Act. Continuing, the complaint alleges that subsequent to the transactions which took place in Nevada, but prior to the sale of any shares of stock to plaintiff or his assignors, the individual defendants above named, including the said Clyde Lamb Thompson, were at a meeting in Oakland elected directors; that said directors knew prior to the sales of stock that the corporation had been incorporated in Nevada, and the stock issued to Pizzotti as trustee for the benefit of and agent of the corporation to evade the California Corporate Securities Act, and that Pizzotti intended to sell said stock in California without a permit from the Corporation Commissioner; that thereafter, with the express knowledge, permission and consent of the directors, and their express knowledge that no permit had been applied for, Pizzotti, acting as trustee and agent for the corporation, sold to plaintiff and his assignors certain shares of stock for certain sums, and upon payment therefor there was issued to said purchasers shares of stock in said corporation; that said stock was worthless and void; that no permit had been obtained for the issuance or sale of said stock in California, and that the corporation and the directors individually and as directors knew that the provisions of the California Corporate Securities Act, requiring such a corporation to file with the Corporation Commissioner a certificate of its authority to transact business in the state where it was incorporated and to appoint the California Corporation Commissioner its attorney, had not been complied with, and that the sale of said shares in California was not authorized or permitted by the California Corporation Commissioner; that the purchasers of said stock relied implicitly upon the genuineness of the issue, delivery and sale of said stock and believed that the defendants had complied with the requirements of the California Corporate Securities Act and had obtained a permit for the issuance and sale of said stock; that the money so paid for the stock

was with the defendants' consent, approval and knowledge expended in the development of said mining property and the purchase of equipment therefor, and operating the plants for or pertaining to the aforesaid mining property, and that the corporation and its directors had accepted and retained the use and benefits of said money so paid out and expended. The assignment of the assignors' claims to plaintiff is then alleged; also the death of Thompson, the appointment of appellant as executrix of his estate, the presentation of a verified claim to the estate, and its rejection. And finally it is alleged that the sale and purchase of the shares of stock were illegal and void and no rights were acquired by the purchasers; that no consideration was received by them, and the money paid out lost, and that the plaintiff has been damaged in the sum paid for the stock.

The sixth to nineteenth counts (inclusive) repeat the above allegations, and allege also that at a meeting in Oakland in December, 1935, the board of directors of said corporation, all being present and participating therein, authorized an increase in the common capital stock of said corporation from 250,000 to 300,000 shares, and further authorized the issuance and delivery in California of the additional 50,000 shares to Pizzotti, as trustee for the benefit of and agent for the corporation, under the same understanding and agreement as in the original issuance of the stock to him in Nevada, and that Pizzotti with the express knowledge, permission and consent of the board of directors and their express knowledge that no permit had been obtained, sold said stock to the purchasers named in the various counts.

The Corporate Securities Act (Deering's General Laws of 1937, Act 3814, p. 1768) contains these provisions: (sec. 3) "No company shall sell any security, except upon a sale for a delinquent assessment against such security made in accordance with the laws of this state, or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do"; (sec. 16) "Every security issued by any company without a permit of the commissioner authorizing the same then in effect, shall be void * * *." We are of the opinion that the facts found herein by the court to be true are legally sufficient to sustain plaintiff's contention that the transactions relating to the issuance and sale of the stock contravened the foregoing provisions of said act and constituted actionable fraud. Gillis v. Pan American Western Petroleum Co., 3 Cal.2d 249, 44 P.2d 311; Pollak v. Staunton, 210 Cal. 656, 293 P. 26; People v. Eiseman, 78 Cal.App. 223, 248 P. 716.

[2] It is appellant's theory that the issuance of the stock to Pizzotti and the subsequent sale thereof by him falls within the exception declared by section 2, subdivision (c), 3, of said act, which provides that the requirements as to obtaining permits to sell securities shall not apply to the "sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of such securities, disposes of his own property for his own account, and such sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of such security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this act." People v. Pace, 73 Cal.App. 548, 238 P. 1089; People v. Craven, 219 Cal. 522, 27 P.2d 906. And in support of such theory appellant makes the following statement in her opening brief: "The facts were that Pizzotti and his associates (but not Dr. Thompson) owned an interest in mining property located in Sierra county, California. They incorporated in Nevada and took the capital stock in exchange for their interest in the property, the stock being issued to Pizzotti as trustee for himself and associate owners, and they brought that stock, so issued in Nevada and privately owned, to the state of California, where plaintiff and his assignors bought some of it from Pizzotti." But, the appeal having been taken on the judgment roll, the evidence is not before us; and the findings clearly negative appellant's theory, for nowhere in the allegations of the complaint or in the findings does it appear that Pizzotti was the owner of the property which was turned over to the corporation or that the stock was issued to him in exchange for said property. Quite to the contrary, the allegations and the findings are to the effect that the stock was issued to him "as trustee for the benefit of and its agent for and on behalf of said corporation"; that it was sold by him in California, and that this was done with intent to evade the provisions of the Corporate Securities Act.

[3-6] Appellant makes the further point that in any event "The Nevada corporation, in Nevada, acting under the laws of Nevada, might lawfully issue its shares of capital stock to Pizzotti, and after their issuance might deliver them to Pizzotti as trustee to 'sell shares of stock so issued and delivered to the public at large in California and to develop the mining property' ", and that any statute of this state which would have the effect of interfering with the exercise of such rights would be in violation of the doctrine of comity and of federal control of interstate commerce. We are unable to sustain this view. The controlling doctrine in this regard is stated in Corpus Juris as follows: "A corporation created by one state or by a foreign government can exercise none of the functions or privileges conferred by its charter in any other state or country, except by the comity and consent of the latter. Subject to constitutional limitations, a state has the right to entirely prohibit foreign corporations from doing business within the state. Having the right to prohibit foreign corporations from doing business in a state at all, it is within the power of the state to prohibit the transaction of business by the foreign corporation within the state except upon compliance with such terms or conditions and subject to such restrictions as the state may in its discretion see fit to impose, unless such prohibition or restriction imposed is so conditioned as to violate some provision of the federal constitution." Vol. 14a, p. 1244. And again, in volume 12, page 82, it is stated thus: "State statutes, commonly known as 'Blue Sky Laws,' which prohibit the sale of stocks, bonds, notes, mortgages, and other securities, not only by corporations, but by all persons, partnerships, or aggregations of individuals, whether residents or nonresidents of the state, except on compliance with certain prescribed terms and conditions, are police regulations which affect interstate commerce only incidentally, and, in the absence of action by congress, are not invalid as contravening the commerce clause of the federal constitution." Substantially the same doctrine is declared in Gillis v. Pan American Western Petroleum Co., supra, wherein several decisions from the Supreme Court of the United States are cited.

[7] As pointed out by appellant, the court found that director Thompson was not a member of the board of directors at the time the transactions took place in Nevada relating to the issuance to Pizzoti as trustee of the 250,000 shares of stock, and there is no finding that he himself ever made any sales of stock. It is contended, therefore, that the facts found fail to establish any liability on his part for any of the transactions involving the sales made by Pizzotti. The court did find, however, that the deceased became a director prior to the making of any sales, and that he was acting as such when the sales were made to plaintiff and his assignors; furthermore, the court found that prior to such sales all directors knew the purposes for which the incorporation had taken place in Nevada, that the stock had been issued to Pizzotti as trustee and agent for the corporation, and that it was the intention to sell the same in California without a permit; also that the sales by Pizzotti were made "with the express knowledge, permission, aid and consent" of the directors; and they knew that no permit had been obtained, and that the sales were unauthorized by the Corporation Commissioner, and were about to be made without complying with the provisions of the Corporate Securities Act. Continuing, the court found that all directors participated in the meeting of the board in California at which, with intent to evade the Corporate Securities Act, the board authorized additional shares of stock to be issued to and sold by Pizzotti in California under the same arrangement, and that such stock was so sold to purchasers in this state with the permission, knowledge and consent of the members of said board. It would seem, therefore, that the facts thus found are sufficient under the rule of the cases hereinafter cited to charge each member of the board of directors with liability for said sales. Randall v. California L. B. Syndicate, 217 Cal. 594, 20 P.2d 331; Mannion v. Baldwin, 217 Cal. 600, 20 P.2d 678; Boss v. Silent Drama Syndicate, 82 Cal.App. 109, 255 P. 225; O'Connell v. Union Drilling, etc., Co., 121 Cal.App. 302, 8 P.2d 867; Holmquist v. Kent, 219 Cal. 231, 25 P.2d 977.

[8, 9] Appellant points out also that according to the findings director Thompson received no part of the purchase price paid for any of said stock; that all of it was "used, paid out and expended in the development and improvement of and in acquiring equipment and operating plants for or pertaining to" the mining property belonging to the corporation; and in this connection it is held to be the law that in

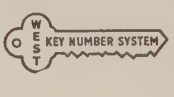
actions to recover the purchase price paid for stock sold without a permit, based on counts for money had and received, a defendant's liability is limited to the amounts actually received by him from said sales. Pollak v. Staunton, supra. However, such is not the rule where, as here, recovery of the amount of the purchase price is sought by way of an action for damages. Randall v. California L. B. Syndicate, supra; Holmquist v. Kent, supra. And it is held also that in seeking recovery of the purchase price paid, a buyer is not restricted to the remedy by way of rescission, but may, as here, bring an action for the damages suffered. Castle v. Acme Ice Cream Co., 101 Cal.App. 94, 281 P. 396.

[10-12] Appellant further contends that the causes of action sued upon are in their nature either actions to enforce a statutory penalty or to recover upon a liability based on tort, and that in either case the causes of action as to director Thompson abated upon his death, and were unassignable. While it is true that an action to enforce a statutory penalty does not survive death and is not assignable, it has been held in several cases that where, as here, the remedy is measured by actual loss, the remedy is not to enforce a penalty. Moss v. Smith, 171 Cal. 777, 155 P. 90; Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am.St.Rep. 153; Agudo v. County of Monterey, 13 Cal.2d 285, 89 P.2d 400. And with respect to actions sounding in tort, it is well settled that although in the absence of statute torts founded on wrongs of a purely personal nature do not survive death and are not assignable, such is not the rule as to torts affecting property. Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 274 P. 959; Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P.2d 643; Evans v. Gibson, 220 Cal. 476, 31 P.2d 389. Nor in view of the negative finding upon the matters pleaded by appellant in her first special defense and affirmative findings upon the allegations of paragraph IX of the complaint to the effect that the buyers of said stock relied implicitly upon the genuineness of the issue and believed that the sales were made under authority granted by the Corporation Commissioner, is there any legal ground for the application of the rule of pari delicto.

[13] Counsel for appellant in his closing brief has set forth at some length a statement of evidentiary matters relating to the incorporation of the company, the purpose of its incorporation, the value of its properties, and the circumstances attending the purchase of stock by plaintiff and his assignors; also the manner in which the decedent was persuaded to fill a vacancy on the board of directors during the period of time the stock sales transactions were being carried on, and the financial ruin that will ensue to appellant if the judgment as to her is upheld. As already stated, however, the appeal was taken on the judgment roll alone, and that being so, the evidentiary matters narrated in counsel's statement do not constitute proper subject matter for consideration in the determination of the appeal. The other points raised by appellant are merely incidental to those already determined, and being without merit do not require discussion.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.



38 Cal.App.2d 335

FARMERS' MUT. FIRE INS. CO. OF YOLO COUNTY v. FIRST RE–INSURANCE CO. OF CALIFORNIA.

Civ. 2501.

District Court of Appeal, Fourth District, California.

April 4, 1940.

1. Insurance ⇐244

Generally, insured is not entitled to cancel policy and demand return of proportionate part of premium unless such right is conferred by statute or by contract of parties.

2. Insurance ⇐244

The statute providing for return of premium to insured in event of cancellation of policy was intended at time of enactment in 1872 to apply to ordinary contract between insured and insurer where insured had nothing to do with insurer except as arising from his contract of insurance. St.1935, p. 509, § 481.

3. Insurance ⇐679

Under Insurance Code, membership in re-insurance companies is based on giving of written obligation by county mutual fire insurance company to pay its pro rata share of expenses and losses, and the taking out of policies of re-insurance by county mutual fire insurance company. St.1935, pp. 628, 629, 631, §§ 7080, 8030, 8031, 8090 et seq.

4. Insurance ⇐681

As respects cancellation of reinsurance, the statute providing for return of premium to insured in event of cancellation of policy was not intended to give an insured who was not a part of the insurer the arbitrary right to cancel policy at any time and demand the proximate return of premium paid. St.1935, p. 509, § 481.

5. Insurance ⇐681

The statute providing for return of premium to insured in event of cancellation of policy did not permit county mutual fire insurance company to arbitrarily withdraw from re-insurance company and cancel re-insurance policies and obtain return of premiums on such policies. St.1935, pp. 496, 499, 509, 628, 629, 631, 632, §§ 2, 37, 481, 7080, 8030, 8031, 8090, 9010–9012.

6. Insurance ⇐681

A county mutual fire insurance company liquidating its insurance business with consent of department of insurance and ceasing to transact business and permitting its members to transfer their insurance to other companies and returning policies of re-insurance to re-insurance company with cancellation notes, had ceased to be member of re-insurance company within by-law of re-insurance company providing that return of premiums on policies canceled by mutual company ceasing to be member of re-insurance company was optional with re-insurance company, notwithstanding that mutual company had taken no steps for dissolution.

7. Insurance ⇐681

As respects rights on cancellation, a county mutual fire insurance company which is member of re-insurance company remains liable for its proportion of expenses and losses which are to be expected. St.1935, p. 628, § 7080 et seq.

8. Insurance ⇐681

A county mutual fire insurance company which is member of re-insurance company ceases to be member of re-insurance company within meaning of by-law of re-insurance company providing that return of premium on re-insurance policies canceled by mutual company ceasing to be member of re-insurance company is optional with re-insurance company, where mutual company ceases its insurance business and cancels its policies and terminates its liabilities and obligations as member of re-insurance company.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by the Farmers' Mutual Fire Insurance Company of Yolo County against the First Re-Insurance Company of California, to recover so-called unearned premiums on canceled re-insurance policies which had been issued by the defendant to the plaintiff. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

A. G. Bailey, of Woodland, for appellant.

G. L. Aynesworth, of Fresno, and Fred D. Johnston, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action to recover so-called unearned premiums on cancelled reinsurance policies which had been issued by the defendant to the plaintiff.

The plaintiff was organized under the County Mutual Insurance Act of April 1, 1897, St.1897, p. 439, as amended, which is now chapter 5 of division 2, part 1, of the Insurance Code, St.1935, p. 614, § 5050 et seq. The defendant was organized under the Reinsurance Company Act of 1925, St.1925, p. 349, as amended, which is now chapter 6 of the same division and part of the Insurance Code, St.1935, p. 628, § 7080 et seq. The plaintiff was one of the organizers and incorporators of the defendant, and thereafter carried certain policies of reinsurance in the defendant company. On May 22, 1937, the plaintiff started to liquidate its insurance business, giving notice to the Department of Insurance. With the consent of the insurance commissioner the date of liquidation of the plaintiff was fixed as May 22, 1937, and the plaintiff ceased to transact business as a county mutual insurance company and permitted its members to transfer their insurance to other companies. The plaintiff returned all of its policies of reinsurance to the defendant, with cancellation notices, and the policies were cancelled. The plaintiff then

demanded a return of a proportionate part of the premiums it had paid on these policies. This demand was refused and this action followed. It was stipulated at the trial that the plaintiff owed the defendant nothing as its share of claims then existing against the defendant reinsurer. From a judgment in favor of the defendant the plaintiff has appealed.

[1] As a general rule, the insured is not entitled to cancel a policy and demand the return of a proportionate part of the premium unless that right is conferred by statute or by the contract of the parties. Joshua Hendy Machine-Works v. American Steam Boiler Ins. Co., 86 Cal. 248, 24 P. 1018, 21 Am.St.Rep. 33. The appellant contends that its contracts with the respondent were silent on that subject, and that it was, therefore, entitled to a return of premiums covering the remainder of the terms of the cancelled policies, under section 481 of the Insurance Code, which provides that unless the insurance contract otherwise provides a person insured is entitled, if the policy is cancelled, to a return of a proportion of the premium corresponding with the unexpired time. The sole question presented on this appeal is whether section 481 of the Insurance Code is here applicable.

[2, 3] Section 37 of the Insurance Code reads: "Provisions of this code relating to a particular class of insurance or a particular type of insurer prevail over provisions relating to insurance in general or insurers in general." Under section 2, provisions of the Insurance Code are to be construed as continuations of then existing statutory provisions on the same subject matter and not as new enactments. The provisions for a return of premium upon cancellation of a policy contained in section 481 of the Insurance Code have been in effect in substantially the same form since 1872. When enacted, and at least for many years thereafter, they were intended to apply to the ordinary contract between an insured and an insurer where the insured had nothing to do with the insurer except as arising from his contract of insurance. Many years later, a special act was enacted permitting the organization of county mutual fire insurance for the purpose of furnishing mutual fire insurance to their insured members. Still later, in 1925, another special act permitted the organization of county mutual fire reinsurer companies for the purpose of furnishing reinsurance to its members, who must be county mutual fire insurance companies organized under the other act. Both of these special acts are now a part of the Insurance Code. The reinsurance act permits five or more of the county mutual companies to incorporate a reinsurance company for the purpose of furnishing mutual reinsurance to its members. Section 7080 speaks of the member companies who may organize the reinsurance company as "insurers, operating under Chapter 5 of this part." Section 8030 provides that any other county mutual fire insurer may become a member of such reinsurer. Section 8031 provides that upon becoming a member of such reinsurer the county mutual insurer shall give its written obligation to pay its pro rata share of expenses and losses, and shall also "at the time of effecting the reinsurance" pay certain other charges. Article VI of chapter 6 of the Insurance Code, § 8090 et seq., provides for the making of assessments by the reinsurer upon the insurer members, but these may only be in proportion to the policies of reinsurance. These and other provisions indicate that membership in the reinsurance company is based upon the giving of the written obligation referred to and the taking out of policies of reinsurance. Section 8031 provides that the obligation to pay its pro rata share of the expenses and losses given by the insurer members shall apply during the time for which their respective policies are written. Sections 9010 to 9012 are found in article VII, which is headed "Cancellation of Membership". They provide that any member of such reinsurer may cancel any policy of reinsurance at any time by taking certain named steps, and further provide that the reinsurer may cancel any policy by giving the member ten days' written notice and returning to it any excess of premium as measured by certain rules.

[4, 5] Section 481 was originally adopted for the benefit of an insured who was not also a part of the insurer. It was, however, not intended to give to such an insured the arbitrary right of canceling his policy at any time and demanding a proportionate return of the premium paid. That section, as it formerly stood in the Civil Code, was interpreted in Joshua Hendy Machine-Works v. American Steam Boiler Ins. Co., supra, as meaning that an insured was entitled to a proportionate return of premium only when he had a legal reason for canceling the policy. Reinsur-

ance, as later provided for, differs materially from general insurance involving merely an insurer and an insured, and is a particular class of insurance with a particular type of insurer, the insured being also a part of the insurer. Section 8010 of the Insurance Code provides that such a reinsurance company may carry on a reinsurance business "as provided by this chapter". It hardly seems possible that it was intended by this act to make the provisions now included in section 481 applicable to this type of insurance giving the insurer members the right to arbitrarily withdraw and secure a return of premiums, and thereby giving to such insurer members an advantage much greater than that enjoyed by the insured under a general insurance policy. Such an insurer member is not only an insured under the policy of reinsurance, but is also a component part of the reinsurance company which issues the policy. The insurer member is liable for expenses and losses throughout the life of its reinsurance policies and it has obligations to the reinsurance company and its members in addition to the mere matter of paying premiums on its reinsurance.

The act permitting the formation of such reinsurance companies is not entirely silent on the matter of the return of premiums on the cancellation of reinsurance policies. While it provides that the insurer member may cancel its policies at any time it says nothing about a return of premiums paid. But in the same article and on the same subject it provides for a return of premiums if the reinsurer shall cancel the policy. This seems to indicate an intention that no such return of the premium is to be allowed where the insurer member cancels the policy. The appellant argues that there would be no benefit to the insurer member in canceling the policies if a return of premium was not then provided for, but this is not the case since the insurer member by canceling the policies receives the benefit of ending its liability for future expenses and losses suffered by all members of the reinsurance company, which liability was, according to its membership contract, to continue throughout the life of its policies. It seems more reasonable to conclude that it was the intention of the legislature, in adopting this special act, to provide that no premium should be returned when the policies were cancelled by the insurer member through whose cooperation the reinsurer had incurred other obligations and that, under section 37, the special act relating to a particular class of insurance and a particular type of insurer prevails over section 481, which relates to insurance in general and insurers in general.

A further consideration is that the applications for reinsurance and the reinsurance contracts issued to the appellant specifically provide that the by-laws of the respondent are a part of the contract of insurance. Section 4 of article VIII of these by-laws reads as follows:

"Whenever any member company shall, for any cause or through any method, cease to be a member of said First Re-Insurance Company, the liability of such member company theretofore incurred shall be in no way affected or discharged by the fact that such county fire insurance company shall have ceased to be a member of said First Re-Insurance Company; and no member company shall be permitted to withdraw as a member until it shall have paid and discharged in full, all of its liability to said First Re-Insurance Company. Whenever any member company shall cease to be a member of said First Re-Insurance Company, any re-insurance carried by said First Re-Insurance Company for such member company may be cancelled and premiums in re-insurance thus cancelled may be adjusted as provided in Section 16 of Chapter 195 of the Statute of 1925 of the State of California; (being the statute under which said First Re-Insurance Company was organized) but the return to any member company of any premium upon any insurance thus cancelled, shall be optional with this First Re-Insurance Company, and shall be determined, by the Secretary with the approval of a three-fourths of the members of the Board of Directors."

[6-8] The appellant argues that although it had, with the permission of the insurance commissioner, ceased to transact business as a county mutual insurance company it was still a member company of the respondent because it had taken no steps for dissolution and was still a corporation entitled to do business in this state and, therefore, that section 4 of article VIII of these by-laws has no application here. This by-law applies to any member company which shall "for any cause or through any method cease to be a member of said First Re-Insurance Company". This seems to be broad enough to cover the appellant, which withdrew from the reinsurance company through the method of canceling its policies and retiring from the insurance

field after obtaining the permission of the insurance commissioner, who fixed the date of appellant's liquidation as May 22, 1937. We think a member of this reinsurance company, within the meaning of the act permitting the organization of such a company, is a member insurer company which remains liable for its proportion of the expenses and losses which are to be expected. When a member company ceases its insurance business, cancels its policies and terminates its liabilities and obligations as a member of the reinsurance company, we think it has ceased to be a member of such reinsurance company within the meaning of the quoted by-law.

For both of the reasons herein set forth we conclude that section 481 of the Insurance Code is not controlling under the circumstances here appearing. It follows that the appellant is not entitled to a return of the premiums in question under either statutory or contractual provisions.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



38 Cal.App.2d 185

SULLIVAN v. TAIT.

Civ. 11195.

District Court of Appeal, First District, Division 2, California.

March 28, 1940.

Hearing Denied May 27, 1940.

1. Constitutional law ⇐70(1)
Workmen's compensation ⇐2121

The statute providing that if, as result of employee's action for damages, a judgment is obtained against employer in excess of compensation awarded employee, the compensation awarded by Industrial Accident Commission, if paid, or security is given for its payment and is approved by the court, shall be credited upon such judgment, is free from ambiguity, and courts are bound to follow provisions of the statute as they are written. St.1937, p. 271, § 3709; Code Civ. Proc. § 1858.

2. Statutes ⇐190

Interpretation and construction of a statute is for purpose of ascertaining the legislative will, and, when such will is clear, interpretation is not allowable.

3. Workmen's compensation ⇐2121

Where minor employee, while employed around machinery in a butcher shop contrary to law, sustained an injury and was awarded compensation and subsequently brought a common-law action and recovered a judgment for an amount less than the compensation award, action of trial court in entering a satisfaction of the common-law judgment by the amount of the compensation award which had been fully paid was contrary to the clear mandate of the Labor Code and unauthorized. St.1937, p. 271, § 3709; Code Civ.Proc. § 1858.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Daniel Sullivan, a minor, by John Sullivan, his guardian ad litem, against Frank Tait, also known as Frank Tate, for injuries suffered by plaintiff while employed by defendant. From an order decreeing satisfaction of a judgment for plaintiff, plaintiff appeals.

Reversed.

Chauncey Tramutolo and Juliet Lowenthal, both of San Francisco, for appellant.

J. W. Ehrlich and Roy A. Sharff, both of San Francisco (Alfred M. Miller, of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

In an action brought to recover damages for injuries suffered by the plaintiff while employed by the defendant, the plaintiff recovered a judgment. Thereafter the trial court made an order decreeing satisfaction thereof. From that order the plaintiff has appealed.

The plaintiff, a minor, was employed by the defendant in a butcher shop. On July 27, 1936, his left hand was seriously injured while operating a grinding machine. Thereafter, on September 26, this action was commenced. In the following year, on January 30, the Industrial Accident Commission entered an award in favor of the plaintiff and against the defendant in that proceeding, No. 52260, records of said commission.

The record does not show that a petition for a rehearing was filed or granted. Hence it is final. On the 1st of September thereafter the defendant filed his answer. Later the action was tried before the trial court sitting with a jury and on March 8, 1938, a judgment was entered in favor of the plaintiff. Thereafter, on December 7, the order decreeing satisfaction thereof was entered.

[1-3] The plaintiff has brought up a copy of the judgment roll and a limited bill of exceptions. In his complaint the plaintiff pleaded the facts showing his employment, his injury, and pain and suffering caused thereby. In his prayer he asked for damages in the sum of $20,000. In his answer the defendant inserted certain denials and pleaded affirmatively the proceedings had before the Industrial Accident Commission and that the latter " * * * on January 30, 1937, made its award against the defendant ordering him to pay to the plaintiff above named the sum of $2,886 as compensation for said injuries, and further ordered this defendant to pay all medical, hospital and nursing bills, including surgery and all future medical treatments required by the plaintiff above named; that said award of said Industrial Accident Commission is payable in the sum of $24.05 per week; that this defendant is paying said award as ordered by the said Industrial Accident Commission; and that the payment of that portion of said award which is unpaid at this time is secured by an attachment levied on real property belonging to this defendant." The jury returned a general verdict in favor of the plaintiff in the sum of $2,250. The trial court fixed the plaintiff's attorney fee in the sum of $400. It taxed the plaintiff's costs in the sum of $191.40 and entered a judgment for $2,841.40. No special verdict was rendered by the jury. Later the defendant made a motion that the trial court enter a satisfaction of the judgment. In support of his motion he tendered the affidavit of one of his attorneys. In that affidavit it was set forth that the award of the Industrial Accident Commission had been fully paid including medical care and hospitalization in the sum of $3,187.95. It was also set forth in said affidavit that on the trial the court gave an instruction that the jury might consider the five elements of damages, (1) loss of earnings; (2) loss of future earnings; (3) medical and doctors expenses; (4) future medical expenses; (5) pain and suffering. (8 Cal.Jur. 810 "Damages" secs. 68, 69, and 70.) On the hearing of the motion the plaintiff objected to the granting thereof because the judgment entered on the verdict of the jury was not in excess of the compensation awarded by the Industrial Accident Commission. At this time the plaintiff renews that objection and the sole question presented on this appeal is the proper construction of section 3709 of the Labor Code, St. 1937, p. 271. It is as follows: "3709. If, as a result of such action for damages, a judgment is obtained against the employer *in excess of the compensation* awarded under this division, the compensation awarded by the commission, if paid, or security is given for its payment and is approved by the court, shall be credited upon such judgment." (Italics ours.) Having cited the section the plaintiff contends the statute is entirely free and clear of ambiguity, that there is no room for construction, and that the courts are bound to follow the provisions of the section as they are written. With those contentions we wholly agree. The rule is statutory. (Code Civ.Proc., sec. 1858.) It was tersely stated in Davis v. Hart, 123 Cal. 384, at page 387, 55 P. 1060, 1061: "A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable." It follows that under the uncontradicted evidence the order appealed from should not have been entered.

In support of the order the defendant argues that section 3709 of the Labor Code, as construed by the plaintiff, authorizes a double recovery. We think it is clear it does not do so. Be that as it may, the record in the present case does not show a duplication of compensation and the question is not before us.

The order appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

38 Cal.App.2d 348

HARVEY et al. v. BALLAGH et al.
Civ. 2524.

District Court of Appeal, Fourth District, California.

April 4, 1940.

1. Attorney and client ⇐166(3)

In action against lessees of oil interest in land on oral contract under which lessees contracted to pay attorneys one-fourth of amount recovered on lessees' claims against an assignee of oil lease, evidence sustained judgment for attorneys who had obtained judgments against assignee, for one-fourth interest in amount received by lessees as result of a settlement with assignee, whereby assignee reconveyed oil interest to lessees, on ground that under the contract the attorneys were entitled to 25 per cent. of any property received as result of attorneys' efforts and not merely 25 per cent. of any cash received from the assignee.

2. Appeal and error ⇐1010(1)

Finding of trial court substantially supported by the evidence will not be disturbed on appeal.

3. Attorney and client ⇐149

Where lessees of oil interest in land orally agreed to pay attorneys one-fourth of amount recovered on lessees' claims against an assignee of oil lease and after attorneys obtained judgments against assignee, the lessees obtained reconveyance of oil interest in settlement of judgment debts, and released such interest, lessees could not avoid liability on oral agreement on ground that they received no property as result of efforts of the attorneys because the reconveyance constituted only removal of cloud from lessee's title and was of no value.

4. Attorney and client ⇐149
Trusts ⇐63¾, 103(4)

Where lessees of oil interest in land orally agreed to pay attorneys one-fourth of amount recovered on lessees' claims against an assignee of oil lease and, after attorneys obtained judgments against assignee, lessees obtained reconveyance of oil interest in settlement of judgment debts and re-leased such interest, the attorneys were entitled to one-fourth of proceeds obtained as result of the settlement, including one-fourth of royalties received by lessees, and equity would enforce a "constructive trust" or "resulting trust" in favor of the attorneys for their share of the proceeds, regardless of fact that the oral agreement gave no lien to the attorneys.

5. Trusts ⇐63½, 63¾, 92½, 103(4)

Where lessees of oil interest in land orally agreed to pay attorneys one-fourth of amount recovered on lessees' claims against an assignee of oil lease and, after attorneys obtained judgments against assignee, lessees obtained reconveyance of oil interest in settlement of judgment debts and re-leased such interest, a "resulting trust" or "constructive trust" arose in favor of attorneys as to property recovered as result of their efforts and lessees could not avoid liability to attorneys on ground that agreement was unenforceable because it was oral. Civ.Code, §§ 853, 1091, 2224; Code Civ.Proc. § 1971.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust" and "Constructive Trust".

6. Specific performance ⇐39

Where lessees of oil interest in land orally agreed to pay attorneys one-fourth of amount recovered on lessees' claims against an assignee of oil lease and, after attorneys obtained judgments against assignee, lessees obtained reconveyance of oil interest in settlement of judgment debts, and re-leased such interest, the oral contract was not within the statute of frauds and attorneys could maintain action to recover one-fourth interest in amount received by lessees in the settlement, including one-fourth interest in future royalties, as against contention that action was for specific performance of unenforceable oral contract. Civ.Code, § 1624.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by T. N. Harvey and another, copartners doing business under the firm name and style of Harvey & Johnson, and others, against E. E. Ballagh and others, for an accounting to recover certain amount of money and a one-fourth interest in certain oil and gas leasehold estate as compensation for legal services rendered. From an adverse judgment, defendants E. E. Ballagh and others appeal.

Affirmed.

Thomas Reynolds, Willard W. Wallace, and Sidney A. Cherniss, all of Los Angeles, for appellants.

Cross & Brandt, of San Francisco, and Harvey & Johnston, of Bakersfield, for respondents.

GRIFFIN, Justice.

This is an appeal from a judgment ordering an accounting, awarding plaintiffs and respondents $781.25 and a one-fourth interest in a certain oil and gas leasehold interest. On October 24, 1930, E. E. Ballagh and John Patterson, as lessees, obtained an oil lease to 120 acres of land in Kern county from the General Petroleum Corporation, and they, in turn, assigned this lease, in so far as it pertained to about 85 acres thereof, to Erie Petroleum Company, for which assignment the Erie Petroleum Company agreed to pay them $10,000. Two promissory notes, dated October 24, 1930, for $8,000 and $2,000 respectively were given. John Patterson had an unpaid claim for wages in the sum of $2,100 against the Erie Petroleum Company. The notes were not paid at maturity. Respondents were employed to collect the notes and claim. In this regard the testimony shows that Ballagh asked respondent Johnston what he would charge for instituting and prosecuting the necessary action or actions. Johnston testified: "He (Ballagh) wanted to know what I would charge and I asked him did he want to pay us so much a day in court or whether he wanted to take it on the basis of whatever we recovered, and he said on the basis of whatever was recovered. I told him we would take it on 25% of what was recovered and he would pay all the costs. * * * He said that was all right with him * * *." This oral conversation constitutes the contract for the attorneys' fees and the present action is based on this fee agreement.

Respondents Harvey and Johnston accepted the employment as arranged. They brought two actions in Kern county against the Erie Petroleum Company upon the promissory notes. These actions were consolidated and transferred to San Francisco for trial. The law firm of Cross & Brandt of San Francisco were associated with them, with the consent of appellants, upon the basis that they were to receive 50 per cent of the compensation agreed upon between the firm of Harvey & Johnston and appellants. The case was tried in that county and resulted in a judgment against the Erie Petroleum Company in favor of appellants herein. Abstracts of judgment were recorded in Fresno county and in Kern county. Subsequently the executors of the estate of one Pearce, deceased, commenced an action in Fresno county to cancel the lease held by Erie Petroleum Company on certain Fresno property. In this action respondents, acting for Ballagh and Patterson, and in an effort to protect and collect the judgments obtained by them against Erie Petroleum Company, intervened. The case was tried and submitted to the trial judge, but before decision the judge died.

The second action to cancel the Erie Petroleum Company lease covering property in Fresno county was commenced by the Pearce estate in San Francisco, in which respondents again appeared. Judgment in favor of the Pearce estate was rendered in that action leaving the Kern county leasehold as the only assets of Erie Petroleum Company.

Subsequently Mr. Johnston, of the law firm of Harvey and Johnston, wrote to appellants asking them to advance the necessary costs with which to levy upon and sell the leasehold interest of Erie Petroleum Company which it had acquired from the appellants. The costs were never advanced by appellants. Subsequently, by satisfying the judgments apparently without respondents' knowledge, which said judgments appellants had obtained through the efforts of respondents, they obtained back by quitclaim or leasehold deed a leasehold interest in the premises involved in this action which they had originally assigned to the Erie Petroleum Company, and immediately released the premises, including the other premises which they were holding under lease from the General Petroleum Corporation, and collected $4,000 as bonus from the re-leasing of this property. Upon this state of facts the trial court apportioned the $4,000 thus received between the acreage which the Erie Petroleum Company formerly held and the remainder of the acreage held by appellants under the General Petroleum Corporation lease, and awarded to respondents $781.25, being 25 per cent of the amount of the bonus thus apportioned to the acreage formerly held by the Erie Petroleum Company, and 25 per cent of the royalties paid under the lease in proportion to such acreage, and ordered appellants to pay one-fourth of all future rents, royalties, bonuses or any other thing of value from the property mentioned in the judgment, to the plaintiffs and respondents herein. From this judgment appellants appeal.

They attack the judgment upon the following grounds: (1) that the findings of the trial court supporting the judgment are not supported by the evidence; (2) that the appellants had received nothing as a result of the services of the respondents; (3) that the agreement between appellants and respondents gave no lien to respondents of any specific property; (4) that the contract violated sections 1091 of the Civil Code and 1971 of the Code of Civil Procedure; and (5) that the cause of action relied upon by plaintiffs is for specific performance of a contract and that the complaint must fail because it fails to state a cause of action for specific performance and that the testimony disclosed a contract within the statute of frauds, Civil Code, § 1624.

[1, 2] First, it is contended by appellants that respondents Harvey & Johnston agreed that it was solely in the event that respondent succeed in collecting *cash* from the Erie Petroleum Company that they were to receive 25 per cent of such *cash* so collected and that if appellants receive any other property than cash, respondents were to receive nothing. The evidence merely resolves itself into a conflict. This conflict was decided against the appellants and the finding of the trial court is substantially supported by the evidence and will not be disturbed. Chichester v. Seymour, 28 Cal. App.2d 696, 83 P.2d 301. Under the testimony the court was fully justified in awarding to respondents one-fourth of any property which appellants received as a result of the efforts of respondents. The evidence showed that in consideration of the satisfaction of judgment which respondents obtained for appellant, they received back into their possession and under their control for oil and gas leasing purposes, the acreage which they had formerly assigned to the Erie Petroleum Company, and that upon the return of this property to them, they released it, obtaining a substantial bonus therefor and royalty agreements to be paid them for oil and gas produced from such acreage. Under the circumstances it is idle to suppose that appellant Ballagh and respondent Johnston, when they entered into the oral contract for the performance of the services of Harvey & Johnston, believed that in the event appellant satisfied their many demands against Erie Petroleum Company by the acceptance of property other than cash, respondents should regard their services as a labor of love. In fact, it is not to be supposed that an attorney would enter into any such contract. The reasonable contract would be that whatever the defendant should receive as the result of the attorneys' efforts, if the contract for such services were on a contingent basis, that the attorneys should receive their proportionate share of whatever the clients received. The circumstances of this case show that the Erie Petroleum Company had two oil and gas leases and that in order to collect any judgments that might be obtained upon their notes it might be necessary to resort to these leases in order to satisfy the judgment and such resort to the leases might result in obtaining no cash for the appellants but only the acquisition of these leases.

[3] Second, appellants further contend that they received no property as a result of the efforts of respondents. In view of the court's finding on the conflicting evidence this contention must also be held to be without merit, their contention being that the giving of the quitclaim deed was only for the purpose of removing the cloud upon the title. In lieu of using the process of law to recover-back their title to the leasehold interest appellants elected to satisfy their judgments and accept in consideration thereof a return to them of the leasehold title by means of a leasehold deed from the Erie Petroleum Company. To say, therefore, that by appellants' satisfying the judgments in that manner they only succeeded in removing a cloud from their title is untenable. They acquired a leasehold interest which they did not previously have and which they could not obtain otherwise, as there had been no default on the part of Erie Petroleum Company which would justify any action to cancel the leasehold interest. It is equally untenable to say that what the appellants received in return for the satisfactions of the judgments was valueless when it is considered that immediately upon obtaining back from the Erie Petroleum Company the leasehold interest which that company held, appellants re-leased the entire property which they had obtained under the General Petroleum lease and which acreage received from the Erie Petroleum Company was by far the greater part, and received in consideration thereof a bonus in the sum of $4,000 cash.

[4] Third, respondents claim no lien upon any specific property by reason of the agreement, but contend that under their contract they were entitled to receive from appellants one-fourth of whatever prop-

erties of any kind and nature appellants may have received in consideration of the satisfaction of judgments which respondents obtained for appellants. Appellants recovered as a result of respondents' services the leasehold interest held by the Erie Petroleum Company. Therefore, under the contract between appellants and respondents, respondents were entitled to one-fourth of such leasehold interest and any monies which may have accrued or may hereafter accrue by virtue of such recovery upon the equitable principles and under authorities herein set forth and to the protection of the equity side of the court to enforce a trust in favor of their proportionate proceeds recovered by virtue of the judgment. This right has been upheld in the cases of Hoffman v. Vallejo, 45 Cal. 564; Luco v. De Toro, 91 Cal. 405, 18 P. 866, 27 P. 1082; Bergen v. Frisbie, 125 Cal. 168, 57 P. 784; Gomez v. Superior Court, 134 Cal.App. 19, 24 P.2d 856. It therefore follows that the judgment awarding to the respondents a one-fourth interest in the property which appellants recovered by virtue of the satisfaction of judgments obtained by the respondents for the appellants should be affirmed.

[5] Fourth, appellants advance the proposition that because respondents are seeking to recover a one-fourth interest in the leasehold interests held by appellants and obtained by them from the Erie Petroleum Company, that relief must be denied to them for the reason that they are seeking to enforce a contract for the recovery of real property, and the contract being oral cannot be so enforced. The actions of appellants have created a trust by operation of law, either resulting or constructive, in favor of respondents as to any property recovered as a result of their efforts, and sections 1091 of the Civil Code and 1971 of the Code of Civil Procedure cited by appellants, cannot be used to deprive respondents of the just fruits of their services, and thereby permit appellants to work a fraud upon respondents. Bates v. Babcock, 95 Cal. 479, 30 P. 605, 16 L.R.A. 745, 29 Am.St.Rep. 133; Civ. Code, secs. 853 and 2224; White v. Sheldon, 4 Nev. 280; 65 Cor.Jur., sec. 159, p. 392, Trusts; Donahoe v. Tjosevig, 6 Alaska, 139.

In O'Byrne v. McNeill, 90 Colo. 226, 7 P.2d 956, at page 957, as to the contention that no trust existed for the reason that the claim of O'Byrne was void under the statute of frauds, the court said: "The confidential relations between the parties were sufficient to create a constructive trust. [Cases cited.] As said in Kayser v. Maugham, 8 Colo. 232, 238, 6 P. 803, 807: 'If, as already declared, a trust exists at all in this case, it belongs to the class known as resulting, or that denominated constructive; but the trusts are created by operation of law, and the statue of frauds has no application thereto. [Citing cases.]'"

The language of the Supreme Court of the state of Colorado in disposing of the plaintiffs' contention there is peculiarly applicable to the claim of appellants in this case. It should be noted that while the contract between respondents and appellants contains no provision whereby appellants were to convey to respondents any interest in the leasehold interest affected by the decree of the trial court, nevertheless, the subsequent acts of the parties under the agreement created rights in reference to the leasehold interest which a court of equity should protect against any attempt to make the statute of frauds an instrument of fraud.

In Porterfield v. Taylor, Tex.Civ.App., 171 S.W. 793, it was held that where one employed an attorney to recover certain land, conveying to him an interest in the cause of action as compensation for his services, and afterwards the client, without the attorney's knowledge, procures a conveyance to himself of the title to such land from the holder thereof, he holds the same as a constructive trustee for the attorney to the extent of the latter's interest.

From the foregoing it appears that the acts of appellants have created either a constructive or a resulting trust in favor of respondents in the leasehold interest acquired by appellants to the extent of respondents' proportionate share thereof. Under such circumstances it is well settled that appellants are not in a position to plead either section 1971 of the Code of Civil Procedure or section 1091 of the Civil Code to protect them against the equitable claim of respondents. 25 Cal.Jur. [Trusts], secs. 31, 32 and 33; Allen v. Freear, 50 Cal. App. 645, 195 P. 748; Leviston v. Tonningsen, 212 Cal. 656, 299 P. 724; Burrows v. Burrows, 136 Cal.App. 323, 28 P.2d 1072; Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501.

[6] Fifth, appellants make the final point against the judgment obtained by respondents, that the action brought by respondents is one for specific performance of a contract between appellants and respondents, and it is therefore void as against the statute of frauds. The action is not brought for the purpose of requiring the defendants to specifically perform their contract. The contract contained no provision whereby the appellants agreed to convey to plaintiffs any land or any interest in any land. As pointed out above, it is not within the statute of frauds. The action is one to have it declared that plaintiffs and respondents are entitled to receive a one-fourth interest in the leasehold which the defendants and appellants received from the services of respondents. Appellants obtained this one-fourth interest subject to a trust in favor of respondents, and it was for the purpose of enforcing that trust that this form of judgment was ordered.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.



38 Cal.App.2d 373

STRUCKMAN v. BOARD OF TRUSTEES OF TRACY UNION HIGH SCHOOL et al.

Civ. 6267.

District Court of Appeal, Third District, California.

April 10, 1940.

1. Schools and school districts ⇐141(6)

Evidence sustained finding that leave of absence granted to a union high school teacher who had not become a permanent employee was not granted for the purpose of permitting travel or study but was granted because of teacher's ill health and consequently was within the provisions of the statutes which make no provision for reinstatement after a leave of absence. School Code, §§ 5.500 to 5.506, 5.721, 5.722.

2. Appeal and error ⇐1011(1)

In presence of conflicting evidence, reviewing court must uphold findings of trial court.

3. Statutes ⇐183

The intention of the legislature in the enacting of a statute must be ascertained, and when ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute, and the language of the statute should never be so construed as to nullify the will of the legislature or to cause a law to conflict with the intention of the legislature.

4. Schools and school districts ⇐141(6)

A high school teacher on a leave of absence, who has not become a permanent employee, is entitled under the school code to reinstatement only if leave was granted for travel or study. School Code, §§ 5.721, 5.722.

5. Statutes ⇐185

In construing a statute, court is not at liberty to impute a particular intention to the legislature when nothing in the language of the statute implies such an intention.

6. Estoppel ⇐52

Office of an "equitable estoppel" is to protect one from a loss, which but for the estoppel he could not escape, and vital principle thereof is that he, who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing expectations upon which he acted, since such a change of position involves fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

7. Estoppel ⇐62(5)

Board of trustees of a union high school, which granted a teacher who had not become a permanent employee a leave of absence for illness, was not barred by "equitable estoppel" from denying teacher's right to be reinstated where board did not hold out to teacher that he would be reinstated at the end of his leave. School Code, §§ 5.500 to 5.506, 5.721.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Proceeding by H. W. Struckman to compel Board of Trustees of Tracy Union High School, John L. Mullally, Bert A. Banta,

W. F. Costello, Wm. Coster, and Irvin M. Petz, as members of such board, to reinstate petitioner as a teacher. From an adverse judgment, petitioner appeals.

Affirmed.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

F. C. Clowdsley, Dist. Atty., and R. M. Dunne, Asst. Dist. Atty., both of Stockton, and George Wadsworth, of Tracy, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

Petitioner sought by means of a writ of mandate, to compel the respondents, as school trustees, to reinstate him as a teacher. The court found in favor of respondents upon the material facts in issue, and judgment was entered denying the writ. The appeal is from the judgment.

Petitioner was a teacher in Tracy Union High School for some eight years. He had never become a permanent employee of the high school district under the provisions of School Code, sections 5.500-5.506. The essential facts of the controversy are set forth in the following findings:

"III

"That on May 14th, 1937, the respondents duly granted the petitioner a leave of absence for the school year, 1937-1938; that said leave of absence was granted to the petitioner at his own request, on account of his poor health, and said leave of absence was not granted under the provisions of Sec. 5.722 of the California School Code; that after said leave of absence was granted, petitioner signed a writing which was introduced in evidence and marked 'Petitioner's Exhibit #2', which said writing is in the words and figures, as follows, to-wit:

"'May 14, 1937.

"'The following form must be signed by the individual who has been granted a "Leave of Absence":

"'The Board of Trustees hereby grants a "Leave of Absence" to Mr. Henry W. Struckman for the school year of 1937-38, for the following reasons:

"'First, due to Dr. Power's written statement as to Mr. Struckman's health.

"'Second, for the purpose of permitting Mr. Struckman to attend an accredited College or University, and to obtain at least four College units of work in the field of education.

"'"I, H. W. Struckman, (own writing), do hereby certify that I have read the policy as adopted by the Board of Trustees of Tracy Union High School on May 11, 1937, at a regular Board meeting. I give reasonable assurance that I will abide by the above regulations and the policy of the Board of Trustees; also, that I will return to Tracy Union High School after a period of one school year.

"'"I release the Board of Trustees from any and all obligations whatsoever to re-employ me, should my character, health, or ability change and become any other than that standard which is maintained by the Board of Trustees for teachers in Tracy Union High School, Trustee's decision on above matters to be final."

Signed: H. W. Struckman
Witness: Mrs. Leila Riggs
Witness: Mrs. Rena Cross

"'Date: May 14, 1937.'

"That on February 9th, 1938, respondents notified the petitioner, in writing, in the form and manner required by the School Code of the State of California, that they would not re-employ him for the school year 1938-1939, which said notice was duly received by the petitioner."

The uncontradicted evidence shows that appellant, during his leave, never traveled, nor did he obtain four units of work in the field of education.

[1, 2] It is contended by appellant that the School Code had no right or authority to discharge him during the time he was on leave of absence. He relies upon section 5.722 of the School Code, which relates to leave of absence granted to a teacher "for the purpose of permitting study or travel". The section provides, at the end thereof, that: "At the expiration of the leave of absence of said employee, he shall, unless he otherwise agrees, be reinstated in the position held by him at the time of the granting of the leave of absence." Assuming that the construction placed upon the foregoing section by appellant is correct, we are satisfied that there is ample evidence to support the finding that the leave was not granted under the provisions of said section, but was granted because of the ill health of appellant, and consequently came under the provisions of section 5.721 of the School Code relating to granting of a leave of absence on account of illness, which makes no provision whatever for reinstatement. Appellant testified: "It is permissible under

the law, after you have worked in a place for eight years, and I was a sick man. * * * My doctor advised me that if I did not take a rest I probably would not finish the next year, and I thought that was reason enough to ask for it, the Board would grant it." Assuming, as appellant contends, that the conduct of the parties would indicate, that the leave was under section 5.722, this would merely create a conflict in the evidence, and we are bound to uphold the finding under those circumstances.

[3-5] It is contended that if the finding mentioned is upheld, appellant still could not be dismissed during his leave, for the reason that the provision for reinstatement found in section 5.722 should be read into section 5.721. He points out that there are four sections of the School Code under the title "Leaves of Absence". In one only, relating to travel and study, is there any provision for reinstatement. That the legislature had the power to so act, is not questioned by appellant. There is no ambiguity, conflict or uncertainty. "It is a cardinal rule that statutes are construed according to the intention, or at least according to the apparent or evident intention or purpose, of the lawmakers. Such intention controls, if it can be reasonably ascertained from the language used. Indeed, it has been said that the legislative intent in enacting a law is the law itself. Accordingly, the primary rule of statutory construction, to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained, if possible, and, when once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute. In other words, as is declared by the Code, 'in the construction of a statute the intention of the legislature * * * is to be pursued if possible'. Certainly the language of a statute should never be so construed as to nullify the will of the legislature, or to cause the law to conflict with the apparent purpose had in view by the lawmakers." 23 Cal.Jur., pp. 725-726-727. It is our conclusion that the legislature intended to grant reinstatement only to those teachers whose leaves of absence were predicated upon travel or study. We are not at liberty to impute a particular intention to the legislature when nothing in the language employed implies such an intention. The authorities cited by appellant do not sustain his position, and if adopted here, would result in an unwarranted invasion of the functions of the legislature.

Finally, it is contended by appellant that respondents are equitably estopped from denying petitioner's legal right to be reinstated. He points out that at the time he was granted his leave, May 14, 1937, he was required to sign the statement prepared by respondents and set forth in the findings quoted above as petitioner's exhibit No. 2.

[6, 7] That the next time he heard from respondents was through his letter of dismissal, which was dated February 9, 1938. His argument is predicated upon the fact that it appears that "it was the thought, intent, and purpose of respondents to reinstate petitioner at the end of such leave of absence in accordance with the provisions of the School Code". We cannot start with such a premise because the trial court has impliedly found, upon sufficient evidence, that respondents did not hold out to appellant that he would be reinstated at the end of his leave. "The whole office of an equitable estoppel is to protect one from a loss which, but for the estoppel, he could not escape. The vital principle of equitable estoppel, it has been said, is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position involves fraud and falsehood, and the law abhors both." 10 Cal.Jur., p. 626. We are of the opinion that the evidence is insufficient to give rise to an equitable estoppel. There was no evidence that appellant was misled, to his prejudice, nor are any elements of fraud or falsehood present in the record.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

38 Cal.App.2d 369

WESTWATER v. SOUTHERN PAC. CO. et al.

Civ. 11097.

District Court of Appeal, First District, Division 1, California.

April 10, 1940.

Hearing Denied June 6, 1940.

1. Carriers ⇐280(1)

A carrier of persons for reward is not an insurer of absolute safety of passengers and, unless called on to explain cause of accident, is not responsible on mere proof of happening thereof, but utmost care must be used by carrier for passengers' carriage, and everything necessary for that purpose must be provided and the carrier must exercise to that end a reasonable degree of skill. Civ.Code, § 2100.

2. Negligence ⇐136(2)

Negligence is a question of fact unless by statutory provision it may be presumed.

3. Carriers ⇐280(1)

Dogs can be carried by a common carrier, but in such event utmost care must be used by carrier, and, after acceptance of a dog in a passenger coach, there should be reasonable supervision, with relation to passengers, of the place allotted the dog, and consideration should be given to opportunity of dog to injure passengers and, if doubt exists as to whether carrier should have permitted dog to ride in passenger coach or if carrier is derelict in supervision of dog, utmost care has not been taken by carrier to safeguard passengers.

4. Carriers ⇐280(1)

In determining whether or not utmost care was used by a common carrier in permitting a dog to ride in a passenger coach, consideration should be given to the size, type, breed, and sex of the dog, whether caged or muzzled, whether the dog is accustomed to traveling, or may become frightened or irritable on account of strange noises relating to the operation of the carrier.

5. Carriers ⇐302(1)

A railroad was liable for injuries inflicted on a passenger, who was a minor, by a dog which railroad had permitted another passenger to bring into passenger coach, where railroad failed to make any effort to determine whether dog was vicious or was likely to be vicious upon being thrust into strange surroundings, and whether adequate supervision was to be exercised over the dog, although custodian of dog, who was not its owner, was held not liable because lacking knowledge of dog's vicious tendencies. Civ.Code, § 2100; St.1931, p. 1095.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by David Leo Westwater, a minor, by Leo R. Westwater, his guardian ad litem, against Southern Pacific Company, a corporation, and others, to recover for injuries inflicted by a dog. From an adverse judgment, named defendant appeals.

Affirmed.

Elliott Johnson, of Oakland, for appellant.

Hildebrand & Bills, of Oakland, for respondent.

WARD, Justice.

An appeal from a judgment rendered in favor of plaintiff minor, by his guardian ad litem, against defendants Southern Pacific Company, a corporation, and Dorothy Miles, taken by the corporation alone.

The facts of the case are as follows: Miss Miles, while on a trip to Alaska, entrusted the care of her Scotch terrier dog to Miss Grover. Having occasion to make a trip to Berkeley, Miss Grover purchased a ticket therefor at the San Francisco ticket office of defendant company. She was accompanied by the dog, wearing a collar to which a leash was attached. She testified that on depositing the ticket at the entrance gate, she inquired of the gateman, "Is it all right for me to take the dog across?" to which the gateman replied: "Why, certainly." The animal weighed about seventeen pounds, appeared to be well-mannered and had no known vicious tendencies. As she boarded the train, holding the dog under her arm, she passed the conductor, who was standing on the back platform. Miss Grover took a seat on the right-hand side of the car and placed the dog on the seat beside her, next to the window. She sat with her arm over the animal and held the leash in her hand. The minor, David Westwater, accompanied by his mother, was a passenger and occupied the seat next to the window, directly in front of the dog. The minor raised himself on the seat, turned around

to speak to Miss Grover or to look at the dog, and was immediately bitten.

The court found that Miss Grover was not careless or negligent and that the dog "without provocation on the part of plaintiff and without warning to plaintiff, leaped at said plaintiff and bit plaintiff in the nose and thereby caused plaintiff to be injured"; that the injuries were sustained by reason of the negligence of defendant corporation and as a direct and proximate result thereof.

[1, 2] A carrier of persons for reward is not an insurer of the absolute safety of passengers (Champagne v. Hamburger & Sons, 169 Cal. 683, 147 P. 954), and unless called upon to explain the cause of the accident, is not responsible upon the mere proof of the happening thereof. Nevertheless, utmost care and diligence must be used for the passengers' carriage; everything necessary for that purpose must be provided and the carrier must exercise to that end a reasonable degree of skill. Civ.Code, sec. 2100. Unless by statutory provision negligence may be presumed, it is a question of fact. It is provided by statute that the owner of a dog which shall bite any person while such person is on or in a public place, or lawfully on or in a private place (Stats.1931, p. 1095; 1 Deering's Gen.Laws [1937], Act 384a, p. 166) shall be liable for damages suffered. No doubt this is the theory adopted in holding the owner liable in this case. Our attention has not been called, however, to any statutory provision forbidding common carriers to transport dogs, hence, as to the carrier, the question before us resolves itself into whether or not the defendant corporation discharged toward plaintiff its legal duty; in other words, did the defendant corporation use the utmost care and diligence for his safe carriage.

In considering the evidence, we have not lost sight of the fact that the defendant corporation has been held liable in damages for permitting Miss Grover to board the train with the dog, and that Miss Grover has not been held liable for bringing the dog aboard. Under the rule generally described as the "one bite" rule, if a custodian knows of the vicious tendency of a dog, liability may attach. In this case, there is no evidence that the dog was vicious. Miss Grover could be held only under the due diligence and ordinary care rule. The court found that she was not guilty of negligence.

[3-5] We cannot hold that a carrier has no right to transport dogs in a coach set apart for passengers as was held in Westcott v. Seattle, etc., R. Co., 41 Wash. 618, 84 P. 588, 4 L.R.A.,N.S., 947, 111 Am. St.Rep. 1038. We conclude rather that dogs can be carried, but that in such event utmost care shall be used. In this respect, many conditions and the natural tendencies of the dog should be ascertained so far as can reasonably be done, for instance, the size, type, breed and sex of the dog, whether caged or muzzled, whether the dog is accustomed to traveling or may become frightened or irritable on account of strange noises related to the operation of the vehicle, such as the pounding of wheels, blowing of whistles, tooting of horns or other noises incidental to the trip. In addition, after acceptance of a dog in a passenger coach, there should be reasonable supervision, with relation to passengers, of the place allotted the dog, and its opportunity to injure with tooth, paw or body, irrespective of its apparent reputation for calm temperament. The Lord Derby, C.C., 17 F. 265; Trinity & S. R. Co. v. O'Brien, 18 Tex.Civ.App. 690, 46 S.W. 389. These and many other considerations may enter into the determination of whether or not utmost care is used in permitting a dog to ride in a passenger coach. Many of these considerations may be determined by observation; others by inquiry of the custodian, but if any doubt exists after reasonable examination, or if the carrier is derelict in the supervision of the dog, then the utmost care and diligence has not been taken by the carrier to safeguard and protect the passenger.

In this case, unlike the situation in Gallagher v. Kroger Grocery & Baking Co., Mo.App., 272 S.W. 1005, the evidence indicates the appellant had a reasonable opportunity to inquire concerning the dog's habits. The entire record herein does not disclose that there was any effort made by the defendant corporation to determine whether the dog was vicious, or, if well-mannered, whether there was a likelihood of sudden viciousness upon being thrust into strange surroundings, and whether adequate supervision was to be exercised over the dog.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

38 Cal.App.2d 366

GUY F. ATKINSON CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11347.

District Court of Appeal, First District, Division 1, California.

April 10, 1940.

1. Workmen's compensation ⇐1723

Under statute increasing the compensation otherwise recoverable if the injury is result of serious and willful misconduct of employer, serious and willful misconduct is a question of fact. St.1937, p. 281, § 4553.

2. Workmen's compensation ⇐939

Where deceased employee occupied the position of general carpenter foreman who directed men at work and used his judgment relative to the construction of guard rails where necessary and it was not shown that any executive, managing officer or general superintendent of employer knew of need for guard rail but failed to provide one around skylight opening and foreman was killed in fall through skylight not protected by guard rail, wife was not entitled to additional compensation benefits on ground that foreman died as result of an injury caused by the "serious and willful misconduct of employer." St.1937, pp. 280, 281, §§ 4551, 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Willful Misconduct of Employer".

3. Workmen's compensation ⇐1939

Findings of Industrial Accident Commission supported by evidence are binding on Court of Appeal.

Proceeding by writ of review by Guy F. Atkinson Company, a corporation, employer, against the Industrial Accident Commission of the State of California to annul an award granting Ruby I. Grady additional death benefits based on serious and willful misconduct of the employer.

Additional award annulled.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten, and Eldon B. Spofford, both of San Francisco, for respondents.

WARD, Justice.

This is a petition for a writ of review to annul an award of death benefits, made by the Industrial Accident Commission and based on the serious and wilful misconduct of an employer.

Petitioner herein, Guy P. Atkinson, a corporation, was engaged in the construction of buildings on Treasure Island, including one housing the Alameda-Contra Costa counties exhibit. Connecting this with the Mission Trails Building was a small one-story structure, and it was in the latter decedent sustained his injury, which was occasioned by falling through a space designed to be used as a skylight. The evidence shows that uneven boards protruding over this space had been in whole or in part trimmed. If trimmed, guard rails surrounding it should have been erected. It appears to be the practice, also, that if an opening is not to be covered for a day or two, such guard rails should be installed, irrespective of trimming. The testimony is slightly conflicting on this phase of the evidence, but it is sufficient to establish that the carpenter employed at this skylight opening immediately prior to the accident had stepped about ten feet away to talk to a fellow workman. During this short interval a state building-construction inspector, who happened to be on the building, called the foreman carpenter (decedent), who was on a lower floor to come up and discuss a matter,—one not connected with the skylight. The foreman ascended through another opening and, while walking toward the inspector, fell through the space, receiving injuries which resulted in his death.

Prior to the present award, normal compensation benefits had been allowed in the sum of $5,000 plus funeral expenses, etc. On rehearing, without additional evidence touching the merits of the controversy, an additional sum equal to one-half the normal compensation was awarded,—this, upon the theory the employer was chargeable with serious and wilful misconduct.

The application for adjustment of claim described the deceased as a carpenter foreman. The original findings so declared, and in addition thereto stated that the injury was not caused by reason of the serious and wilful misconduct of the employer. The decision on rehearing, however, while adhering to the original finding as to the status of the claimant, de-

clared that the injury was caused by the serious and wilful misconduct of the employer.

Labor Code, section 4553, St. 1937, p. 281, provides in part: "The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and wilful misconduct of any of the following: * * * (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof."

[1] Fritz Fieldheim occupied the position of general carpenter foreman, and a Mr. Moore that of general superintendent. The carpenter foreman, the evidence shows, directs the men at work and uses his judgment relative to the construction of guard rails. Serious and wilful misconduct is a question of fact (Ethel D. Co. v. Industrial Accident Comm., 219 Cal. 699, 28 P.2d 919; Hatheway v. Industrial Accident Comm., 13 Cal.2d 377, 90 P.2d 68), but there is no evidence that any executive or managing officer or general superintendent knew or should have known that guard rails had not been installed, so that he could be charged with serious and wilful misconduct, unless it be claimed that the foreman carpenter (decedent), who directed the work of the men, was in fact such a superintendent as the statute contemplates. If this conclusion is correct, then the foreman employee, if injured, could cause the compensation to be increased by establishing his own misconduct as foreman employee. Where death results, the same principle applies.

[2] Respondents rely upon section 4551 of the Labor Code, which provides: "Where the injury is caused by the serious and wilful misconduct of the injured employee, the compensation otherwise recoverable therefor shall be reduced one-half, except: (a) Where the injury results in death." Placing the decedent in the category of an employee whose death ensues from an injury, we have before us no evidence which shows that any executive or managing officer or general superintendent knew or in the usual course of the work should have known of the danger and failed to take reasonable precaution to insure safety by erecting guard rails around the open space. In this respect, if any such duty existed, it rested upon decedent.

[3] Some effort was made to show that decedent was not in fact the foreman, and that orders were given the workmen by others. On each award respondent commission, upon evidence, found decedent to have been the foreman, and we are therefore bound by the finding.

The additional award of $2,500 is annulled.

We concur: PETERS, P. J.; KNIGHT, J.



38 Cal.App.2d 360

PEOPLE v. RODGERS.

Cr. 2116.

District Court of Appeal, First District, Division 1, California.
April 9, 1940.

1. Criminal law ⇐1084

The District Court of Appeal in exercise of its constitutional authority can in a proper case, by way of writ of supersedeas, stay the execution of a sentence imposed pursuant to a judgment of conviction pending appeal. Pen.Code, § 1243; Const. art. 6, § 4.

2. Criminal law ⇐1084

A stay of execution of a sentence imposed pursuant to a judgment of conviction, by way of writ of supersedeas, should be denied by the court of appellate jurisdiction where it appears that the appeal is frivolous. Pen.Code, § 1243; Const. art. 6, § 4.

3. Criminal law ⇐1084

A writ of supersedeas to stay execution pending appeal from judgment of conviction would not be granted, where inspection of record demonstrated that appeal was frivolous. Pen.Code, § 1243; Const. art. 6, § 4.

4. Criminal law ⇐1114(1)

As respects application for writ of supersedeas to stay execution pending appeal from judgment of conviction, defendant's claim that clerk of court just before opening of trial approached him and stated that judge was willing to allow defendant to plead guilty to one charge and that, if he did not agree to do so, and was found guilty on all charges, the judge would order that the sen-

tences run consecutively, presented no ground for reversal, where there was nothing in record to show that the incident ever occurred.

5. Criminal law ⇐1035(2)

As respects application for writ of supersedeas to stay execution pending appeal from judgment of conviction, order of trial court consolidating three charges against defendant for trial afforded no ground for reversal where record showed that no objection was made by defendant, especially where public defender filed an affidavit stating that defendant advised him that he desired to have all charges tried at one time.

6. Criminal law ⇐808½

As respects application for writ of supersedeas to stay execution pending appeal from judgment of conviction, trial court's instruction upon doctrine of reasonable doubt afforded no ground for reversal, where record showed that instruction followed the form prescribed by statute. Pen.Code, § 1096.

7. Criminal law ⇐798½

As respects application for writ of supersedeas to stay execution pending appeal from judgment of conviction, trial court's method of submitting various forms of verdicts to jury afforded no grounds for reversal, where it appeared there was no foundation for defendant's claim that trial judge stated that jury was to fill in the word guilty in the blank space and made no mention of any verdict in the event it was not guilty.

8. Criminal law ⇐1084

In passing upon an application for writ of supersedeas to stay execution pending appeal from judgment of conviction, District Court of Appeal must assume that defendant has set forth in his petition the points upon which he intends to rely most strongly for a reversal. Pen.Code, § 1243; Const. art. 6, § 4.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

David Rodgers was convicted of five felonies and two misdemeanors, and he appeals. The trial court refused defendant a stay of execution pending the appeals, and he applies for a writ of supersedeas.

Writ denied.

Raine Ewell, of San Francisco, for appellant.

Preston Devine, Deputy Dist. Atty., and James A. Toner, Deputy Public Defender, both of San Francisco, for respondent.

Raymond D. Williamson, of San Francisco, for Sheriff, City and County of San Francisco.

KNIGHT, Justice.

On November 27, 1939, the defendant, David Rodgers, was found guilty by a jury of having committed five felonies and two misdemeanors. The felonies were sex crimes Pen.Code, secs. 261, 286, 288, and 288a, committed upon three girls, aged 14, 13 and 9 years respectively; and as a punishment therefor consecutive sentences of imprisonment in the state prison were imposed. The misdemeanor convictions were based on charges of contributing to the delinquency of two of the girls, sec. 702, Welfare and Institutions Code, St.1937, p. 1033, and upon each of those convictions he was sentenced to one year in the county jail, but the sentences were suspended. Appeals were taken from all of said judgments of conviction, and from the orders denying the motions for new trial. Following the taking of the appeals appellant's present counsel was substituted for the public defender, who until then had defended appellant; and his present counsel applied to the trial court for a stay of execution pending the appeals. The application was denied. Thereupon he filed an application in this court for a writ of supersedeas, and a stay was granted pending the filing of the record on appeal and until this proceeding was determined; and the transcripts on appeal have since been filed.

[1–3] Prior to the recasting in 1927 of section 1243 of the Penal Code, relating to the issuance of certificates of probable cause, it was held in effect that upon the refusal of the trial court to grant such certificate the appealing party was entitled thereto as a matter of right from the court of appellate jurisdiction unless it clearly appeared that the appeal was frivolous. In re Adams, 81 Cal. 163, 22 P. 547. As reenacted, the code section declared that an appeal to the District Court of Appeal from a judgment of conviction does not stay the execution of the judgment in any case unless the trial court shall so order, and that "The granting or refusal of such order shall rest in the sole discretion of the trial court." Since the recasting of said code section it has been held that despite the fact that the legislature incorporated therein the

clause just quoted, a District Court of Appeal in the exercise of the constitutional authority granted by section 4 of article VI of the Constitution may nevertheless in a proper case, by way of writ of supersedeas, stay the execution of a sentence imposed pursuant to a judgment of conviction. In re Albori, 95 Cal.App. 42, 272 P. 321. But it is also held that the rule still prevails that a stay should be denied by the court of appellate jurisdiction where it appears that the appeal is frivolous (In re Albori, supra; People v. Burnette, 34 Cal.App.2d 663, 94 P.2d 399); and in the present case a mere inspection of the record demonstrates without argument and beyond any rational doubt that the points upon which appellant states he will rely for reversal fall far short of presenting even debatable questions.

[4] The sufficiency of the evidence is not challenged; nor is any criticism made of the trial court's rulings on the admissibility of evidence or the conduct of the trial court or the district attorney during the course of the trial. The first point relied upon relates to an incident which appellant claims occurred just before the opening of the trial and prior to the empanelment of the jury, wherein, so he asserts, the clerk of the court "approached" him and stated that the judge "was willing to allow" him to plead guilty to one charge, and that if appellant did not agree to do so and was found guilty on all charges, the judge would order that the sentences run consecutively. There is nothing in the record, however, to show that the incident ever occurred; consequently under no circumstances could it be considered in determining the appeal; moreover, the clerk of the court has filed an affidavit in the present proceeding denying unequivocally that any such conversation ever took place.

[5] Appellant's next point is directed against the order made by the trial court at the commencement of the trial consolidating the three cases for trial. In this connection the record shows that a separate grand jury indictment was found against appellant covering the crimes alleged to have been committed upon each girl; and that at the opening of the trial the district attorney moved that the three cases be tried together; that no objection whatever was made by appellant, either personally or by counsel, and that accordingly the motion to consolidate was granted. Appellant now asserts, first, that prior to the commencement of a previous trial on said charges, which resulted in a disagreement of the jury, he "personally" demanded a separate trial on each indictment; secondly, that the public defender stated to him at that time that he could not have separate trials; and thirdly, that "against the will and consent of this defendant" an order was made prior to the commencement of the present trial consolidating the three cases for trial. None of the foregoing assertions finds any support in the record; furthermore, the public defender has filed an affidavit in the proceeding now before us wherein he denounces appellant's first assertion as being "utterly false", and the second as "another deliberate falsity"; and with respect to the third, he avers that appellant advised him "that he desired to have all charges against him tried and determined at one time, and in the same trial"; and it appears that such course was followed at the first as well as at the second trial.

[6] Appellant's third point is that the trial court instructed the jury "that the law did not require a reasonable doubt to keep from convicting this defendant, and that all they needed was a probable doubt". The record shows, however, that the instruction given by the court upon the doctrine of reasonable doubt followed exactly the form prescribed by section 1096 of the Penal Code; and continuing the court stated: "In other words, a reasonable doubt means just what the term implies, a doubt based upon reason, a doubt that presents itself in the minds of reasonable people who are weighing the evidence in the scales, one side against the other, in the logical manner in an effort to determine wherein lies the truth." Obviously there is nothing in the latter portion of the instruction to justify the complaint appellant makes against it.

[7] Appellant's final claim is that in presenting the various forms of verdicts to the jury the judge stated: "'In this blank space you are to fill in the word guilty,' and made no mention of any verdict in the event it was not guilty." There is no foundation whatever for such claim. Nine forms of verdict were given to the jury. Three of them pertained to the charge of violating section 261 (rape), and with respect thereto the jury was instructed that it should return the first form if it found the defendant guilty and recommended imprisonment in the state prison; that it should return the second

form in case it found the defendant guilty and recommended county jail imprisonment, and the third was in the usual form of a "not guilty" verdict. In submitting each of the remaining six forms of verdicts the court advised the jury that a blank space had been left in each form wherein the words "guilty" or "not guilty" should be inserted by the jury.

[8] In passing upon an application such as this, for a writ of supersedeas in a criminal action, it must be assumed that an appellant has set forth in his petition the points upon which he intends to rely most strongly for a reversal; and as will be seen from the foregoing, the petition here has not specified a single legal point upon which candid minds might reasonably differ in determining the appeal. Furthermore, it appears that the cause took but one day to try, that the reporter's transcript contains only sixty pages of testimony and twelve pages of instructions, including the forms of verdicts, and that although the clerk's and reporter's transcripts have now been on file for more than three and a half months, counsel for appellant has not yet filed an opening brief.

For the several reasons above stated, we feel justified in holding that the appeal is frivolous; and that being so, the writ should be denied. It is so ordered, and the stay heretofore granted is terminated.

We concur: PETERS, P. J.; WARD, J.



38 Cal.App.2d 377

THOMPSON v. THOMPSON.

Civ. 6328.

District Court of Appeal, Third District, California.

April 10, 1940.

1. Judgment ⇐375

"Extrinsic fraud" warranting setting aside of judgment consists of such false representations as will prevent a real trial of cause upon merits of issues involved, such as conduct inducing an interested party to refrain from appearing or participating in trial, a failure to serve timely notice, or preventing presence of material witnesses.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

2. Divorce ⇐161

Where it was alleged that husband bringing action for divorce against wife told her that if she contested action he would quit his job and obtain a divorce, and that he would discontinue support of wife and children, and that she would lose her home, as result of which wife allowed default to be entered and took no steps to have case reopened, no "extrinsic fraud" which would warrant setting aside of interlocutory divorce decree existed.

3. Judgment ⇐386(1)

Motion to vacate judgment, not void on its face, based either on statutory grounds or in exercise of inherent powers of the court, must be made within a reasonable time not exceeding the maximum time limited by statute, whether such statute is applicable either expressly or by analogy.

4. Divorce ⇐161

A motion to vacate default and set aside interlocutory decree of divorce filed more than a year after entry of decree was not filed within a reasonable time, and was properly denied.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine and Robert W. Kenny, Judges.

Action for divorce by Henry Newton Thompson against Edda Officer Thompson. From an order denying a motion to set aside an interlocutory decree, defendant appeals.

Affirmed.

Conroy & Conroy and Edward L. Conroy, all of Los Angeles, for appellant.

Farrand & Slosson, of Los Angeles, for respondent.

PER CURIAM.

An action for divorce was filed by respondent, and upon the default of the defendant, on May 21, 1935, an interlocutory decree was entered on June 6, 1935. By this interlocutory decree the respondent husband offered to and was directed, among other things, to main-

tain a $10,000 life insurance policy in favor of defendant, and to continue her as beneficiary to the amount of the unpaid balance on a note and deed of trust on the home property standing in the wife's name and being her separate property; to pay $185 each month on the taxes, insurance and instalments of principal and interest on said note and deed of trust, and also to pay $440 each month for the support of appellant and their minor children. All of these terms and conditions were regularly performed by respondent.

Nothing was done by appellant until on May 27, 1936, over a year after the entry of the default, she moved to vacate such default and to set aside the interlocutory decree. This motion was based upon the records and files in the case, her proposed answer, and upon her original and supplementary affidavits. The gist of these affidavits was that subsequent to the commencement of the action for divorce and before she had been served with the summons and complaint, plaintiff, her husband, told her he had commenced an action for divorce, and that if she contested the same he would quit his job and go to some other state and obtain a divorce, and that he would discontinue the support and maintenance of defendant and the children, and that she would lose her home in which she and the children were living. Upon account of these statements, she avers, she was intimidated, and for that reason alone failed to contest the divorce action, allowed her default to be entered and took no steps to have the case reopened. To these allegations plaintiff filed counter-affidavits, denying most of the charges made by defendant.

The trial court held the facts presented on the motion were not sufficient to entitle defendant to the relief sought, and from that order this appeal is brought.

It is the claim of appellant that the threats of respondent constituted extrinsic fraud on the court, and duress, coercion and extrinsic fraud on her. She further contends that where a judgment had been obtained through fraud the court has inherent power to set aside the judgment, and its right so to do is not derived from section 473 of the Code of Civil Procedure, and a motion to set aside may be considered if made within a reasonable time.

[1] First, did the statement of respondent constitute extrinsic fraud? "Extrinsic fraud, which alone will warrant a court of equity in setting aside a judgment or decree consists", as said in Godfrey v. Godfrey, 30 Cal.App.2d 370, 86 P.2d 357, 362, "of such false representations as will prevent a real trial of the cause upon the merits of the issues involved, like the conduct which may induce an interested party to refrain from appearing or participating in the trial, a failure to serve timely notice of the hearing, or acts preventing the presence at the trial of material witnesses". But in Hendricks v. Hendricks, 216 Cal. 321, 14 P.2d 83, where the husband, the defendant in a divorce suit, in attempting to persuade the wife to file an action for divorce, threatened to charge her with adultery, a court of equity refused to set aside the decree thus obtained upon the ground that where the evidence of the fraud or duress could have been presented to the court or an attorney of complainant's choosing during the pendency of the action or that a full examination of the facts could have been made, the court will not interfere, but will leave the parties where they placed themselves.

[2] In the instant case the defendant wife, through the court and her attorney, could, if she had made an effort, have obtained all the relief she now seeks, except perhaps, the court might not have awarded payments of alimony to her in the amounts plaintiff voluntarily bound himself to pay. Under the facts here presented we cannot find extrinsic fraud.

[3, 4] If, however, we concede the case to be one of extrinsic fraud, the motion comes too late. A motion to vacate a judgment not void on its face, based either upon statutory grounds or in the exercise of the inherent powers of the court, must be made within a reasonable time, not exceeding the maximum time limited by statute, whether such statute is applicable either expressly or by analogy. Macbeth v. Macbeth, 219 Cal. 47, 25 P.2d 11; People v. Davis, 143 Cal. 673, 77 P. 651; Wheelock v. Superior Court, 67 Cal.App. 601, 227 P. 931; Bowman v. Bowman, 97 Cal.App. 613, 275 P. 1023.

Furthermore, if this motion was limited to a reasonable time, then the trial court, in the exercise of its discretion, was justified in denying relief because the motion was not timely. 14 Cal.Jur. 1062, 1063,

1065; Richert v. Benson Lumber Co., 139 Cal.App. 671, 34 P.2d 840; Consolidated Construction Co. v. Pacific Electric R. Co., 184 Cal. 244, 193 P. 238; Sepulveda v. Apablasa, 25 Cal.App.2d 390, 77 P.2d 530; see, also, Hiltbrand v. Hiltbrand, 218 Cal. 321, 23 P.2d 277.

The order is affirmed.



38 Cal.App.2d 381

PEOPLE v. NUDO.

Cr. 1710.

District Court of Appeal, Third District, California.

April 10, 1940.

1. Assault and battery ⇐92

In prosecution for assault by means of force likely to produce great bodily injury, evidence sustained finding that assault was committed by means of a blackjack.

2. Criminal law ⇐824(1)

In a criminal case it is duty of trial court to give sua sponte instructions on the general principles of law pertaining to the case, but such rule does not apply to those instructions which do not cover broad general principles and which are mere refinements of other instructions given.

3. Criminal law ⇐824(2)

In prosecution for assault by means of force likely to produce great bodily injury where court read information to jury and charged them that every material allegation thereof must be proved beyond a reasonable doubt, and defined the assault in statutory language, there was sufficient definition of crime charged and failure to give instruction as to what force would be likely to produce great bodily injury was not error in absence of request therefor. Pen.Code, § 240.

4. Criminal law ⇐1038(3)

A judgment will not be reversed because trial court did not instruct regarding lesser crime included in greater one charged, unless defendant requests that jury be so instructed.

5. Criminal law ⇐1038(3)

In prosecution for assault by means of force likely to produce great bodily injury, where no instruction was presented to court or requested to effect that defendant might be convicted of lesser offense, failure to give instruction that defendant could be found guilty of simple assault and failure to submit to jury a form of verdict covering simple assault was not reversible error.

6. Assault and battery ⇐80

Where information for assault by means of force likely to produce great bodily injury charged that the assault was committed by a "hard object" and evidence warranted finding that assault was committed by means of a blackjack or by means of defendant's fists, such means of assault were within the designation of a "hard object". Pen.Code, § 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Hard Object".

7. Assault and battery ⇐95

In prosecution for assault by means of force likely to produce great bodily injury, what force is likely to produce great bodily injury is a question of fact to be determined by the jury. Pen.Code, § 245.

8. Assault and battery ⇐96(1)

In prosecution for assault by means of force likely to produce great bodily injury, where, after jury had deliberated for some time, they returned to court and asked for and court gave further instructions, defendant was not prejudiced from failure of court to go into details in respect to manner in which assault was made. Pen.Code, § 245.

9. Indictment and Information ⇐133(7)

Where information for assault by means of force likely to produce great bodily injury charged that assault was committed by a "hard object" if further particularity was desired by defendant, an objection should have been raised to the pleading. Pen.Code, § 245.

10. Criminal law ⇐864, 1039

In prosecution for assault by means of force likely to produce great bodily injury, where, after jury had deliberated for some time, they returned to court and asked for further instructions and at suggestion of court two notes were written out by a juror and handed to trial judge, manner in which jury communicated with trial judge was not approved but prejudice was not disclosed

where no request was made by defendant for inspection of the notes.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Louis Nudo was convicted of assault by means of force likely to produce great bodily injury and he appeals.

Affirmed.

Margaret Gettys Hall and E. H. Zion, both of Modesto, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

The defendant was convicted after trial by jury in the county of Stanislaus, of the crime of assault by means of force likely to produce great bodily injury, a felony. He objected to the court of its own motion referring the matter to the probation officer, and was sentenced to one year in the county jail. This is an appeal from the judgment of conviction and from the order denying a new trial.

The information by which defendant was charged is as follows: "Information for assault by means of force likely to produce great bodily injury, a felony. Louis Nudo is accused by the District Attorney for the said County of Stanislaus, State of California, by this information, of the crime of assault by means of force likely to produce great bodily injury, a felony, committed as follows: The said Louis Nudo, on or about the 25th day of January, A.D., nineteen hundred and thirty-nine, at and in said County of Stanislaus, State of California, and prior to the filing of this information, assaulted Bill Koch by striking him and gouging his eye with a hard object and by beating him and breaking his ribs."

Considering the evidence in the light most favorable to the People, we find the essential facts of the case to be as follows: William Koch, the party who was very severely beaten by the defendant, was an old man, 77 years of age. He was, and had been, for six years, a night watchman at the Riverbank Cannery, in Stanislaus county. The defendant, a comparatively young man, had for many years held a similar job, but had been discharged by the cannery for illegally selling certain materials which, it was claimed, he had stolen from the cannery. The defendant claimed that this was a frame-up, and allegedly believed that Koch was one of the instigators thereof. Apparently, the defendant had been trying to find out more about this alleged frame-up, but Koch would not talk about it, and defendant wanted to be informed by Koch as to the identity of the others involved, so that he could "get even". Sometime thereafter, defendant was riding in an automobile along the highway, and he saw Koch walking up a slope toward the car. Defendant stopped his car and he and a companion alighted. Koch did not see them alight, and he approached the car and asked if there was any trouble. He then started to walk away, when someone struck him with a blackjack and knocked him down. He saw defendant take the blackjack and heard him say, "I got you, you———, and I am going to kill you." Defendant then struck Koch again in the eye, and he was rendered unconscious. In his fall he struck a guard-rail and broke several ribs. Koch bled profusely from his wound, and was taken to the hospital, where he remained nine days. Defendant testified that he had owned a blackjack, but that he had burned it two months prior to the assault. He also testified that he did not use a blackjack, but hit Koch with his fists.

[1] It is contended that there is no evidence to justify a finding to the effect that a blackjack or other hard object was used. A reference to a resume of the testimony given above is a sufficient answer. The point raised involves nothing more than a conflict in the evidence, and we are satisfied that the record supports a finding that the assault was committed by means of a blackjack.

[2-5] It is contended that the court should have instructed the jury—1: Upon the question as to what force would be likely to produce great bodily injury; and—2: That, under the evidence, defendant could have been found guilty of simple assault. No instruction was offered by defendant upon either question. As to the first point, while it is the rule that it is the duty of the trial court, in a criminal case, to give, sua sponte, instructions on the general principles of law pertaining to the case (People v. Peck, 43 Cal.App. 638, 185 P. 881), this does not apply to those instructions which do not cover broad, general principles, and which are mere refinements of other instructions given. Here, the trial court defined an assault in the language of the Penal Code (sec. 240). The court read the information to the jury, and charged

them that every material allegation thereof must be proved beyond a reasonable doubt. This was a sufficient definition of the crime charged. As to the second contention, it is argued that the evidence justified a verdict of simple assault, a misdemeanor, and an offense necessarily included in the charge made. 3 Cal.Jur. p. 224, sec. 32. No instruction was presented to the court, or requested by appellant to the effect that defendant might be convicted of the lesser offense, and the court did not give such instruction. It is the rule "that a judgment will not be reversed because the trial court had not instructed as to a lesser crime, included in the greater one charged, unless the defendant had requested that the jury be so instructed". People v. Bailey, 142 Cal. 434, 76 P. 49, where numerous authorities are cited. Under the same rule, it was not reversible error for the court to fail to submit to the jury a form of verdict covering simple assault.

After the jury had deliberated for some time, they returned into court and asked for further instructions. A prolonged colloquy between the court and a member of the jury, and between court and both counsel followed. At the suggestion of the court, two notes were written out by a juror and handed to the trial judge. The contents of such notes were not disclosed. No request was made by counsel for defendant that such notes be exhibited to her. The court, at the request of the People, then gave the following instruction: "You are instructed that it is not essential that the People prove that the assault, if any, was committed by the exact means charged in the information. It is sufficient if it is proved beyond a reasonable doubt and to a moral certainty that Louis Nudo assaulted Bill Koch by means of force likely to produce great bodily injury, providing you are convinced that such assault, if any, was not committed in self-defense."

No further instructions were offered by defendant. The instruction quoted was objected to by defendant as an incorrect statement of the law. He contends that the trial court should have specified the exact means by which the bodily injury was inflicted. The information charged that the assault was committed with a "hard object". The statute under which the charge was brought reads as follows: "Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the State prison not exceeding ten years, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment." Pen.Code, sec. 245.

[6, 7] Under the evidence the jury could have found that the assault was committed by means of a blackjack or by means of defendant's fist. The former admittedly comes within the designation of a "hard object." Likewise, upon an occasion of this character, a fist can reasonably be so described. This is obvious from the nature of the injury inflicted. What force is likely to produce great bodily injury is a question of fact to be determined by the jury. People v. Fuqua, 58 Cal. 245. In People v. Hinshaw, 194 Cal. 1-18, 227 P. 156, 163, it is said: "The pleading here, by way of describing the means employed and the force used and where the force was directed, alleges that the assault was made with the fists and hands upon the head and face and that the result was a fractured jaw and other grievous injuries. Such allegations, under the circumstances of this case, describe both the means employed and the force used, which we think meet the language of the statute, 'by any means or force likely to produce great bodily injury,' and are 'not the details of probative matter or particulars of evidence by which these material elements are to be established.' Pomeroy's Code Remedies (4th Ed.) p. 555."

[8, 9] An almost identical instruction was approved in People v. Blake, 129 Cal. App. 196, 18 P.2d 399. We cannot see how any possible prejudice could result from the failure of the court to go into further details in respect to the manner in which the assault was made. Furthermore, no demurrer was interposed to the information. If further particularity was desired by appellant, an objection should have been raised to the pleading. The case of People v. Perales, 141 Cal. 581, 75 P. 170 (decided in 1904), is relied upon by appellant. There, however, the objection to the information was made by demurrer, the court holding that the offense of assault by means likely to produce great bodily injury was not stated with sufficient particularity. The information described the object used as a "heavy wooden stick." The Supreme Court held that the weight, strength and size of the stick should have been alleged. We seriously doubt if such

a technical omission would be held reversible error today. Here, there was no objection whatever interposed to the information by appellant.

[10] As to the manner in which the jury communicated with the trial judge, while we do not approve of the practice, we cannot see how any prejudice resulted from the procedure. No request was made by appellant for an inspection of the notes. Doubtless the judge acted out of an abundance of caution, with a view of keeping the observations of a particular juror from the other members of the jury.

From appellant's own lips, the record shows a vicious and unjustified assault made upon a man 77 years of age. To consume pages in discussing the question of whether appellant used a blackjack or his fists would seem a waste of words. In any event, in the language of the section of the Penal Code quoted above, the assault was committed "by means of force likely to produce great bodily injury".

The judgment and order are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



BODINSON MFG. CO. v. CALIFORNIA EMPLOYMENT COMMISSION et al.*

Civ. 6414.

District Court of Appeal, Third District, California.

April 4, 1940.

Rehearing Denied May 4, 1940.

Hearing Granted May 31, 1940.

1. Master and servant ⇐78

Under the Unemployment Insurance Act, all unemployment benefits paid to workmen are charged to account of each employer who is given a merit rating dependent upon unused money which he has contributed to fund, and employer has vested interest in trust fund entitling it to protest against unlawful expenditures of unemployment wages to its workmen, since such payments increase the contributions which employer will be required to make and deprive it of its proper merit rating. Federal Social Security Act, 42 U.S.C.A. § 301 et seq.; St.1935, p. 1233, § 42; St.1939, pp. 2052, 2147, 3010, §§ 44, 39, 67.

2. Mandamus ⇐23(1)

An employer to whose account unemployment benefits paid to workmen were charged by the employment commission and whose merit rating was dependent upon unused money contributed to trust fund was entitled to maintain a mandamus proceeding to compel a lawful and proper administration of trust fund and to prevent an unjust impairment, since employer was directly interested in the fund. Code Civ.Proc. §§ 1085, 1086; St.1935, p. 1233, § 42; St.1939, pp. 2052, 2147, 3010, §§ 44, 39, 67.

3. Injunction ⇐43

The provision of the Unemployment Insurance Act that if a referee of the employment commission affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken does not bar a court from enjoining illegal payment of benefits after referee has directed payment to be made, since statute does not purport to apply to an appeal to a court of competent jurisdiction to prevent an unlawful payment of benefits, but applies only to an appeal from the order of a referee to commission. St.1939, p. 3013, § 72.

4. Mandamus ⇐73(1)

Mandamus is a proper remedy where it clearly appears that the employment commission has abused its discretion in arbitrarily disregarding plain and unambiguous provisions of statute relating to disbursement of funds for unemployment benefits. Code Civ. Proc. §§ 1085, 1086; St.1935, p. 1226, as amended.

5. Mandamus ⇐72

Mandamus will not issue to interfere with discretion of a board or commission in determining duty or benefit imposed by law, but when a board or commission acts without jurisdiction contrary to clear and unambiguous language of statute, or has clearly abused its discretion with respect to its statutory authority, writ will lie. Code Civ. Proc. §§ 1085, 1086.

6. Master and servant ⇐78

Under provision of the Unemployment Insurance Act that an individual is not eligible for benefits and no such benefits shall be payable to him if he left his work because of a trade dispute, employment commission

* Subsequent opinion 109 P.2d 935.

has no discretion but has clear duty to disallow unemployment wages during time of trade dispute. St.1939, p. 8, § 56.

7. Master and servant ⇐78

The word "left" as used in paragraph (a) of a section of the Unemployment Insurance Act denying benefits to workmen who leave their jobs voluntarily during the time a trade dispute is in actual progress in their employer's establishment, merely means that when an employee has departed or absented himself from his work and fails to return to it, he is not entitled to unemployment benefits. St.1939, p. 8, § 56(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Left".

8. Master and servant ⇐78

The statutes providing for unemployment compensation were enacted under police powers to minimize harmful effect on society of unemployment of large numbers of workmen, who become idle through no fault of their own. St.1935, p. 1226, as amended.

9. Master and servant ⇐78

Under statute providing that an individual is not eligible for unemployment benefits if he left his work because of a "trade dispute", where employer's plant was picketed by union and members of affiliated trade group refused to go through picket line though there was work awaiting them and other workmen passed through freely without molestation, "trade dispute" existed and members of affiliated trade group were not entitled to unemployment benefits since one who refuses to pass through picket line is interested in a "trade dispute" and by the terms of the statute is not entitled to unemployment benefits notwithstanding private rule between unions establishing that persons who pass through picket line are strikebreakers. St.1939, p. 8, § 56.

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Dispute".

10. Statutes ⇐190

Rules of construction may be resorted to only where the statute is uncertain or ambiguous, and when the language and meaning of a statute is clear and certain, there is no room for construction. Code Civ.Proc. § 1858.

11. Master and servant ⇐78

The statute providing that an individual is not eligible for unemployment benefits if he left his work because of a trade dispute is so clear and unambiguous that it does not require an application of ordinary rules of construction to determine the meaning intended by the Legislature. St.1939, p. 8, § 56; Code Civ.Proc. § 1858.

Mandamus proceeding by the Bodinson Manufacturing Company against the California Employment Commission and others. On motions to quash an alternative writ and separate demurrers on ground that petition failed to state a cause of action.

Motions denied, demurrers overruled and peremptory writ issued.

J. M. Mannon, Jr., Edwin S. Pillsbury, George O. Bahrs, and McCutchen, Olney, Mannon & Greene, all of San Francisco, for petitioner.

Horton & Horton and Joseph K. Horton, all of Los Angeles, Webster V. Clark and Rogers & Clark, all of San Francisco, Hubert H. Briggs, of Stockton, and Brobeck, Phleger & Harrison, M. B. Plant, and David Smith, all of San Francisco, amici curiæ for petitioner.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., and Maurice P. McCaffrey, of San Francisco, for respondent California Employment Commission.

Robert W. Kenny, of Los Angeles, for corespondents.

PER CURIAM.

By means of a writ of mandamus the petitioner seeks to compel the commission having control of an unemployment insurance fund created by statute to properly administer that trust fund as required by the provisions of the Unemployment Insurance Act of California. (Stats.1935, p. 1226, and amendments of 1939.) It is alleged the commission has consistently disregarded the clear mandate of section 56 of that act, St.1939, p. 8, and that it will continue to do so, by illegally and wrongfully paying and charging to its account benefits to workmen in petitioner's establishment who have left their work because of a trade dispute therein between the employer and members of a labor organization to which the corespondents do not belong. The claimants, by the advice of an agent of their own labor union, refused to pass through a picket line which was maintained about the plant. The petitioner asks that the commission

be required to disallow and refrain from paying such illegal claims or from charging the same to the accounts of the petitioner. It also requests that its account be credited with the sum of such payments, and that its merit rating be restored.

The commission and the corespondents filed separate motions to quash the alternative writ, and separate demurrers on the ground that the petition fails to state facts sufficient to constitute a cause of action warranting the issuance of a writ of mandamus. Separate answers were also filed admitting all the essential allegations of the petition necessary to a determination of the issues presented thereby. No preliminary restraining order was sought or made in this proceeding.

The following essential facts related in the petition are admitted by the answers:

[1] The Bodinson Manufacturing Company is a corporation engaged in manufacturing commodities at its establishment in San Francisco; it employs at that plant a large number of workmen who belong to various union labor organizations. The respondent commission consists of five named individuals who are appointed to administer the trust fund of the California Unemployment Insurance Act now containing over $150,000,000, to which fund the petitioner contributed, as required by law, prior to October 31, 1939, the aggregate sum of $9,851.72. To this fund the workmen contribute a designated percentage of their wages. (U.I.Act, sec. 44, St.1939, p. 2052.) This fund is augmented by appropriations from the federal government in accordance with the provisions of the Federal Social Security Act, 49 U.S.Stats. at Large, p. 620, 42 U.S.C.A. § 301 et seq. The state treasurer is ex-officio treasurer and custodian of the fund which he may disburse only by "direction of the commission". The commission is required to administer and disburse the funds in the manner provided by the Unemployment Insurance Act of California. For the purpose of administering this fund the commission is required to keep a system of books in which each employer is credited with all payments of money on that account. All unemployment benefits paid to workmen by the commission are charged to the account of each employer thereof. (U.I.Act, sec. 39, St.1939, p. 2147.) Each employer is given a merit rating dependent upon the unused money which he has contributed to the fund. (U.I.Act sec. 42.) The unlawful payment of unemployment wages automatically impairs an employer's merit rating and increases the future payments he is required to contribute to the fund. (U.I.Act, sec. 67, St.1939, p. 3010.) The petitioner has a vested interest in the trust fund entitling it to protest against unlawful expenditures of unemployment wages to its workmen, since such payments increase the contributions which it will be required to make to the fund and deprive it of its proper merit rating.

The corespondents, Cailteaux, Harvey, Haydock, Almeida and Martinez, and many others who are not named, were continuously employed by the petitioner as machinists in its San Francisco plant for a period of time long prior to May 22, 1939. Paragraph VII of the petition, the allegations of which are admitted by the answers, states that the above-named corespondents belonged to San Francisco Lodge No. 68, International Association of Machinists, a sister lodge of the Welders Union, Local No. 1330; that on the morning of May 24th the employees of petitioner at its San Francisco plant, who belong to said Welders Union, Local No. 1330, and affiliated with the International Association of Machinists "called a strike against petitioner as a result of a trade dispute between said union and said petitioner", and established a picket line at the entrance to its plant; that upon returning to their work on the morning of the last-mentioned day the named corespondents and many others refused to pass through the picket line or to return to their work in the plant "solely by reason of the continued existence of the strike and picket line carried on and maintained by said Welders Union, Local No. 1330"; that all other workmen who were employed in the plant, except those who belonged to the two previously-mentioned unions, continued to pass through the picket line and to perform their work in the plant daily during the entire period of the strike; that during the whole period of time involved in this proceeding there was ample work in the plant to keep the corespondents continuously employed, and that the corespondents were advised by one Harry Hook, an agent of their local labor union, not to return to their work in the plant during the "existence of said strike and picket line", which advice they followed and absented themselves from their

work from May 24th to July 10, 1939. It is not denied that a trade dispute existed in the petitioner's establishment during all of the time involved in this proceeding. That fact is conceded.

May 24th, after abandoning their jobs with petitioner, the corespondents registered for work in the Department of Employment, and claimed the benefit of unemployment wages. The adjustment unit of the unemployment compensation division of the commission denied their application. Two of the applicants appealed from that decision to the appellate board of the commission, which reversed the former decision and allowed the claims for unemployment wages. This petitioner then appealed to the commission pursuant to the provisions of section 72 of the act, St.1939, p. 3013. A formal hearing was held before the commission, which adopted findings and wrongfully determined that the two corespondents were entitled to unemployment wages under section 56 of the act. The petitioner thereby exhausted every remedy provided by the act. (U.I.Act, sec. 72.) The commission has repeatedly and consistently held under circumstances similar to those involved in this case, that workmen were entitled to unemployment wages in spite of the fact that they left their employment by reason of the fact that trade disputes exist in the establishments in which they work during the periods of time for which they claim benefits. At the hearing of this case the commission conceded that it would continue to allow and pay such unemployment wages under similar circumstances.

There is no substantial merit in either the motions to quash the alternative writ or the demurrers. This is not a suit for declaratory relief under section 1060 of the Code of Civil Procedure, as asserted by the respondents. It is a mandamus proceeding under section 1085 of the last-mentioned code to require the commission to administer the unemployment insurance trust fund in accordance with the clear language of the statute with respect to section 56 thereof.

[2] The petitioner has a right to maintain this proceeding to compel a lawful and proper administration of the trust fund and to prevent an unjust impairment of its merit rating, both as a party directly interested in the fund (sec. 1085, Code Civ.Proc.; Gillum v. Johnson, 7 Cal. 2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A. L.R. 595), and as a taxpayer. Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R. A. 312; Landsborough v. Kelly, 1 Cal.2d 739, 37 P.2d 93, 96 A.L.R. 707; Eby v. School Trustees, 87 Cal. 166, 25 P. 240; Winn v. Shaw, 87 Cal. 631, 25 P. 968; Yarnell v. City of Los Angeles, 87 Cal. 603, 25 P. 767; Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 50 P. 1025; Anderson v. Houts, Tex.Civ.App., 240 S. W. 647, 58 A.L.R. 588, 599.

[3] Section 67 of the Unemployment Insurance Act, relied on by the corespondents, does not bar this court from enjoining the illegal payment of benefits after the referee of the commission has directed the payment to be made. The portion of that section relied upon reads:

"If a referee affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken * * *."

The preceding language does not purport to apply to an appeal to a court of competent jurisdiction to prevent an unlawful payment of benefits. It applies only to an appeal from the order of a referee to the commission. It does not prohibit a court from staying the unlawful payment of benefits. That section is merely directory and procedural in character, while section 56 of the act is mandatory and controlling. If section 67 did purport to prohibit a court from interfering with unlawful payments of benefits it would be in conflict with article VI, section 1, of the California Constitution, and therefore void.

[4] We are of the opinion mandamus is a proper remedy where it clearly appears, as it does in the present proceeding, that the commission has abused its discretion in arbitrarily disregarding the plain and unambiguous provisions of the statute. Sec. 1085, Code Civ.Proc.; Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal.2d 75, 87 P.2d 848; Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 1045, 63 P.2d 810, 108 A.L.R. 595. The code section last cited provides in part: "It may be issued * * * to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station."

Section 1086 of the Code of Civil Procedure provides that: "The writ must be

issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested."

In the Gillum case, supra, by means of a writ of mandamus, the proprietor of the Hotel Claremont in Alameda County, who was the employer of several hotel workmen, sought to compel the commission in charge of the Unemployment Insurance Fund to fully comply with the act which is here involved, by paying to the state treasurer, as required by the statute, the money collected by the commission from the petitioner. The court held that the money so collected constitutes a tax levied upon both the employers and the employees, which becomes a trust fund in which both parties have a beneficial interest authorizing the maintenance of a mandamus proceeding. The court said: "The funds so deposited do not belong to the United States. The beneficial title thereto is in the state or in the state agency depositing the same, which in turn is trustee for those who had made the contributions, or for the beneficiaries under the state act."

[5] It is true that mandamus will not issue to interfere with the discretion of a board or commission in determining a duty or benefit imposed by law. 16 Cal.Jur. 820, sec. 34. But when a board or commission acts without jurisdiction or authority contrary to the clear and unambiguous language of a statute, or it has clearly abused its discretion with respect to its statutory authority, the writ will lie. The text in 38 Corpus Juris., page 598, section 74, to that effect is supported by a multitude of authorities, among which are numerous California cases. It reads in part: "The great weight of authority is to the effect that an exception to the general rule that discretionary acts will not be reviewed or controlled exists when the discretion has been abused. The discretion must be exercised under the established rules of law, and it may be said to be abused within the foregoing rule where the action complained of has been arbitrary or capricious, or based on personal, selfish, or fraudulent motives, or on false information, or on a total lack of authority to act."

[6] Where the clear language of a statute specifically directs a board or commission how to act upon undisputed evidence of facts involved, the tribunal has no discretion, authority or jurisdiction to disregard the statute and to arbitrarily act otherwise. In the present proceeding, section 56 of the Unemployment Insurance Act is clear and unambiguous with respect to the disallowance of unemployment wages during the time a "trade dispute is * * * in active progress in the establishment". That section reads:

"An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions:

"(a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

The dissenting opinion filed in this case by Commissioner Ansley K. Salz accurately and concisely expresses his conclusion regarding the undisputed facts: "I conclude that claimants voluntarily left their work because of a trade dispute and that they are ineligible for unemployment benefits under section 56(a), for the period during which they continued out of work because of the fact that the trade dispute was still in active progress in the establishment in which they were employed."

No one connected with this proceeding denies that a trade dispute was in active progress in the institution where the corespondents were employed during all of the time for which they claim benefits. Nor can it be reasonably said they left their employment involuntarily. Other union labor members continued to work in that plant during the entire time which is involved in this controversy. There is no intimation the corespondents would have been in danger of personal injury if they had attempted to pass the picket line. We may not presume that a striking group of workmen will violate the law by making an assault upon other workmen who attempt to peaceably pass a picket line to resume their employment. The law recognizes the right of peaceable picketing but not of the use of force and violence. It is conceded that workmen belonging to another labor group passed through the picket line and continued to perform their usual labor in the plant throughout the period of time which is here involved. Those men exercised their personal voli-

tion to work and continued to do so without personal violence or harm. It follows that the corespondents exercised their volition not to pass through the picket line or to work in the plant while the trade dispute and strike were in progress. Evidently the corespondents, and their associates in Lodge No. 68, ceased to work and participated in what is commonly called a sympathetic strike to aid and assist the Welders Union, Local No. 1330, to win its labor dispute. It does not appear there was any agreement between those two labor organizations to render support to each other by sympathetic strikes in case of pending labor disputes. Even though there was such an agreement it could not affect the rights of this petitioner who was not a party to any such secret understanding. To hold that such an agreement would warrant the commission in determining that the corespondents did not voluntarily leave their work, and that they are therefore entitled to unemployment benefits, would place above the laws a secret agreement between labor organizations to which an employer is not a party. This trust fund was not created to be used as a weapon to coerce employers to submit to the demands of striking employees by paying the maintenance of workmen while they engage in prosecuting a strike. Nor was it intended to be used as an instrument to aid strike-breaking. On the contrary, it was enacted for the avowed purpose of assisting workmen while they are out of employment through no fault of their own. It is specifically provided that they may not recover benefits if they leave their work on account of an existing labor dispute in the plant where they are employed. The record is undisputed that the corespondents left their work at the petitioner's plant solely because of the existence of a labor dispute in that establishment.

[7] Section 56 of the Unemployment Insurance Act does not purport to grant benefits to workmen who leave their jobs voluntarily. It specifically denies benefits to workmen out of employment in a particular plant during the time a trade dispute of any sort is in actual progress in that establishment, provided they leave their employment on account of that labor dispute. The world "left", as it is used in paragraph (a) of section 56, has no mysterious meaning. From the context of the paragraph its meaning is clear and certain. It merely means that when the employee has departed or absented himself from his work, and fails to return to it, he is not entitled to benefits. There is no merit in the strained construction which is placed upon that word by some of the respondents.

Nearly every state of this Union possesses unemployment compensation acts similar to that of California. These statutes were inspired by the English National Insurance Act, 1911. (Stats. 1-2, Geo. V.) Section 87 (1) of the last-mentioned act provides in part that: "A workman who has lost employment by reason of a stoppage of work which was due to a trade dispute at the factory, workshop, or other premises at which he was employed, shall be disqualified for receiving unemployment benefit so long as the stoppage of work continues."

[8] These statutes are enacted under police powers to minimize the harmful effect on society of unemployment of large numbers of workmen, who become idle through no fault of their own. The California statute declares that it is enacted for "the public good and the general welfare" to inaugurate "a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum". St.1939, p. 1968, § 1.

The British act has been consistently construed to deprive unemployed workmen of benefits thereunder, whether they participate in strikes and labor disputes or not, so long as the labor controversy which caused them to cease working remains in progress in the plant where they are employed.

The English statute was amended in 1924, by section 4 (1) (Stats. 14-15, Geo. V), relieving the workmen from the absolute disqualification to receive benefits provided they could prove that they were neither financially or otherwise interested in the trade dispute and that they did not belong to the labor union, grade or class of workmen which inaugurated and maintained the strike or trade dispute.

In five states of this Union, including California, unemployment insurance acts have been adopted which are more stringent in their terms than the English law. In those five states—Wisconsin, Kentucky,

Ohio, New York and California—the workmen are absolutely disqualified from receiving benefits regardless of whether they are interested in or participants in a strike or labor dispute, provided they leave their employment on account of a pending labor dispute. In the last-mentioned states non-interest and non-participation in the trade disputes on the part of the claimants are not conditions which are mentioned or which may be considered in construing the clear and unambiguous language of those statutes. The California statute contains no such conditional clause as is now present in the English statute as amended, and in those of most of the states of this Union. The only question to be determined in this case is, Did the corespondents leave the plant and fail to return to their work on account of the existence of a trade dispute therein? In other words, would they have continued to perform their work in the plant except for the existence of the trade dispute therein? Upon that question there can be no doubt. The record is uncontradicted that the agent of their Lodge No. 68 advised them not to pass through the picket line, and that they accepted that advice and refused to do so, although numerous workmen belonging to other unions continued to pass through the line and to perform their work throughout the entire period of time which is here involved.

[9] It is argued that the corespondents did not voluntarily "leave their work", since they belong to a labor union affiliated with the striking union, and that there is a recognized principle in vogue among labor unions that under certain circumstances the passing of members of one labor unit through the picket line established by another group, characterizes the invaders as "strike-breakers", for the reason that they thereby aid and encourage the cause of the employers to the detriment of the strikers. That is a mere private rule adopted for the mutual benefit of associated labor organizations. It is not a general rule of law. Assuming that it is a justifiable conclusion regarding the effect of passing through a picket line, the converse of the rule must also be equally true, that one who refuses to pass through the picket line thereby aids, assists and supports the cause of the striking union as against the employers. It follows that those who refuse to pass through the line are interested and thereby participate in the trade dispute and strike. In that event, under the statutes of every state of this Union and of England, such workmen would be prohibited from participating in unemployment wages while they remain away from their employment. Certainly that is the incontrovertible and explicit language of the California statute.

In the state of Washington, which has an unemployment statute similar to the English law, 800 employees of a lumber mill, who refused to pass through the picket lines established at the mill by a union labor group to which the claimants did not belong, were refused compensation. (In re St. Paul & Tacoma Lumber Co., etc., Docket No. A-1, App.Trib.Unemp.Comp. and Placement, state of Washington.) It was there held that the refusal to pass through the picket line constituted acts of participation in and the establishment of a direct interest in the trade dispute. It is interesting to note the similarity of the Washington act to the English law. Section 5 of the Washington statute (Laws 1937, chap. 162, as amended in 1939, chap. 214) reads in part: "An individual shall be disqualified for benefits: * * * (e) For any week with respect to which the commissioner finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, * * *."

That statute provides that the preceding section does not apply if:

'(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

"(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute."

It will be observed the California act contains no such modifying clause as the preceding statute contains, which will conditionally exempt workmen from the disqualification to receive benefits. To read the foregoing conditional language into the California statute would amount to judicial legislation, which is forbidden by law. In fact, an amendment to section 56 of the California act, conforming almost exactly to the conditions found in the English statute, was presented to the last legislature and failed of enactment.

Poe v. Seaborn, 282 U.S. 101, 51 S.Ct. 58, 75 L.Ed. 239; 25 R.C.L. 1039, sec. 271. In view of the clear and explicit language of our statute in that regard, we must presume the legislature thereby deliberately refrained from so liberalizing the California Unemployment Insurance Act.

[10] Much space in respondents' briefs and much time in their oral arguments were devoted to a recital of the anticipated evils or detriment to unemployed workmen which may follow the construction of section 56 of the act so as to deny them benefits under the circumstances of this case. If voluntary membership in a labor organization which enforces an agreement with another auxiliary union to participate in sympathetic strikes causes the employees to abandon their work, it may reasonably be said their voluntary membership is the primary cause of their loss of employment. The law, however, recognizes no such private agreement or labor practice which will guarantee sympathetic strikers compensation from the fund under section 56 of the act. That argument, in effect, is advanced on the theory that the harm which may follow a literal construction of the language of that section indicates that the legislature did not intend to deny benefits to employees who involuntarily left their work while a labor dispute existed in the establishment in which they were employed. In other words, the respondents urge the application of an ordinary rule of construction to determine the intention of the legislature with respect to the meaning of section 56 of the act. Section 56 (a) is so clear and unambiguous that it requires the application of no rules of construction to ascertain the intention of the legislature. Those rules may be resorted to only when the statute is uncertain or ambiguous. When the language and meaning of a statute is clear and certain, there is no room for the application of the rules of construction. Sec. 1858, Code Civ.Proc.; In re Mitchell, 120 Cal. 384, 52 P. 799; 25 R.C.L. 957, sec. 213. In the authority last cited it is said in that regard:

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. When the meaning of a law is evident, to go elsewere in search of conjecture in order to restrict or extend the act would be an attempt to elude it, a method which, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless. In such a case arguments from the reason, spirit, or purpose of the legislation, from the mischief it was intended to remedy, from history or analogy for the purpose of searching out and justifying the interpolation into the statute of new terms, and for the accomplishment of purposes which the lawmaking power did not express, are worse than futile. They serve only to raise doubt and uncertainty where none exist, to confuse and mislead the judgment, and to pervert the statute."

[11] We conclude that section 56 (a) of the statute is so clear and unambiguous that it does not require an application of the ordinary rules of construction to determine the meaning intended by the legislature. It follows that the commission has clearly abused its discretion in allowing unemployment benefits to workmen under the circumstances of this case.

The motions to quash the alternative writ are denied. The demurrers are overruled. Let the peremptory writ of mandamus issue. The commission is directed to comply with the prayer of the petition and disallow benefits to the corespondents, Haydock, Almeida and Martinez, between the dates of May 24, 1939, and July 10, 1939, and to credit to the petitioner's account all benefits heretofore paid to the other corespondents, and to disregard entirely the said claims of the corespondents in determining and fixing the petitioner's merit rating under the Unemployment Insurance Act.

GANTNER & MATTERN CO. v. CALIFORNIA EMPLOYMENT COMMISSION et al.*

Civ. 6415.

District Court of Appeal, Third District, California.

April 4, 1940.

Hearing Granted May 31, 1940.

1. Mandamus ⇐3(8)

Under provision of the Unemployment Insurance Act providing that any party to a decision by a referee may appeal to employment commission from such decision, and commission may, on its own motion, affirm, modify or set aside any decision of referee on basis of evidence previously submitted in such case or direct taking of additional evidence, party aggrieved by a decision of referee must first exhaust his statutory remedies of appeal before he can maintain mandamus to prevent employment commission from paying unemployment benefits to employees who left their work because of strike and picket line. St.1939, p. 3013, § 72.

2. Mandamus ⇐3(8)

An employer dissatisfied with the decision of a referee of the employment commission recommending that benefits be paid to employees who left their work because of strike and picket line could not maintain mandamus to prevent payment of unemployment benefits to such employees without first exhausting the statutory remedy of appeal from referee's decision on ground that employment commission by a long line of decisions had made plain its views as to law applicable to the situation and that it would have been idle act to have asked for a review by commission. St.1939, p. 3013, § 72.

Mandamus proceeding by the Gantner & Mattern Company against the California Employment Commission and others.

Writ denied.

Milton Marks, of San Francisco, for petitioner.

M. B. Plant and Brobeck, Phleger & Harrison, all of San Francisco, amici curiæ.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., and Maurice P. McCaffrey, of San Francisco, for respondent California Employment Commission.

Gladstein, Grossman & Margolis, of San Francisco, for interveners.

PER CURIAM.

Petitioner herein is a corporation engaged as a manufacturer and wholesaler of knit goods. Among its many employees were janitors, who were members of the Building Service Employees' International Union, Local No. 87; some 150 others were engaged as employees in the manufacturing, packing and shipping of knit goods and were members of Knitgoods Workers' Union, Local No. 191, International Ladies' Garment Workers' Union; still other employees, according to their particular craft or occupation, were members of Office Employees' Union, Local No. 21320, Machinists Lodge No. 68, Warehousemen's Union, Local No. 860, and Building Service Employees' International Union, Local No. 87.

On October 10, 1939, petitioner discharged a janitor then in its employment, who was a member of the Building Service Employees' International Union heretofore referred to. Thereafter the union demanded of petitioner that it re-employ and reinstate the janitor, which demand was, by petitioner, refused. On October 16, 1939, the Building Service Employees' Union declared a strike against said petitioner, and established a picket line at the factory of the Gantner & Mattern Company, in which picket line the several unions, except the Knitgoods Workers, joined and participated.

Upon the declaration of the strike and the establishment of the picket line the members of the Knitgoods Workers' Union left their work at the establishment of petitioner and refused and still refuse to return to their work at the plant of petitioner.

Thereafter these employees, members of the Knitgoods Union, made application to the respondent commission for the payment to them of unemployment benefits, and pursuant to an order of respondent commission, petitioner filed a list of its employees, members of the Knitgoods Union who were in its employment at the time the strike was declared, and who had left their work because of the strike and picket line. Subsequent to the filing of such list of employees, respondent commission, through its adjustment unit, ordered and directed the payment of unemployment benefits to the employees of petitioner, members of the Knitgoods Workers' Union. Thereafter, and within the time fixed by the Unemployment

* Subsequent opinion 109 P.2d 932.

Insurance Act (Stats. 1935, chap. 352, p. 1226) petitioner filed with respondent commission an appeal in writing from the decision of the adjustment unit of the respondent commission, setting forth that the jobs of said employees were then and there at all times open to said employees, and that these employees had left their work because of a strike and the maintenance of a picket line and were disqualified to receive benefits under the provisions of the act, and particularly section 56 thereof, St. 1939, p. 8.

Upon the filing of this appeal with respondent commission, it was referred to a referee who, after a hearing, recommended that unemployment benefits be paid to said employees, members of Knitgoods Workers' Union, Local No. 191.

To prevent such payments, petitioner, by this writ of mandate, seeks to prevent respondents from paying any unemployment benefits to the members of the Knitgoods Workers' Union, to recover back all benefits already paid to them, and to enforce the provisions of the Unemployment Insurance Act.

Many of the points urged by respondents in answer and opposition to the application for this writ are fully considered in the case of Bodinson Manufacturing Co. v. California Employment Commission et al., Cal. App., 101 P.2d 165, filed this day. We need not again discuss the principles there established, but one point urged in this proceeding did not there arise, and we will direct our attention to that matter.

The point so urged in this proceeding is that petitioner has failed, without justifiable excuse, to exhaust his statutory remedies, and for that reason this court should refuse to issue its writ of mandate.

[1] Section 72 of the Unemployment Act as amended in 1939, St. 1939, p. 3013, provides that any party to a decision by a referee may appeal to the commission from such decision, and the commission may, on its own motion, affirm, modify or set aside any decision of the referee on the basis of the evidence previously submitted in such case or direct the taking of additional evidence.

We are of the opinion that where a procedure is provided, as here, that a party must first exhaust his statutory remedies before this court can intervene.

San Joaquin, etc., Company v. County of Stanislaus et al., 155 Cal. 21, 99 P. 365, holds that a water company engaged in the business of furnishing water for irrigation cannot maintain an action to have declared void orders of the board of supervisors establishing the maximum rates for water, and to enjoin the enforcement of such rates, on the ground that the same were unfair and unreasonable. if the company had made no attempt within a year to secure a readjustment of the rates by petition to the supervisors.

In re Kehr, 190 Cal. 401, 212 P. 913, in which a writ of mandate to compel a superior court to hear a petition for distribution, where money had been paid to the state treasurer under the provisions of section 1737 of the Code of Civil Procedure, was denied on the ground that the remedy of petitioner was first by proceedings found in section 1272a of the Code of Civil Procedure.

Teeter v. Los Angeles, 209 Cal. 685, 290 P. 11. Here a property owner attempted to enjoin a city from carrying out the terms of a contract to improve certain streets. He failed, however, to first file his protest before the city council, as required by the Street Improvement Act of 1911, and a writ was denied.

Collier v. Astor, 9 Cal.2d 202, 70 P.2d 171, "Any action involving a controversy arising under the Private Employment Agency Act [Stats. 1913, p. 515] brought in the superior court, without first referring the controversy to, and securing the determination of, the labor commissioner, is prematurely brought, and cannot be maintained." (Syllabus.)

[2] It is here argued by petitioner that by a long line of decisions the commission has made plain its views as to the law applicable to a situation similar to the one now before us, and that it would have been an idle act to have asked for a review by the commission. But be that as it may, we cannot presume that the commission, having adopted a particular rule or policy in like cases in the past, would necessarily have applied the same rule in the case at bar. The exhaustion of remedial procedure as laid down by the statute is required unless the petitioner can positively state that the commission has declared what its ruling will be in the particular case, and that petitioner is unable to do.

For that reason, and upon that ground, the writ of mandate is denied.

38 Cal.App.2d 405

REED et al. v. MOLONY et al.

Civ. 6329.

District Court of Appeal, Third District, California.

April 11, 1940.

1. Appeal and error ⇐236(2)

Plaintiffs who made no request that trial court permit filing of amended pleading "waived" right to do so and could not on appeal complain of abuse of discretion by trial court in failing to permit filing of such a pleading.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

2. Replevin ⇐57

Complaint in replevin action which charged members of Board of Medical Examiners and special officer of the board as public officers, with unlawfully searching private residence and seizing without a warrant, plaintiffs' personalty, including liberty bonds, notes, mining stock, and formula for producing motion picture films which special investigator stated would develop valuable evidence to show that plaintiffs had been practicing medicine without a license, failed to state a cause of action. Gen.Laws 1931, Act 4807, § 5; Pen.Code, § 817.

3. States ⇐45

Members of the State Board of Medical Examiners were "public officers" and special officer of the board, employed to investigate unlawful practice of medicine, was a "public peace officer". Gen.Laws 1931, Act 4807, § 5; Pen.Code, § 817.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Officers", and "Public Peace Officer".

4. Pleading ⇐8(3)

Allegation that a special investigator for State Board of Medical Examiners acted in official capacity and under color of office in seizing property of plaintiffs, was mere "conclusion of law". Gen.Laws 1931, Act 4807, § 5; Pen.Code, § 817.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

5. States ⇐78

Plaintiffs could not recover from State Board of Medical Examiners for tort of special officer of the board who allegedly unlawfully seized personalty belonging to plaintiffs, acting illegally and without a warrant, and without specific direction or cooperation of members of board, since under such circumstances "respondeat superior doctrine" was inapplicable. Gen.Laws 1931, Act 4807, § 5; Pen.Code, § 817.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior Doctrine".

6. Replevin ⇐57

In action of replevin based on alleged illegal seizure of plaintiffs' personalty by special officer of State Board of Medical Examiners, complaint which charged special officer in his official capacity only and not individually was insufficient to state cause of action against special officer. Gen.Laws 1931, Act 4807, § 5; Pen.Code, § 817.

7. Parties ⇐71

The character in which one is made a party to a suit must be determined from allegations of pleading.

8. Officers ⇐119

A pleading must specifically show whether suit against a public officer for negligence or misconduct is brought in his individual and private capacity or as an officer.

9. Judgment ⇐244

Generally a complaint against one in his official or representative capacity will not support a judgment against him in his individual capacity.

10. Limitation of actions ⇐66(14)

Action for recovery of personalty which was allegedly illegally seized without a warrant more than three years before action was brought was barred by limitations even though demand for return of personalty was made within three years before action was commenced. Code Civ.Proc. § 338, subd. 3.

11. Limitation of actions ⇐55(5)

In action for claim and delivery of personalty or in suit of trover for conversion of property, limitation runs from time of wrongful taking of possession or illegal exercise of dominion over the property. Code Civ.Proc. § 338, subd. 3.

12. Limitation of actions ⇐66(14)

Only when personalty is legally taken is statute of limitations tolled until owner demands and is refused possession of personalty. Code Civ.Proc. § 338, subd. 3.

13. Replevin ⇐62

In replevin action for recovery of formula for production of motion picture films, allegation that plaintiffs could have received royalties amounting to $200,000 a month from the formula was too remote, uncertain and speculative upon which to base claim for special damages.

14. Damages ⇐144

Facts upon which special damages for prospective earnings depend must be particularly stated in a pleading.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action of replevin by Frances E. Reed and another against William R. Molony, M. D., and others, members of the Board of Medical Examiners of the State of California, and another, to recover personalty or the value thereof together with alleged loss of possible earnings from a certain formula for development of motion picture films. From an adverse judgment, the plaintiffs appeal.

Affirmed.

Martin E. Geibel, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a judgment rendered against them pursuant to an order of court sustaining a general and special demurrer to their second complaint without leave to amend the pleading. By means of replevin the complaint demanded recovery of possession of specific personal property or the value thereof together with alleged loss of possible earnings from a certain formula for the development of moving picture films.

The demurrer was filed by Mr. Molony, one of the members of the board, jointly with Mr. Byrne, the special officer. It was sustained on the ground that the members of the State Board of Medical Examiners are not liable for the tort of a subordinate officer even though it was performed under color of his office, and that the liability for the tort is barred by the statute of limitations.

Each defendant is sued as a member of the State Board of Medical Examiners, except William A. Byrne, who is sued as a special officer of the board. It is alleged that Byrne was employed as a special investigator of the board to secure evidence against other individuals for violations of the Medical Act of California under section 5 thereof. Stats.1913, p. 722, and amendments; Deering's Gen.Laws of 1931, p. 2344, Act 4807. It is not alleged that the plaintiffs, or either of them, are physicians or that they were charged with violating any provision of the Medical Act. No such charge was made or filed against them. The only allegation of that nature contained in the complaint is the conclusion that Byrne secured information that Frederick W. Reed "had in his possession certain articles" which he "believed the possession of * * * constituted a violation of the provisions of the Medical Practice Act", consisting of United States Liberty Bonds in the sum of $3,000, two promissory notes of $1,000 each, a number of shares of Abilene Group Mining Stock of the par value of $6,000 and a formula for the production of motion picture films, from which "plaintiffs could have received royalties amounting to Two Hundred Thousand Dollars ($200,000.00) a month". It is not stated how the possession of this property constituted a violation of the Medical Act. It is alleged that, in September, 1928, William A. Byrne, in his official capacity, illegally, without a search warrant or an order of court, and against the protest of the plaintiffs, entered their home in Los Angeles, and took from their possession the previously described property, saying with respect to the moving picture film formula, "This formula is a medical formula. It will develop valuable evidence to show that you have been practicing medicine without a license." It is also alleged that the property in question was never used as evidence in any proceeding and that the defendants have failed to return it to plaintiffs, who, at all times mentioned in the complaint were, and now are the owners thereof; that "by reason of said Byrne * * * keeping said notes, * * * the same have become outlawed, and plaintiffs have thereby suffered the loss of the payment of the same"; that plaintiffs sustained a loss of $200,000 a month from December 1, 1928, on account of being deprived of possession of the moving picture film formula. Finally it is alleged demand was

made October 18, 1935, upon the officer William A. Byrne, as agent of the board for return of the property, with which they failed to comply. Judgment for recovery of possession of the property is demanded, and upon failure to do so the complaint prays for damages for the value of the promissory notes and accrued interest, the liberty bonds and accrued interest, the mining stock, royalties in the amount of $200,000 a month from December 1, 1928, alleged to have been lost by being deprived of possession of the formula, together with costs and counsel fees. Clearly the defendants are sued in their official capacity only, and not as individuals.

We are of the opinion the general and special demurrer to the second amended complaint was properly sustained for the reasons that the pleading is uncertain and defective in several respects, and because it fails to state facts sufficient to constitute a cause of action on a theory of either replevin or conversion.

[1] The appellants may not complain of an abuse of discretion on the part of the trial court in failing to permit the filing of another amended pleading since no request to do so was made. That privilege was therefore waived. Powell v. Lampton, 30 Cal.App.2d 43, 85 P.2d 495.

[2] The complaint fails to state a cause of action. The transaction complained of is surrounded with mystery and uncertainty. The defendants are charged, as public officers, with unlawfully searching a private residence and seizing valuable personal property without a warrant. There is no allegation that a complaint was ever filed against the plaintiffs by the State Board of Medical Examiners charging plaintiffs or either of them with a violation of any provision of the Medical Act, or that they threatened to do so. There is no allegation that the defendants ever accused the plaintiffs or either of them with practicing medicine without a license, or with any other violation of the Medical Act. There is no allegation that the special officer, Byrne, was directed by the board to search the residence of plaintiffs or to seize the property in question. There is no allegation of any statement made by Byrne or by any member of the board that any of the property seized would be held or used by the board as evidence in an action pending or to be brought against the plaintiffs. The only statement in the complaint, in that regard, is that Mr. Byrne said concerning the formula: "It will develop valuable evidence to show that you have been practicing medicine without a license." No excuse for taking or retaining the bonds, notes or stock is alleged. It seems preposterous to assume that the liberty bonds, the promissory notes, the mining stock or the formula for producing moving picture films would or could have any bearing on a possible charge of violating the Medical Act. If that property was seized as alleged, it was unlawfully done without color of official right. There is no allegation as to when the promissory notes matured, or why suit was not or could not have been brought upon them before they became outlawed. There is no specific allegation that plaintiffs had a contract for royalties on the formula for moving picture films, or how they could have earned royalties thereon if they had possessed the formula. It is merely stated as a speculative conclusion that they "could have received royalties amounting to Two Hundred Thousand Dollars ($200,000) a month" if they had had possession of the formula. The means of earning that alleged sum is uncertain, prospective and visionary. It is alleged that a demand for the return of the property was not made until October 18, 1935, which is more than seven years after it was seized. Four years have elapsed since the complaint was filed. The unwarranted delay, peculiar circumstances and uncertainties of the allegations of the complaint indicate there is no merit in this action.

[3-5] The defendants are sued in their official capacity. The members of the State Board of Medical Examiners are public officers. The special officer, Byrne, was a public peace officer. Sec. 817, Pen.Code. Since it is alleged that Wm. Byrne is a mere subordinate officer of the board and that he illegally seized and retains the property without specific direction or cooperation of the members of the board, they are not liable for his tort. Hilton v. Oliver, 204 Cal. 535, 269 P. 425, 61 A.L.R. 297; Michel v. Smith, 188 Cal. 199, 205 P. 113; 102 A.L.R. 174, note. The allegation that Byrne acted "in his official capacity and under color of his office", is a mere conclusion of law. People, to Use of Purdy v. Pacific Surety Co., 50 Colo. 273, 109 P. 961, Ann.Cas.1912C, 577. Clement v. Dunn, 114 Cal.App. 60, 299 P. 545. In the present case it is affirmatively alleged that Byrne acted illegally without a warrant. Under such circumstances the members of the

board are not liable for the tort of a subordinate officer, for the reason that the doctrine of respondeat superior does not apply. In Michel v. Smith, supra, a judgment for damages for false imprisonment against a chief of police and a sergeant, together with two subordinate officers, was reversed on the ground that the doctrine of respondeat superior did not apply so as to render the chief and sergeant of the police department liable for the tort of inferior officers, since the superior officers did not direct or participate in the illegal arrest. The syllabus correctly states the law of that case as follows: "A public officer is not responsible for the acts of omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done or has personally cooperated therein."

In the case of Hilton v. Oliver, supra, a judgment against the trustees of a reclamation district for damages for the tort of subordinate officers was reversed for the same reason assigned in the Michel case. The court said in that regard [204 Cal. 535, 269 P. 426, 61 A.L.R. 297]: "The defendant trustees can be held liable under the facts shown herein only by reason of the application of the doctrine of respondeat superior. This doctrine has no application as between a public officer and his subordinates, who are likewise in the public service, unless the public officer has directed or countenanced the tortious acts to be done, or has co-operated therein."

[6-9] Clearly the demurrer was properly sustained as to Mr. Molony and the members of the board. We are of the opinion it was also properly sustained as to Mr. Byrne in the capacity of a special officer of that board. Assuming that Mr. Byrne would be personally liable for wrongfully seizing and retaining the plaintiffs' property in the illegal manner described in the complaint, the pleading is fatally defective in failing to sue him as an individual. No judgment against Byrne or any other named defendant, in his individual capacity, is sought. The language of the complaint leaves no doubt that the defendants are each charged in his official capacity, only, with the tort of illegally seizing and retaining the property in question. The defendants, as individuals, are not parties to the suit. The character in which one is made a party to a suit must be determined from the allegations of the pleading. 47 C.J. 176, sec. 327. It is essential that a pleading shall specifically show whether a suit against a public officer for negligence or misconduct is brought in his individual and private capacity or as an officer. Van Cleave v. Bucher, 79 Cal. 600, 21 P. 954. In the case last cited it was held a demurrer to the complaint was properly overruled since the pleading clearly charged the defendant with a tort in his official capacity. Ordinarily a complaint against one in his official or representative capacity will not support a judgment against him in his individual capacity. The distinction is apparent.

[10-12] Under the pleading in this case the action is barred by the statute of limitations. Sec. 338, Code Civ.Proc.; Benoist v. Benoist, 178 Cal. 234, 172 P. 1109; San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 239 P. 319; 5 Cal.Jur. 172, sec. 11; 24 Cal.Jur. 1036, sec. 14. In an action for claim and delivery of personal property or in a suit of trover for the conversion of property, the statute of limitations runs from the time of the wrongful taking of possession or the illegal exercise of dominion over the property. Sec. 338, subd. 3, Code Civ.Proc. In the present case it is alleged the property was illegally seized without a warrant in September, 1928, and that demand for the possession thereof was not made by plaintiffs for over seven years. It is only when personal property is legally taken that the statute of limitations is tolled until the owner demands and is refused possession of it. 24 Cal.Jur. 1036, sec. 14.

[13, 14] The allegation that the plaintiffs "could have received royalties amounting to Two Hundred Thousand Dollars ($200,000) a month" from the formula for the production of moving picture films is too remote, uncertain and speculative, upon which to base a valid claim for such special damages. The facts upon which special damages for prospective earnings depend must be particularly stated in a pleading. Shaw v. Southern Pac. Ry. Co., 157 Cal. 240, 107 P. 108; 8 Cal.Jur. 889, sec. 127.

The demurrer was properly sustained. The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

PEOPLES STATE BANK v. IMPERIAL IRR. DIST. et al.

L. A. 17248.

Supreme Court of California.

April 16, 1940.

Rehearing Denied May 16, 1940.

1. Bankruptcy ⇐3

Provision of the federal Bankruptcy Act authorizing composition of debts of described taxing agents of state, but requiring consent of state, is not unconstitutional, as applied to California irrigation district, which proposed to file a voluntary application with state's consent, as interfering with state's essential independence as preserved by the Federal Constitution. Bankr.Act, §§ 81–84, 11 U.S.C.A. §§ 401–404.

2. Bankruptcy ⇐3

The state statute authorizing any taxing district in state to file proceedings for composition of their debts under federal Bankruptcy Act is not unconstitutional, as an attempt to surrender power of taxation, but rather state acts in aid, not in derogation, of its sovereign power, in that it invites intervention of bankruptcy power of federal government to save its agencies which state itself is powerless to rescue. St.1934, Ex.Sess., p. 5; Bankr.Act, §§ 81–84, 11 U.S.C.A. §§ 401–404.

3. Bankruptcy ⇐38

Where state act, repealing the act which gave consent to taxing agencies of state to file proceedings for composition of their debts under federal Bankruptcy Act, contained express proviso that its repeal should not impair any proceeding commenced under federal Bankruptcy Act while state act was in effect and, in the repealing act, a new consent was given to taxing agencies, the state had given its consent to irrigation district to file proceedings under federal Bankruptcy Act, whichever of two statutes might be held applicable. St.1934, Ex.Sess., p. 5; St.1939, p. 1009; Bankr.Act, §§ 81–84, 11 U.S.C.A. §§ 401–404.

EDMONDS and HOUSER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Imperial County; Frank J. Macomber, Judge.

Action by the Peoples State Bank against the Imperial Irrigation District and the Board of Directors of the Imperial Irrigation District, for declaratory relief and for an injunction to enjoin the defendants from filing a petition in bankruptcy. From a judgment dismissing the action, the plaintiff appeals.

Affirmed.

Prior opinion, 93 P.2d 1015, in which rehearing was denied in 94 P.2d 370.

W. Coburn Cook, of Turlock, for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco, amici curiæ.

Call, Murphey & Davis, of Los Angeles, amici curiæ for Lynn Atkinson.

Herman Phleger, Brobeck, Phleger & Harrison, Pillsbury, Madison & Sutro, and Hugh K. McKevitt, all of San Francisco, amici curiæ.

Clark, Nichols & Eltse and George Clark, all of Berkeley, and David Freidenrich and Ralph Alfred Wood, Jr., both of San Francisco, amici curiæ.

Harry W. Horton and George R. Kirk, both of El Centro, for respondents.

CURTIS, Justice.

This action was instituted by the plaintiff, the owner and holder of five one-thousand dollar bonds of the defendant irrigation district, together with attached coupons, for declaratory relief and for an injunction restraining and prohibiting the defendant district from instituting proceedings under chapter X (now chap. IX) of the United States Bankruptcy Act. Chapter X (now chap. IX) of said act comprises sections 81 to 84 of said Bankruptcy Act. Said chapter was enacted as an amendment to the bankruptcy statute on August 16, 1937. 50 U.S.Stats., p. 653, 11 U.S.C.A. §§ 401–404.

Count 1 of the complaint purports to set forth a cause of action entitling the plaintiff to declaratory relief in an alleged actual controversy between the plaintiff and defendants "as to the right of the defendants to file a petition under the bankruptcy act", and count 2 of the complaint is for an injunction directed to the defendants restraining them from filing any proceedings under the bankruptcy laws of the United States. The defendants appeared and filed both a general and special demurrer to said complaint. On the hearing of said demurrer, the trial court sustained the same and dismissed the action. From the judg-

ment following said order of dismissal the plaintiff appealed to this court.

The contentions of the appellant are (1) that an irrigation district organized under the laws of this state is a governmental agency and as such is not subject to said chapter X (now chap. IX) of the United States Bankruptcy Act, and (2) that the state has not given its consent to the filing of a petition for composition of its debts by an irrigation district under the Bankruptcy Act of the United States, as amended by the enactment of said chapter X (now chap. IX) thereof.

Each of these two contentions has been, in our opinion, completely answered adversely to the appellant by the opinion of the Supreme Court of the United States in the case of United States v. Bekins, 304 U.S. 27, 58 S.Ct. 811, 82 L.Ed. 1137. The facts in that case show that the Lindsay-Strathmore Irrigation District, organized under the laws of this state, sought to take advantage of the amendment to the United States Bankruptcy Act, being chapter X (now chap. IX) of said bankruptcy act (which purports to provide a method of relief for certain taxing agencies by permitting them to file a proceeding for the composition of their debts) and chapter 4 of the 1934, Extra Session Statutes of this state, p. 5. Chapter 4 of the 1934, Extra Session Statutes, purports to grant permission to "taxing districts, as described in Chapter IX" of the United States Bankruptcy Act to file proceedings for the composition of their debts under said act, "or as the same may be modified from time to time". In other words, the proceeding instituted by the Lindsay-Strathmore Irrigation District which was considered by the court in the last named case is precisely like that which the appellant alleges the respondents are proposing to institute unless prohibited by order of court. Upon the filing of such a petition in the United States District Court by the Lindsay-Strathmore Irrigation District, Milo Bekins, and others, holding unpaid bonds of the district, appeared in said action and filed objections to the granting of the district's petition. The district court sustained the objection of Bekins and associates, and an appeal was taken from the judgment of the district court to the United States Supreme Court. On appeal the appellees laid special stress upon the case of Ashton v. Cameron County Water Improvement District, 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309, wherein the court had declared unconstitutional the original chapter IX of the U. S. Bankruptcy Act, 11 U.S.C.A. § 301 et seq., on the ground that said act might materially restrict the state's control over its fiscal affairs. In commenting on that objection to chapter IX, and referring to the amendment as contained in chapter X thereof, the court, in the Bekins case, page 50 of 304 U.S., page 815 of 58 S.Ct., 82 L. Ed. 1137, explained, "In enacting chapter 10 the Congress was especially solicitous to afford no ground for this objection. In the report of the Committee on the Judiciary of the House of Representatives, which was adopted by the Senate Committee on the Judiciary, in dealing with the bill proposing to enact chapter 10, the subject was carefully considered".

The court then quotes portions of the report of the House Judiciary Committee in which it refers to "the sweeping character" of the Ashton case, and expresses its belief that the proposed amendment to the United States Bankruptcy Act "is not invalid or contrary to the reasoning of the majority opinion".

After its quotation from the report of the House Judiciary Committee, the court in the Bekins case continues (304 U.S. at page 51, 58 S.Ct. at page 815, 82 L.Ed. 1137): "We are of the opinion that the Committee's points are well taken and that chapter 10 is a valid enactment. The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs. The bankruptcy power is exercised in relation to a matter normally within its province and only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by state law."

Prior to the foregoing statement the court had given consideration to the effect and validity of chapter 4 of the statutes of this state enacted at the 1934 special session. In respect to said statute the court (304 U.S. at page 47, 58 S.Ct. at page 814, 82 L.Ed. 1137) stated: "It is unnecessary to consider the question whether chapter 10 would be valid as applied to the irrigation district in the absence of the consent of the State which created it, for the State has given its consent. We think that this sufficiently appears from the statute of California enacted in 1934. St. of 1934, Ex. Sess., c. 4, p. 5. This statute (section 1)

adopts the definition of 'taxing districts' as described in an amendment of the Bankruptcy Act to wit chapter 9 approved May 24, 1934, 11 U.S.C.A. §§ 301-303, and further provides that the Bankruptcy Act and 'acts amendatory and supplementary thereto, as the same may be amended from time to time, are herein referred to as the "Federal Bankruptcy Statute."' Chapter 10 of the Bankruptcy Act is an amendment and appears to be embraced within the state's definition. We have not been referred to any decision to the contrary. Section 3 of the state act then provides that any taxing district in the State is authorized to file the petition mentioned in the 'Federal Bankruptcy Statute.' Subsequent sections empower the taxing district upon the conditions stated to consummate a plan of readjustment in the event of its confirmation by the federal court. The statute concludes with a statement of the reasons for its passage."

The statement of the reason for the enactment of the statute is contained in section 13 of said chapter 4, and is found on page 10 of the statutes of 1935. This volume of the statutes includes those statutes enacted at the special session of 1934, as well as those of the 1935 regular session. It is not necessary for the purpose of this opinion to set out said statement here.

The opinion concludes (304 U.S. at page 53, 58 S.Ct. at page 816, 82 L.Ed. 1137) with the following comprehensive statement, "In the instant case we have cooperation to provide a remedy for a serious condition in which the States alone were unable to afford relief. Improvement districts, such as the petitioner, were in distress. Economic disaster had made it impossible for them to meet their obligations. As the owners of property within the boundaries of the district could not pay adequate assessments, the power of taxation was useless. The creditors of the district were helpless. The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation. The bankruptcy power is competent to give relief to debtors in such a plight and, if there is any obstacle to its exercise in the case of the districts organized under state law it lies in the right of the State to oppose federal interference. The State steps in to remove that obstacle. The State acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case."

[1, 2] The Bekins case, in our opinion, effectually establishes the validity and constitutionality of both chapter 4 of the 1934 Extra Session Statutes, and chapter X (now chap. IX) of the United States Bankruptcy Act. We are in thorough accord with the views therein expressed, and particularly in respect to its conclusion as to the constitutionality of the statute of our own state. (Chap. 4 of the 1934 Extra Session Statutes.)

Appellants have advanced a number of grounds upon which it contends that chapter 4 of the 1934 Extra Session Statutes is unconstitutional and void, such as, that it is an unlawful attempt to impair the obligations of contracts; that it is an attempt to surrender the power of taxation; that it is an attempt to take private property for the payment of a public debt; and some others of like nature. This same argument was made before the Supreme Court of the United States in the Bekins case, and we understand by the same counsel now representing the appellants in the instant case. Some of them were answered by that court and others were evidently not thought of sufficient importance to require an answer. Undoubtedly the court considered each and every one of them, and found that none of them was meritorious.

It is further contended that in recent decisions rendered by this court we made important rulings with respect to the status of irrigation districts which, had they been rendered prior to the decision in the Bekins case, would have had a material bearing upon that decision, and would probably have resulted in an affirmance of the trial court's judgment instead of a reversal thereof. The cases referred to are: Provident Land Corporation v. Zumwalt, 12 Cal. 2d 365, 85 P.2d 116; El Camino Irrigation District v. El Camino Land Corporation, 12 Cal.2d 378, 85 P.2d 123; Moody v. Provident Irrigation District, 12 Cal.2d 389, 85 P.2d 128. No new principle of law was announced in any of these decisions. We

held, for example, in the case of El Camino Irrigation District v. El Camino Land Corporation, supra, 12 Cal.2d at page 383, 85 P.2d at page 125, that irrigation districts "are agencies of the state whose functions are considered exclusively governmental; their property is state owned, held only for governmental purposes; they own no land in the proprietary sense, within the rule of defendant's cases". This statement is the most favorable statement from appellant's view to be found in any of the three cases relied upon by appellant. In support of this statement the court in the El Camino case cited the following authorities: Whiteman v. Anderson-Cottonwood Irrigation District, 60 Cal.App. 234, 212 P. 706; Turlock Irrigation District v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72; Wood v. Imperial Irrigation District, 216 Cal. 748, 752, 17 P.2d 128. While the exact language of the El Camino case is not to be found in the cases just cited, the principle enunciated therein was firmly established in this state by the three cases cited in the opinion in the El Camino case and many others of this and other appellate courts of this state, many of which are to be found cited in the Whiteman v. Anderson-Cottonwood Irrigation District case, supra. All of these cases had been decided long prior to the time when the Bekins case was before the Supreme Court of the United States. The same argument was made there as is being made here, and that is, that an irrigation district is an agency of the state and its powers are exclusively governmental, and, therefore, it is not subject to the bankruptcy laws of the United States. We do not have the briefs of counsel in the Bekins case before us, but as the same counsel who appears here for the appellant appeared in the Bekins case, we must assume that the decisions of the courts of this state bearing upon the legal status of irrigation districts were called to the attention of the United States Supreme Court on the hearing of the Bekins case. We think it reasonable to assume that counsel would cite to the court all California cases bearing upon the powers of an irrigation district when the question before that court was the exact status of such a district created under the laws of California. We accordingly find no reason to conclude that the later decisions of this court rendered since the Bekins case, and relied upon by appellant have had any effect upon the authoritative value of the Bekins case.

[3] It might be well to say a word of explanation respecting chapter 4 of the 1934 Extra Sessions Statutes. It was in effect at the time this action was filed. It was repealed in 1939 (Stats. of 1939, p. 1009), but with the express proviso that its repeal should not impair or affect any action or proceeding commenced under sections 81 to 84 of the United States Bankruptcy Act while said chapter 4 was in effect. In the same act, repealing said statute, it was provided that, "The State of California hereby * * * consents to the application" of sections 81 to 84 of the United States Bankruptcy Act "to the taxing agencies and instrumentalities of this State". It would seem, therefore, that whichever of the two statutes may be held to be applicable to the present proceeding, the state has given its consent to the filing of the petition which the appellant alleges the respondents propose to file.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CARTER, J.; GIBSON, J.

EDMONDS, Justice (dissenting).

The briefs now before the court in this case clearly show that the controversy between the parties has become moot. However, counsel contend that the court should nevertheless decide the issues originally before the superior court for decision because the question whether an irrigation district may avail itself of the laws relating to bankruptcy of "taxing districts" is of great public importance.

After the entry of judgment denying the appellant an injunction, the irrigation district filed a petition in bankruptcy, and proceedings thereon are now pending in the United States District Court. Although the complaint asks for declaratory relief as well as an injunction to prohibit the filing of any petition in bankruptcy, it alleges that the actual controversy between the parties entitling it to that relief relates to "the rights of the defendants to file a petition under said bankruptcy act". It is axiomatic that a court may not enjoin an act which has already been performed, and certainly no order made upon this appeal can affect the bankruptcy proceedings.

As all of the issues in this case became moot when the irrigation district took the action which the appellant has been attempting to prevent, it is the duty of this court to dismiss the appeal (Weiss v. City

of Los Angeles, 190 Cal. 576, 213 P. 979; Atkins v. Hughes, 208 Cal. 508, 509, 282 P. 787) and, in my judgment, an order should be made accordingly.

I concur: HOUSER, J.



15 Cal.2d 368

LOS ANGELES COUNTY v. MORRISON.

L. A. 16351.

Supreme Court of California.

April 15, 1940.

1. Executors and administrators ⇐1

An executor of decedent's estate is a "trustee" in broad sense, but not in general acceptation of such term as person in whom some estate, interest, or power in or affecting property is vested for another's benefit.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

2. Executors and administrators ⇐1

An executor or administrator of decedent's estate derives his power to act from order of probate court, which is guardian of such estates.

3. Taxation ⇐84

An assessment of tax on decedent's corporation stock is not imposed against executor of decedent's estate as individual, though made in executor's name as trustee, and executor's liability for payment of tax is not personal, but official only, as such tax is charge on estate. Pol.Code, §§ 3627a, 3639, 3642.

4. Executors and administrators ⇐110

An executor or administrator of decedent's estate has authority and owes duty to preserve property of estate by paying taxes legally imposed thereon.

5. Taxation ⇐843

As tax assessed against corporation stock, owned by decedent at time of his death, became obligation of his estate, statutory penalty, which is part of tax, for executor's failure to make return of stock for taxation within required time is also chargeable to estate, not to executor as individual. Pol.Code, § 3627a.

6. Taxation ⇐587, 845

Equities claimed to exist between executor and ultimate distributees of decedent's estate because of executor's nonfeasance, as in failing to make return of decedent's corporation stock for taxation within statutory time, may not be successfully urged in action brought by county against executor for sole purpose of collecting taxes on such stock and penalties for such failure and delinquency in payment of taxes from estate, so that such omission of executor does not render penalty therefor a charge against him individually, rather than against decedent's heirs. Pol.Code, § 3627a.

7. Taxation ⇐838

As respects estate's liability for penalty, an executor's filing of appraisement and inventory of property of testator's estate with probate court, clerk of which transmitted copy thereof to county assessor, in compliance with statute, did not excuse executor's failure to make return of testator's corporation stock for taxation within statutory time, where inventory was not filed until after such time. Pol.Code, § 3627a; Probate Code, § 600.

8. Taxation ⇐838

As respects estate's liability for penalty, the fact that executor did not know value of testator's corporation stock before filing inventory and appraisement of property of estate did not excuse his failure to make return of stock for taxation within statutory time, as owner or person in control of property is not required to fix its value for taxation purposes. Pol.Code, § 3627a; Probate Code, § 600.

9. Taxation ⇐47(6)

A state tax on shares of stock in holding corporation, sole property of which consists of realty owned in fee in another state wherein it is taxed, is not illegal as amounting to double taxation. Pol.Code, § 3627a.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the County of Los Angeles against Morrison Morrison, executor of the estate of Louis W. Morrison, deceased, to recover the amount of a tax on corporation stock owned by deceased and penalties for failure to make a return thereof for assessment purposes and delinquency in payment

of tax. Judgment for plaintiff, and defendant appeals.

Affirmed.

Golden & Kaufman and A. V. Kaufman, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, and Gordon Boller, Deputy Co. Counsel, all of Los Angeles, for respondent.

PER CURIAM.

The facts of this case are as follows: Louis W. Morrison died March 26, 1935, possessed of several shares of stock in a New York corporation valued at $342,820. For two months prior to his death he was in a state of coma, and was unable to make a tax return or otherwise to attend to his affairs. After his death, and on April 15, 1935, Morrison Morrison was appointed and qualified as executor of his will.

No personal property tax return was filed with the county assessor by either the deceased or the executor of his will during the assessment period of the year 1935. However, in accordance with the provisions of section 3627a of the Political Code it is the duty of any person owning, possessing, or in control of shares of taxable stock to make a return thereof for assessment purposes between the first Monday in March and the first Monday in July of each year; and in event of failure to make a return within the required time it is provided that the property "shall, upon the discovery of the escape, be assessed and levied upon", and that "a penalty shall attach to the tax so levied and entered in an amount equal to two times the tax". On December 11, 1935, an inventory and appraisement of the property of the estate was filed in the probate court and a copy thereof was transmitted by the clerk of that court to the county assessor, as required by section 600 of the Probate Code.

Upon receipt of the copy of inventory the assessor discovered that the stock had escaped assessment during the assessment period earlier in the year. Therefore, pursuant to the provision of section 3627a of the Political Code the assessor immediately levied a tax on the stock, at its appraised value, in the sum of $685.64, together with a penalty of two times the tax, amounting to $1,371.28. Without success as far as an evasion or a reduction of such tax was concerned, the executor protested the imposition of the penalty before the Los Angeles board of supervisors sitting as a board of equalization. On February 28, 1936, the county filed the present action for said sums of $685.64 and $1,371.28, plus a delinquent penalty of $20.56, making a total of $2,077.48. As sole defendant in said action the complaint therein named "Morrison Morrison, Executor of the Estate of Louis W. Morrison, deceased".

The trial court found the facts to be as above recited and rendered judgment for plaintiff in the said sum of $2,077.48, and costs. Defendant has appealed from that judgment.

[1-3] Appellant contends that the judgment is erroneous for the reason asserted by him that the assessment should have been levied against Morrison Morrison, the executor, as an *individual* and not against the estate. In that connection appellant cites the further provision of section 3627a of the Political Code, which reads as follows: "If any property taxable under the provisions of this section is held in trust by any person, association, or corporation domiciled or the principal place of business of which is located in this State, such property shall be taxable *solely to the trustee* thereof." (Italics added.) Appellant argues that the provision for taxing the property solely to the trustee was made for the purpose of holding the latter personally responsible, instead of the trust estate—upon the contention that the legislature must have intended that any failure or neglect on the part of a trustee to comply with the provisions pertaining to the making and filing of a return should be chargeable solely to him. With regard to that contention it has been said that although a personal representative of an estate, in a broad sense, does act in the capacity of a trustee during the time the property of the decedent is in his possession as such personal representative, nevertheless he is not a trustee in the general acceptation of the term. 23 Cor.Jur., p. 1170. That distinction is well set forth in the case of In re Hibbler's estate, 78 N.J.Eq. 217, 78 A. 188, 189, wherein it is said: "The duties of an executor and those of a trustee are well recognized in the law as being distinct. The general duties of an executor are to collect the effects of the deceased, pay the claims against his estate, and distribute the residue to those entitled. * * * A trustee is a person in whom some estate, interest or power, in or affecting property is vested for the benefit of another. * * *

Of course, an executor is a trustee in the broadest sense, but not in the general acceptation of the term." The probate court or judge is the guardian of estates of deceased persons and all proceedings are under the direction of the judge. An executor or administrator derives his power to act from the order of the court. 11 Cal. Jur., § 6, p. 214, and cases there cited. Furthermore, even if the assessment here concerned had been made in the name of Morrison Morrison, as trustee, it cannot be said that such assessment would have been imposed against him as an individual. Section 3639, Political Code, provides that when a person is assessed as "trustee" his representative designation must be added to his name and the assessment entered separately from his individual assessment. That section reads as follows: "When a person is assessed as agent, *trustee,* bailee, guardian, *executor,* or administrator, his representative designation must be added to his name, and the assessment entered on a separate line from his individual assessment." (Italics added.) The language of that section not only indicates that for purposes of assessment, as to one who acts in a representative capacity, a "trustee" is to be distinguished from an executor, but also that when the latter is assessed in his representative capacity—the tax having been levied upon the property of the decedent—the executor's representative designation must be added to his name, and any assessment to him as an individual must be indicated separately. Further, the provisions of section 3642, Political Code, authorize the making of an assessment in the manner followed in the instant case. See, also, People v. Olvera, 43 Cal. 492. That section provides that "The undistributed or unpartitioned property of deceased persons may be assessed to the * * * executors, * * *." The ruling of the court in the case entitled San Francisco v. Pennie, 93 Cal. 465, 471, 475, 29 P. 66, 67, is applicable herein. There it was said: "Mrs. Shillaber died February 18, 1885, and the original defendant was appointed special administrator for her estate February 25, 1885. The assessment is of the property belonging to her estate on the first Monday of March of that year. Section 3642 of the Political Code provides that 'the undistributed property of deceased persons may be assessed to the heirs, guardians, executors, or administrators;' and section 3639 provides that, 'when a person is assessed as * * * administrator, his representative designation must be added to his name, and the assessment entered on a separate line from his individual assessment.' The assessment in the present case was made to Carroll Cook, as the administrator of Mrs. Shillaber's estate. Whether he was special administrator or general administrator was immaterial. It was an assessment to him of only the property of the decedent whose estate he represented, and not of any of his individual property. This fact of itself eliminated all uncertainty as to whose property was intended by the assessment. * * * The cause of action is for taxes *due from the estate* of Mrs. Shillaber (Pol. Code, § 3642), and is properly brought against the custodian of that estate. No order or decree for the distribution of the property can be made until they have been paid. Pol.Code § 3752. The liability of the administrator therefore is *official,* and not personal, and, upon his resignation or discharge, such liability is assumed by his successor in the same manner as is any other obligation of the estate." (Italics added.) See, also, 24 Cal.Jur., § 247, p. 270.

[4] It has always been recognized that an executor of a will or an administrator of an estate has authority and it is his duty to preserve the property by paying taxes which have been legally imposed. As was held in the case entitled San Francisco v. Pennie, hereinbefore cited, the taxes are a charge upon the estate, and the liability of the representative is *official* only. 11 Cal. Jur., § 649, p. 1018.

[5, 6] Appellant admits that "it was his duty to file the return in accordance with the provisions of the Political Code and his failure to do so had the effect of creating a liability against the estate". But he argues that the estate may not be held liable for the penalty which was incurred by reason of his failure or neglect in that regard, and that liability therefor should be imposed on him as an individual and not as executor of the estate. The statute provides, sec. 3627a, Pol.Code, that if a return is not made within the time specified therein, "a penalty shall *attach to the tax* so levied". The language of the statute makes it clear that the penalty is intended to "attach to the tax". Therefore, the penalty, in effect, becomes a part of the tax. And since, in the instant case, the taxes which were assessed against property owned by decedent at the time of his death became an obligation due from his estate, it follows that the penalty —being a part of the tax—likewise was

chargeable to the estate. Appellant further argues that inasmuch as the omission to make the return was because of his own failure in that regard, the penalty should not be made a charge against the heirs of the estate. However, whatever equities may be claimed to exist between the executor—for an act of non-feasance in the administration of the estate—and those to whom the estate ultimately is distributed may not be successfully urged in this action, which, in accordance with statutory authorization therefor, is brought by the county solely for the purpose of collecting taxes and the attaching penalties from the estate. There is no language to be found in section 3627a, Political Code, which would give rise to an implication that on a state of facts such as here is presented it was the legislative intent that although the *tax* should be made collectible from the estate, the *penalty* might be collected from another source. In the instant case, therefore, in the absence of statutory authority in that respect, we may not hold that the tax was chargeable against the estate but that the attaching penalty was intended to be imposed against the appellant as an individual, —a procedure which, in any event, would unnecessarily complicate the collection of taxes and penalties legally imposed under legislative authority. The movable and elusive character of intangible property requires that tax assessments thereon shall be followed by prompt collection. Peterson v. Hopkins, 124 Cal.App. 33, 12 P.2d 104.

[7] Appellant also argues that his compliance with section 600, Probate Code, by the filing of an appraisement and inventory with the probate court—a copy of which was submitted to the assessor—in effect excused his nonperformance of the requirements of section 3627a, Political Code. There is no merit in that contention. The provisions of the latter section require that the return be made during the four-month period therein mentioned. The inventory was not filed until some time in December, several months after the assessment season had closed. The duty of compliance with the provisions of section 3627a, Political Code, by the representative of an estate is independent of the duty also imposed on him to comply with the provisions of section 600, Probate Code. The latter section provides for one of the procedural steps necessary in probate matters, and in no wise may be construed as relieving the executor or administrator of an estate of his separate duty to make the tax returns provided for by the Political Code.

[8] Nor is there any merit in appellant's contention that by reason of the fact that he did not know the value of the stock prior to the filing of the inventory and appraisement, he theretofore could not have made the return provided for by section 3627a of the Political Code. An owner or person in control of property is not required to fix its value for taxation purposes, since that is a duty to be performed by the assessor. 24 Cal.Jur., § 155, p. 172; Woolridge v. Boardman, 115 Cal. 74, 46 P. 868; Clunie v. Siebe, 112 Cal. 593, 44 P. 1064; San Jose, etc., R. Co. v. Mayne, 83 Cal. 566, 23 P. 522.

[9] The final contention of appellant is against the legality of the tax itself. In that regard appellant contends that where, as here, the tax is imposed on shares of stock in a holding corporation whose sole property consists of real estate owned in fee in the state of New York, and there taxed, it amounts to double taxation. That contention, likewise, is without merit. Chesebrough v. City and County of San Francisco, 153 Cal. 559, 96 P. 288; Canfield v. County of Los Angeles, 157 Cal. 617, 108 P. 705; Lacoe v. County of San Diego, 33 Cal.App.2d 692, 92 P.2d 809.

From the foregoing, it follows that the judgment should be, and is, affirmed.

15 Cal.2d 338

MINIKIN v. HENDRIX.

L. A. 16187.

Supreme Court of California.

April 12, 1940.

1. Partnership ⇐336(3)

In action to secure dissolution of partnership, evidence sustained finding as to costs of improvements erected on realty owned by one partner, at the expense and for use of the partnership. Code Civ.Proc. § 2061.

2. Evidence ⇐474(18)

One member of partnership, as an owner of improvements erected with partnership funds, was qualified, in proceeding on disso-

lution of partnership, to testify concerning value of improvements.

3. Appeal and error ⇐931(1)

An appellate court must accept as true all evidence tending to establish correctness of the finding of trial court, and must take into account all inferences which might reasonably tend to establish correctness of finding.

4. Appeal and error ⇐1010(1)

Determination of a trial court on a question of fact is binding on reviewing court, except where the finding is unsupported by any substantial evidence.

5. Evidence ⇐584(3)

The testimony of one witness entitled to credit is sufficient to establish a fact in a civil action.

6. Partnership ⇐67

Where improvements purchased with partnership funds were placed on realty owned by one partner, who was compensated by partnership for the use thereof, improvements were not severable as a practical matter from realty, and partners failed to contract as to disposition of improvements in event of dissolution, improvements became a partnership asset, and nonland-owning partner, on dissolution of partnership, was entitled to his proportionate share of their value which was required to be paid by land owning partner.

In Bank.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by William Minikin against Fred Hendrix for dissolution of partnership, appointment of a receiver, an accounting, a sale of partnership assets and distribution of proceeds. From an adverse judgment, defendant appeals.

Affirmed.

James W. Briscoe, of Los Angeles, Cal., and Stanley T. Tomlinson, of Santa Barbara, for appellant.

W. Stuart Smith, of Santa Barbara, for respondent.

PER CURIAM.

This action was brought for a dissolution of partnership; for the appointment of a receiver; for an accounting, a sale of the partnership assets, and distribution of proceeds to the partners. As the result of the trial of one of the issues with respect to the accounting, the trial court rendered a judgment for plaintiff in the sum of $290, which was found to be one-half the total cost of several improvements made by the partnership on certain real property owned by defendant. The latter has appealed from that judgment.

It appears from the facts found by the trial court that on or about the 1st day of July, 1929, at Santa Barbara, California, the parties hereto formed a partnership for the purpose of engaging in a general woodworking business under the name and style of "Custom Woodworkers"; that the partners transacted the partnership business for the period of approximately five and one-half years; that during the continuance of the partnership certain real property personally owned by the defendant partner was occupied and used by the partnership for business purposes; and that pursuant to an agreement between the partners certain improvements were made on the said real property at the expense and for the use of the business of the partnership.

It further appears that on or about February 6, 1935, plaintiff brought the instant action for dissolution of the partnership. Thereupon a receiver was appointed and, pursuant to stipulation of the parties and directions of the trial court in that regard, he proceeded to dispose of the physical personal property of the partnership—excepting therefrom the improvements to the real property, the disposition of which was specifically excepted from his duties by the terms of the said stipulation. After the debts of the partnership had been paid and the net proceeds had been distributed to the partners, the receiver's account was allowed and approved,—which left for disposition by the trial court the issue as to what accounting should be made in connection with the said improvements. The trial court received evidence as to the cost of the various improvements, on the theory that plaintiff was entitled to a one-half share of their total cost. In that regard the trial court found that the respective improvements were as follows: The erection of a stucco addition to another building theretofore erected on the premises; an improvement (consisting of ceiling and siding) to a building used by the partners as an office; the installation in one of the buildings of electric lighting facilities; and the erection and installation of a work bench and vise, a lathe bed, and five nests of drawers.

Appellant contends that the evidence was insufficient to support the findings of the trial court as to the cost of the several items of improvements, and in that regard asserts particularly that the evidence given by plaintiff on that issue was based on conjecture and speculation. Plaintiff testified that the figures given by him as the cost of the various items admittedly were approximations, for the reason that he did not know what the bookkeeping entries of the partnership disclosed in that regard, due to the asserted fact—which was found by the trial court to be true—that defendant had "at all times kept the books of the said partnership and that plaintiff has had no knowledge of the entries made therein relative to the partnership business". Defendant offered no evidence in refutation of plaintiff's testimony regarding the estimates of cost of the several items, nor was any other evidence offered by either party which related to that issue. However, plaintiff further testified that he personally helped in the erection or installation of some of the improvements; that his estimates of cost of some of the others were based on the amount of lumber used in their construction and on the period of time consumed in such construction and installation. With respect to the figure given by him as the cost of installation of electric lighting facilities, he testified that he knew the length of time spent in such installation and "what 'they' charge for putting those in".

[1-5] From the foregoing the trial court clearly may have assumed that plaintiff was not without some knowledge of the cost of the various improvements to which he testified. Also, as one of the owners of the said improvements plaintiff was qualified to testify concerning their value. Los Angeles County F. C. Dist. v. Abbot, 24 Cal.App.2d 728, 737, 76 P.2d 188; People v. Haney, 126 Cal.App. 473, 475, 14 P.2d 854. In the latter case it was said: "'The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth.'" Furthermore, as hereinbefore has been noted, defendant was found to have retained exclusive possession of the books of the partnership, and he offered no evidence in contradiction of the estimates of cost as given by plaintiff. Section 2061, Code of Civil Procedure, provides that "* * * evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; * * *". Manifestly, in the instant case, the rule to be followed is that "'* * * an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. * * *'" Iffland v. John, 128 Cal.App. 531, 533, 17 P.2d 1028, 1029. The trial court was the judge of the credibility of plaintiff as a witness. Its finding as to the value of the several items was based on the minimum figures testified to by plaintiff. Under the circumstances hereinbefore indicated this court may not declare that the findings herein challenged were not sufficiently supported by the evidence,—since the rule is that the determination reached by a trial court on a question of fact is binding upon a reviewing court except in the single instance where there is no substantial evidence to support the challenged findings. If believed by the trial court, plaintiff's testimony as to the cost of the improvements sufficiently supported the findings, inasmuch as it is well settled that the testimony of one witness entitled to credit is sufficient to establish a fact in a civil case. Leffingwell v. Faubion, 89 Cal.App. 157, 264 P. 306.

However, other contentions with regard to the said improvements are made by appellant, for example, the claim that some of them were "trade fixtures" and, consequently—in the event it be ruled that such improvements were a partnership asset—that pursuant to an accounting they should have been removed from the realty and sold. It also is contended that the said improvements were "trivial" and, therefore, that in the absence of a specific agreement therefor it would be inequitable to require the partner who owned the land to pay the other for improvements made thereon, for the asserted reason that it might be found that such improvements had not enhanced the value of the real property. And in that regard appellant contends that it was incumbent upon respondent to have shown an enhancement in value to the real property due specifically to the said improvements.

In answer to those contentions respondent asserts that, although no California case may be found which presents the question here involved, the case of Flint v. Flint, 87 N.J.Eq. 560, 100 A. 754, 755, is decisive of the instant matter, and that it

provides a complete answer to the foregoing contentions made by appellant herein. There it was said: "It is conceded by defendants that the fact that the land was the land of one of the partners and the improvements were made with partnership funds operates to prevent the owner of the soil from asserting, as against the partnership and its representatives, the right to hold the improvements without some compensation. The question is, What is the right of the partnership? Is it a right in the property or a right against the property? Is it a right of ownership in the property, or is it in the nature of a lien against the property *for the value put into it?* I think the latter. What the partnership used was money, personal property. This money was used to purchase personal property. That personal property was put upon real estate, and although its physical nature was not in any wise altered, it became, by virtue of a rule of convenience, real estate, but not I think the real estate of the partnership. By virtue of the relations existing between the parties a duty arose upon the part of the owner of the soil in this case to account to the partnership. The right of the partnership was a right to recover from the owner of the soil, not real estate but personal property, to wit, money. Deveney v. Mahoney, 23 N.J.Eq. 247. Such a right is a chose in action which is personal property. To hold otherwise would result in endless confusion. It is impossible or impracticable, of course, to sell the improvements apart from the soil. It is impossible to actually partition the improvements apart from the soil. * * *" (Italics added.) In that case judgment was rendered in accordance with the views thus expressed.

The same decision was reached in the case entitled Marston v. Marston, 277 Mass. 129, 177 N.E. 862, where it was said: "The judge found and ruled that greenhouses numbered 3, 4, 5 and 6, erected after the formation of the partnership, were partnership property, that there was no agreement that they should become the property of T. Franklin Marston [one of the partners], the owner of the real estate, and that the rule that improvements made on the land owned by one partner, if made with partnership funds or for the purpose of the partnership, are treated as the personal property of the partnership and must be accounted therefor, applied to this property. * * * Where partners are to give their whole time to the business and share equally all profits and losses, structures erected by the partners for the partnership business with partnership funds upon the land of one of the partners are partnership property in the absence of any agreement as to the title to those structures or of facts showing a different intention. See Dyer v. Clark, 5 Metc. [Mass.] 562, 39 Am.Dec. 697; Deutschman v. Dwyer, 223 Mass. 261, 111 N.E. 877."

[6] It is the conclusion of this court that the foregoing cases correctly state the law with regard to the situation herein presented. In the instant case it was conceded by the partners that the improvements were purchased with partnership funds and placed on the real property owned by one of the partners; that the latter was compensated by the partnership for the use of the real property; and that no contract was entered into by the partners respecting the disposition to be made of the improvements in the event of dissolution. Under those circumstances the improvements became a partnership asset and, as such, on dissolution of the partnership the nonland owning partner was entitled to his proportionate share of their value. The evidence showed that with the possible exception of the item "nests of drawers" each of the improvements was affixed to the realty in such manner that severance therefrom would have been impracticable and perhaps impossible. Furthermore, it would appear that the partners recognized the impracticability of severing the improvements for purpose of sale in view of the fact that they specifically stipulated that disposition of the improvements to the real property be excepted from the duties of the receiver in the matter of selling or otherwise disposing of the partnership personalty.

In view of the conclusions reached herein, it follows that no other contention made by counsel need be discussed.

The judgment is affirmed.

15 Cal.2d 363

GOMEZ v. CECENA et al.

L. A. 16837.

Supreme Court of California.

April 12, 1940.

1. Trusts ⇐89(5)

One claiming resulting trust in property has burden of proving facts establishing his beneficial interest therein by clear and convincing evidence.

2. Trusts ⇐86

A person paying all or part of purchase price of realty, conveyed to child or other natural object of bounty of such person, will be presumed to have intended gift, but such presumption may be rebutted by adequate proof that grantee was not intended to have beneficial interest in property.

3. Evidence ⇐589

In suit to establish resulting trust in realty conveyed to plaintiff's son, trial court was not bound to credit plaintiff's testimony that she intended to acquire beneficial interest in realty, though she satisfactorily proved that she contributed substantial part of purchase price thereof where she subsequently acquiesced in son's conveyance of property on trust deed to secure his own debt, moved out of house thereon, leaving son and his wife in sole possession of premises, and made no objection to alterations and improvements made by them.

4. Trusts ⇐89(3)

In suit to establish resulting trust in realty, conveyed to plaintiff's son, on ground that plaintiff furnished money for purchase and improvement thereof on understanding that it would belong to her, evidence *held* to warrant trial court's conclusion that plaintiff had no interest in property.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by Frances Gomez against Robert Cecena, his wife, Victoria Cecena, and others to impress a trust on and quiet title to real property. From a judgment for defendant wife, plaintiff appeals.

Affirmed.

Peter J. Youngdahl, of Los Angeles, for appellant.

H. M. Dalton, of Los Angeles, for respondent.

WASTE, Chief Justice.

In this suit to impress a trust upon and quiet title to real property, the plaintiff appeals from an adverse judgment and from an order denying her motion for a new trial. The defendant Robert Cecena, who is the appellant's son, suffered a judgment to be entered against himself by default. His former wife, the defendant Victoria Cecena, contested the appellant's right to relief, and recovered judgment for costs. The only question raised on the appeal is whether there is sufficient evidence to support the judgment.

The appellant's claim to the property rests upon her contention that she furnished the money for its purchase and improvement upon the understanding that it would belong to her. In 1923, Robert Cecena, who was then unmarried, and one Mike Barrera agreed to buy a lot, each paying $50 down and undertaking to pay a total of $1,200 in monthly $30 instalments. This agreement was later superseded by new contracts of purchase by which each buyer would obtain a specific one-half interest in the lot. According to the appellant's evidence her son kept up his share of the payments for seven or eight months and then came to her with the suggestion that if she would build a house upon his half of the property he would give her the property and that he knew of a building contractor named Blinn who would erect a house for $1,400. The appellant testified that she agreed to this and gave her son $400 to deliver to Blinn as the initial payment, and that thereafter she paid the balance due on the house in instalments of $50 a month. These payments were all made by her son who had executed a note and trust deed for the purchase price. She also testified that she paid the remaining instalments due on the purchase of her son's half of the lot and likewise put up an additional $200 for some concrete work after the completion of the house. In support of this testimony her savings account passbook was introduced showing withdrawals in 1924 of $450, $200, and two items of $40 each. She explained that all of the transactions were completed by her son in his own name because she could speak no English and had no knowledge of business affairs.

The appellant's testimony was substantiated by evidence given by her son. Concerning the building of the house he testified: "I told my mother I didn't have any money and she had money; I told her that if she wanted to build on the lot, that I

would let her have the lot, my part of it, so she agreed with me to build. * * * My mother said it would be in my name because I was going to make the arrangements and all of that, and I was her son; in case of her death the property would be mine, you see." He also testified that he paid half the taxes on the property during the period that he and his mother lived there together and that he also paid a final balance of $87 due on the house in 1928.

The evidence concerning the building of the house and the payments made by the appellant was likewise corroborated by Robert Cecena's friend, Mike Barrera, who was living with the appellant and her son at the time.

The respondent and Robert Cecena were married in 1926, and from that time she and he and the appellant lived together on the property until 1930 when the appellant moved to a separate residence. In 1928, Robert Cecena borrowed $1,400 from a bank, and he and the respondent together executed a trust deed on the property to secure the loan. During the ensuing years payments were made on this debt out of the joint earnings of the husband and wife. In 1932 they built a garage, enlarged one room and added two rooms to the house, also paying for these improvements out of community funds. Robert Cecena left the respondent in 1936, and she remained on the property and continued to make payments upon the balance ($500) of the mortgage debt without the help of her husband.

In that year she brought suit against him for a divorce, seeking in her complaint to have the property in question set aside to her as community property of the marriage. When this complaint was served upon Robert Cecena, he was living with his mother, and he testified that he told her that the respondent claimed the house and lot as community property. He cross-complained, asserting that part of the property in question was community and the remainder his separate property. After a hearing upon this and other issues, the court granted the respondent an interlocutory decree of divorce and also awarded the house and lot to her. A short time later, the appellant commenced this suit to establish a resulting trust in the property.

By this appeal the appellant contends that the judgment denying her relief is erroneous for the reason that the trial court was bound to accept the evidence showing her beneficial interest in the property. That evidence, she asserts, is not inherently improbable, and is neither contradicted nor impeached and hence was entitled to full credit.

[1, 2] While no universal and immutable formula can be prescribed for determining the weight to be accorded testimonial evidence, it has frequently been said that testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of fact. Michaels v. Pacific Soft Water Laundry, 104 Cal.App. 366, 286 P. 172; Shepard v. Shepard, 65 Cal.App. 310, 223 P. 1012; Hynes v. White, 47 Cal.App. 549, 190 P. 836; Lee Sing Far v. United States, 9 Cir., 94 F. 834; see Wigmore on Evidence, 2d Ed., § 2034. On the other hand, one who claims a resulting trust in property has the burden of proving the facts establishing his beneficial interest by clear and convincing evidence. Woodside v. Hewel, 109 Cal. 481, 484, 42 P. 152; Moulton v. Moulton, 182 Cal. 185, 190, 187 P. 421. Even where it is satisfactorily established that all or part of the purchase price was furnished by one other than the grantee, if it appears in addition that the grantee was a child or other natural object of bounty of the person who made the payment, it will be presumed that a gift was intended. Quinn v. Reilly, 198 Cal. 465, 245 P. 1091; Lezinsky v. Mason, etc., Distilling Co., 185 Cal. 240, 196 P. 884; Faylor v. Faylor, 136 Cal. 92, 68 P. 482; 2 Rest. Trusts, § 442; 15 Calif.Law Rev. 160. It is true, however that such a presumption may be rebutted by adequate proof that the grantee was not intended to have the beneficial interest. Parks v. Parks, 179 Cal. 472, 177 P. 455; Buell v. Buell, 191 Cal. 53, 214 P. 844; Quinn v. Reilly, supra; 2 Rest. Trusts, § 443.

[3, 4] Applying these principles to the present controversy, we think that the judgment has substantial support in the record. Conceding that the appellant satisfactorily proved that she contributed a substantial part of the purchase price of the property, we think that nevertheless the trial court was not bound to credit her testimony that she intended to acquire the beneficial interest. Her subsequent conduct was more consistent with the presumption that she intended a gift to her son. Thus. in 1928 she acquiesced in her son's conveyance of the property upon a deed of trust to secure his own debt. In 1930 she moved out of the house, leaving Robert Cecena and the

respondent in sole possession. They made alterations and improvements on the premises, apparently without permission or objection from the appellant. In short, all of the ordinary rights and incidents of ownership over the property were exercised and asserted by Robert Cecena and his wife, and not by the appellant. Considering all of the circumstances of the case, we think that the court was warranted in concluding that the appellant has no interest in the property.

The judgment is affirmed.

We concur: CURTIS, J.; SHENK, J.; HOUSER, J.; CARTER, J.; GIBSON, J.; EDMONDS, J.



15 Cal.2d 344

MacDONNELL v. CALIFORNIA LANDS, Inc., et al.

L. A. 16771.

Supreme Court of California.

April 12, 1940.

1. Principal and agent ⇐23(2)

The creation of an agency may be proved by circumstantial evidence.

2. Corporations ⇐426(10)

Where a corporation accepted fruits of transaction entered into by plaintiff with individuals for purchase of land which belonged to corporation, the corporation could not escape liability for misrepresentations, if any, made by individuals to plaintiff during the negotiations for purchase of land.

3. Corporations ⇐432(12)

Evidence that after plaintiff negotiated with individuals for purchase of land which belonged to defendant corporation, defendant accepted fruits of transactions whereby plaintiff agreed to buy the land, that defendant executed and delivered a deed in favor of plaintiff, and that defendant did not attempt to explain its connection with the individuals, nor to disclaim their apparent authority to act for it, was sufficient to establish a prima facie case of agency by the individuals.

4. Appeal and error ⇐205

On plaintiff's appeal in suit to quiet title to land which plaintiff claimed to have purchased from defendant corporation, Supreme Court could not determine whether trial court erred in sustaining defendant's objections to questions propounded to plaintiff respecting conversations between plaintiff and individuals whom plaintiff claimed were defendant's agents in connection with sale of land, where plaintiff, after objections were sustained, did not make an offer to prove substance of conversations.

5. Appeal and error ⇐901

Burden of showing error rests upon appellant.

6. Quieting title ⇐44(3)

In suit to quiet title to land claimed to have been bought by plaintiff from defendant corporation under a deed allegedly containing, without plaintiff's knowledge, a provision excepting oil and mineral rights, evidence justified denial of relief on ground that plaintiff knew that the reservation was included in the deed at the date of its execution and delivery.

7. Appeal and error ⇐1010(1)

Supreme Court could not disturb the finding of trial court supported by evidence.

In Bank.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Suit by Katherine MacDonnell against California Lands, Inc., and others, to quiet title to land, wherein defendants filed a cross-complaint. From a judgment for defendants, plaintiff appeals.

Affirmed.

Edgar K. Brown and Leo B. George, both of Los Angeles, for appellant.

Keyes & Erskine, of San Francisco, and Preisker, Goble, Twitchell & Stephan, of Santa Maria, for respondents.

CURTIS, Justice.

The amended complaint is in two counts, the first of which is in the usual form of an action to quiet title. In the second count, it is alleged that defendant, California Lands, Inc., was the owner of said real property and agreed to sell the same to plaintiff for the sum of $6,000: $700 in cash and the balance to be represented by a promissory note for $5,300, secured by a trust deed upon said real property. Pursuant to said agreement, defendant executed a deed of said real property and

plaintiff paid to defendant the sum of $700, and executed and delivered to defendant a promissory note in favor of defendant and a trust deed to secure the payment of said promissory note; that the deed from defendant was not delivered to plaintiff but was recorded in the office of the county recorder of the county in which said real property was located; that said deed, without the knowledge of plaintiff, contained a provision excepting and excluding therefrom all oil and mineral rights in said real property; and that said provision was fraudulently inserted in said deed by the defendant; that plaintiff believed and supposed that a deed in her favor had been made conveying all of said real property to her; and that she would not have paid said price, or any part thereof, nor would she have executed said promissory note and trust deed had she not believed that she was receiving a conveyance of all of said real property, including all subsurface rights therein. In the prayer to said complaint, plaintiff asked that defendant be required to execute to her a good and sufficient deed of conveyance of all of said property without exception of mineral rights, that her title be quieted except as to said trust deed, and that it be determined that defendant has no estate or interest in said real property. The case was tried upon said amended complaint and the answer thereto of defendant in which defendant in substance admitted that it sold to plaintiff said real property upon the terms stated by her in said amended complaint, excepting that it reserved from said sale all oil, gas, and mineral rights in and to the same. It further alleged that it was the owner of all said oil, gas, and mineral rights, and denied that plaintiff had any interest therein. It further denied all allegations of fraud contained in plaintiff's amended complaint, and alleged that it sold said real property to plaintiff under an agreement that all oil, gas, and mineral rights contained therein would be and were reserved to defendant. The answer of defendant also pleaded the statute of limitations and laches. Certain fictitious parties were named in the amended complaint, and two parties defendant appeared, claiming to have been served under fictitious names. They represented that they had acquired a certain interest in the mineral rights in said real property through an agreement with the plaintiff. It will not be necessary to deal with their alleged rights in this opinion. The main defendant in this action is the California Lands, Inc., mentioned above, and we shall continue to refer to it as the defendant, or the respondent. The action resulted in a judgment in favor of the defendant, and the plaintiff has appealed.

It is first contended by the appellant that the trial court erred in sustaining respondent's objection to questions propounded to the appellant respecting conversations between appellant and certain persons, who the appellant claims were agents of the respondent and through whom she purchased said real property. The basis of respondent's objection to said questions was that there was no proper foundation laid for the admission of any evidence of said conversations, or in other words, that there was no evidence tending to show that the persons with whom the appellant had said alleged conversations, were the agents of the respondent or had any authority to bind respondent.

[1-5] The appellant testified that the first time she saw the land involved in this controversy was on February 25, 1931, when she and her husband went out to see the land with a Mr. Hammond, a salesman for Mr. Roemer. After looking at the land they went back to the Rubel building and there met Mr. Roemer and Mr. Glines. It was the office of the Valley Motor Sales Company of which Mr. Roemer was manager. Mr. Glines was the manager of the bank at that place. The bank here referred to was the Bank of America at Santa Maria. After arriving at the office of the Valley Motor Sales Company, the appellant and those present talked about the land. Appellant gave Mr. Glines $350, and at the direction of Mr. Glines a receipt for this money was given her by Mr. Roemer. This receipt was offered in evidence, but upon the objection of the respondent it was not admitted except for identification. Later on the appellant sent the balance of the $700, which represented the first payment, to the Bank of America at Santa Maria. Either at this time or shortly thereafter, the appellant signed the trust deed at the request of Mr. Shields, an officer of the bank. There is no evidence, nor is it claimed that there is any evidence, that the appellant acquired said real property through negotiations with any other person than the four persons named above, Hammond, Roemer, Glines and Shields. Her evidence shows, and it is uncontradicted, that she was shown the land by Hammond,

a salesman for Mr. Roemer, who thereafter took her and her husband to the office of the Valley Motor Sales Company where they met Mr. Roemer, the manager of the Sales Company, and Mr. Glines, the manager of the Bank of America at Santa Maria, where they had a conversation, which resulted in the appellant purchasing the land from the respondent. At their meeting the appellant paid Mr. Glines $350 and was given a receipt by Mr. Roemer for that amount. Thereafter appellant paid to the bank the remaining $350 to make up the cash payment, and under the direction of the bank executed the note and trust deed for the unpaid balance due from her on the land. At the time of the execution of said note and trust deed, the respondent executed and delivered a deed to the property in favor of the appellant. There is no question but that this deed was executed solely in consideration of the execution and delivery of said note and trust deed and the sum of $700 which had been paid by the appellant, partly to Roemer and Glines, and the balance to the bank. In other words, the respondent carried out in every detail the arrangement which the appellant had made with the persons who she claims were agents of the respondent. It is well established that the creation of an agency may be proved by circumstantial evidence. Hazard, Gould & Co. v. Rosenberg, 177 Cal. 295, 170 P. 612; Reid v. Clay, 134 Cal. 207, 211 66 P. 262; Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 688, 46 P. 738; Puget Sound Lumber Company v. Krug, 89 Cal. 237, 243, 26 P. 902; Smith v. Schuttpelz, 1 Cal.2d 158, 161, 33 P.2d 836.

The respondent being a corporation could only act through agents. It accepted the fruits of the transaction entered into by the appellant with Hammond, Roemer, Glines and Shields and it would be unjust in the extreme to permit it to escape liability for any misrepresentations, if any were made by them to appellant, during these negotiations. The respondent offered no evidence to explain its connection with these four individuals with whom the appellant dealt in the purchase of said real property, nor to disclaim their apparent authority to act for it. In the absence of any showing to the contrary, we are of the opinion that the circumstances in evidence were at least sufficient to make out a prima facie case of agency. However, this conclusion does not entirely dispose of appellant's contention that the court erred in sustaining said objections to the admissions of these conversations. In those instances when the court sustained the objections to questions propounded to appellant, she was asked to relate the conversation between her and these men whom she took to be agents of respondent. The sustaining of said objections was not, except on two occasions when the evidence sought to be elicited from the witness was of no materiality, followed by any offer to prove the substance of said conversations to be proven. The first of these instances when such an objection was sustained occurred when the appellant related her first visit to the property with her husband and Mr. Hammond. After stating that "the three of us went out to look at the property", the appellant was asked if anything was told her about the property at that time by Mr. Hammond. After an objection to this question was sustained no further question was asked her respecting this conversation nor was any offer made to prove any statement of Hammond's made during said conversation. The other instances where complaint is made that the objection was improperly sustained are similar to the one just related. There is nothing to indicate to this court whether the answer of the witness would have been favorable or unfavorable to appellant's case. It is true that the appellant herself was the witness and it might be contended that we would be safe in assuming that her answer would have been to her interest. But may we indulge in such an assumption? We might assume that the appellant would have testified to statements made by Mr. Hammond which she construed as a representation that the property was being sold, or offered for sale, absolutely free from any mineral reservations. But the court might disagree with the appellant in her construction of such statements, and give to them an entirely different meaning. We are, therefore, of the opinion that without any offer of proof of the substance, at least, of said conversation with Mr. Hammond,—and this conclusion applies to all other conversations which appellant attempted to prove, except in the two instances when offer of proof was made,—the appellant has failed to show that error was committed by the trial court in the sustaining of said objections. As was said by this court in a case in which the facts were similar to the instant case, "There was no offer to prove the facts sought to be elicited by it. [The question to which objection was sustained.] Therefore it cannot be determined from

the record whether there was error or not; and, as the appellant must show error, the ruling is no ground for reversal." Houghton v. Clarke, 80 Cal. 417, 420, 22 P. 288, 289. The rule here announced has been invariably followed by the appellate courts of this state. Snowball v. Snowball, 164 Cal. 476, 479, 129 P. 784; Whitelaw v. Whitelaw, 122 Cal.App. 260, 263, 9 P.2d 874; Grandy v. Southern Pacific Company, 9 Cal.App.2d 441, 444, 49 P.2d 1127. We would call attention particularly to the language of this court found on page 479 in the case of Snowball v. Snowball, supra.

[6, 7] Numerous other contentions are raised by the appellant in support of her appeal from the judgment against her. The most serious obstacle to appellant's success on this appeal is the finding of the trial court that at the time the deed to said real property was executed and delivered, the appellant knew it contained the reservations to the respondent of the oil, gas and mineral rights. In support of this finding the record shows that said deed actually contained said mineral reservations. This deed was recorded at the request of a title company with whom it was placed in escrow by the parties thereto pending the negotiation for the conveyance of said property. In the ordinary course of business this deed would be returned to appellant, the grantee therein. The next day after this deed was executed, appellant and her husband executed the trust deed to secure the note for the unpaid balance of the purchase price. This trust deed contained a description of said real property, and also the reservation of the oil, gas, and mineral rights therein. Appellant testified that she did not read the trust deed but signed it at the request of Mr. Shields in the branch bank of the Bank of America at Santa Maria. Appellant claimed said real property as her separate property, and some three weeks after it was deeded to her, Mr. MacDonnell, her husband, executed in her favor a quitclaim deed to said property and delivered it to her. This deed contained a reservation of the mineral rights in said land "as excepted in the deed to Katherine MacDonnell, dated March 9, 1931 and filed for record March 28, 1931". The deed thus referred to was the deed from respondent to appellant conveying said land subject to the oil, gas, and mineral rights. While appellant had this deed from her husband in her possession from its date to the date of trial, except during the time it was being recorded, she says she never read it nor knew that it contained said mineral reservations. In addition to the probative effect of these deeds, the record contains certain correspondence and transactions between the appellant and Mr. Marston and other officials of the California Lands, Inc., which in our opinion justified the trial court in finding that appellant knew of said mineral reservations at all times. In the first of these letters, written November 14, 1933, appellant writes Mr. Marston as follows: "Mr. Marston is it possible for me to get the mineral oil rights released on property as I want to get a Federal Bank loan so I can take care of property as far as California Lands are concerned and make it easier for myself, give me an opportunity to put in crop and pump, etc. They will not give me a loan without oil rights released, so want to know what you will do about it. Please let me know at once." Mr. Marston answered the letter, stating that his company was unable to give up the mineral rights to the land "except upon payment of a substantial sum". Appellant then telegraphed Mr. Marston as to the price of mineral rights, who replied as follows: "Not interested in selling oil and gas and mineral rights at present time. Our subrogation to Federal Land Bank will meet their requirements." This correspondence was continued between appellant and Mr. Marston and other officers of the California Lands, Inc., for almost eighteen months, during which time nineteen letters and telegrams passed between the parties, seven of which were sent by appellant, and in not one if any of these letters was any claim made that the mineral reservations were improperly inserted in the deed to appellant, or that she did not know that they were in the deed at the time of its execution and delivery. In fact, in her very first letter to Mr. Marston, she refers to "these mineral oil rights" as an accepted restriction upon her absolute ownership of said real property and asks that respondent release them. When her request was denied, she then offered to purchase the reserved rights. Her last letter in this correspondence was dated May 31, 1935. In this letter she expressed her keen disappointment in the final decision of the Home Owners Loan Corporation in denying her application for a loan and asked for a modification of the terms of payment of her note given for the purchase of said land.

In addition to this correspondence the record shows that on April 5, 1937, after foreclosure proceedings had been instituted on the trust deed against her property, she entered into an agreement with the respondent whereby she agreed to pay $500 on her indebtedness to respondent and to pay the balance in certain monthly payments. In pursuance of this agreement she paid respondent said sum of $500 and the respondent agreed "to cancel the present foreclosure action". Whether this agreement was carried out by the parties, the record does not disclose. During this long interval of time between November 14, 1933, the date of appellant's first letter to Mr. Marston, to April 5, 1937, when she agreed to pay $500 on her loan, and its terms were to be changed, the appellant made no claim that she did not know that the mineral rights were reserved in the deed to said land, but on the other hand, she dealt with respondent in respect to said rights as valid and existing exceptions to her complete ownership of said property. There is not one word of testimony in her entire evidence in explanation of her conduct in this respect. In fact, after the introduction of said correspondence and said agreement of April 5, 1937, the appellant did not appear as a witness in the case. The amended complaint was filed in this action on October 8, 1937, just six months after said agreement of April 5 was executed by appellant. The record fails to show just the date when this action was commenced. The date of its commencement was, of course, prior to October 8, 1937, when the amended complaint was filed. Therefore, less than six months intervened between the time when appellant executed the agreement of April 5, 1937, whereby she virtually recognized said deed with its mineral reservations as a valid conveyance and the time when she commenced this action to have it declared invalid by reason of the fraudulent insertion therein of these same mineral reservations. As we have stated, the appellant offered no word of explanation of this unusual conduct on her part. Her counsel in their brief make a feeble attempt to excuse her for not sooner asserting her claim that said reservations were fraudulently and without her knowledge inserted in said deed, by the statement that during all of the time these negotiations were being carried on, she was in default in her payments on said promissory note and for that reason it was not to her interest to assume a belligerent attitude toward her creditor. This argument in the first place has no evidence to support it. If this were the reason that appellant remained quiescent during this long period, we would expect the appellant to have so stated to the court at the trial. Without doubt this same argument was made to the trial court, and rejected by it as the findings show. The trial court having, on the evidence before it, found that the appellant knew that said reservations were included in her deed at the date of its execution and delivery, and said evidence being sufficient to support the finding of the trial court, this court, even if it so desired, is without the power to disturb said finding.

The foregoing disposes of all necessary issues in the case, including the issue of fraud, for if the appellant knew and accepted said deed with the mineral reservations therein, there could be no fraud on the part of respondent in having the same made a part of its conveyance to appellant.

In view of what we have already said it is unnecessary to pass upon the findings of the court respecting the statute of limitations or laches.

The judgment is affirmed.

We concur: WASTE, C. J.; GIBSON, J.; HOUSER, J.; SHENK, J.; CARTER, J.; EDMONDS, J.



15 Cal.2d 405

DEXTER v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 16714.

Supreme Court of California.

April 17, 1940.

Contempt ⇐66(8)

Sentences of the superior court of Los Angeles county imposing fines in contempt proceedings abated upon death of petitioner, and hence proceeding to review the contempt proceedings would be dismissed on ground that questions involved therein had become "moot".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Questions".

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceedings by Stephen B. Dexter against the Superior Court of Los Angeles county, Cal., and the Honorable Emmet H. Wilson, Judge thereof, for review of sentences imposing fines upon petitioner in contempt proceedings.

Proceeding dismissed.

P. E. Keeler, of Los Angeles, for alleged contemner.

Jas. W. Bell, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondents.

Philbrick McCoy, of Los Angeles, and Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiae.

PER CURIAM.

It appearing to the court by the certified copy of death certificate filed here that petitioner Stephen B. Dexter since the commencement of this action has died, and it further appearing that the sentences of the superior court of the county of Los Angeles that said petitioner pay certain fines imposed upon him by said court in the contempt proceedings to review which this proceeding was instituted have abated by reason of the death of said petitioner (17 C.J.S., Contempt, page 85, § 68; Blackwell v. State, 185 Ind. 227, 113 N.E. 723; State v. Fletcher Trust Co., 211 Ind. 27, 5 N.E.2d 538; Pino v. United States, 7 Cir., 278 F. 479, and McGovern v. United States, 7 Cir., 280 F. 73, 74), it is hereby ordered that this proceeding be and the same is hereby dismissed on the ground that the questions involved therein have become moot.



15 Cal.2d 352

ADAMS et al. v. COOK et al.

L. A. 16844.

Supreme Court of California.

April 12, 1940.

1. Trusts ⇐58

In action to free trustee of restriction in declaration of trust as to sale of trust property so as to permit him to execute oil and gas lease allegation of complaint authorized finding that unless trustee was given power to enter into an oil and gas lease, free from restrictions as to sale, trust property would greatly depreciate in value.

2. Trusts ⇐58

In action to relieve trustee of restriction in declaration of trust, as to sale of trust property, finding that unless trustee was given power to enter into oil and gas lease, free from restrictions as to sale, trust property would greatly depreciate in value was supported by the evidence.

3. Trusts ⇐58

A court of equity has power to change method of administering a trust estate, when it is shown that such a change is necessary to prevent loss or destruction of trust property.

4. Action ⇐6

A court of equity in a proceeding to secure declaratory relief had power to change a declaration of trust of realty, which permitted trustee to lease realty subject to sale under conditions stated in trust agreement so as to permit trustee to enter into an oil and gas lease to extend beyond terms of declaration of trust where oil was discovered on property adjacent to trust property, after execution of declaration of trust, and trust property would be rendered worthless unless an oil and gas lease was executed.

5. Trusts ⇐58

The rule against courts modifying terms of a contract does not apply to declarations of trust where primary purpose of trust would not be accomplished by a strict adherence to terms of declaration of trust and hence when it appears that benefits which trustors desire to confer on beneficiaries would not accrue to them by a close adherence to terms of trust, a court of equity may modify terms of trust to accomplish intent and purpose of trustors.

6. Trusts ⇐58

The rule that where primary purpose of trust would not be accomplished by strict adherence to terms of declaration of trust, the court may modify the terms to accomplish intent of trustors is not contrary to canons of construction of contracts contained in Civil Code, since sections of Civil Code are applicable to interpretation of contracts and not to equitable powers of a court of equity to modify terms of a trust indenture.

7. Appeal and error ⇐1056(5)

In action to relieve trustee of realty of restriction in declaration of trust as to sale of trust property, denial of offer of proof that trust property was salable at a named price, and that it was to best interests of beneficiaries that property be sold at named price did not constitute prejudicial error where action was tried by court without a jury and offer was before the court at time it made its findings.

8. Appeal and error ⇐1056(5)

In action to relieve trustee of realty of restriction, in declaration of trust, as to sale of trust property, refusal to admit offered proof that a number of beneficiaries were aged persons and that a sale would be more to their advantage than a lease was not prejudicial as to persons who were not in the class of beneficiaries mentioned in the offer.

9. Action ⇐6

An action for declaratory relief is an equitable proceeding. Code Civ.Proc. §§ 1060, 1062.

10. Action ⇐6

The powers of a court acting under a statute authorizing declaratory relief are as broad and as extensive as those exercised by such court in a suit in equity. Code Civ. Proc. §§ 1060, 1062.

11. Action ⇐6

Under the statutes authorizing declaratory relief, a court was empowered to render a judgment authorizing trustee to execute oil and gas lease without restrictions as to sale of trust property, contained in declaration of trust, as well as under its general equitable powers. Code Civ.Proc. §§ 1060, 1062.

In Bank.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Evart W. Adams and others against Edna T. Cook and others for declaratory relief and for equitable relief. From an adverse judgment, defendants appeal.

Affirmed.

Lawrence M. Cahill, of Los Angeles, for appellants.

James E. Mahon; Fleming & Robbins, and C. S. Tinsman, all of Los Angeles, for respondents.

Charles I. Baker and Gilbert E. Harris, both of Los Angeles, for defendant Title Ins. & Trust Co., trustee.

Hiram E. Casey, of Los Angeles, for defendants Clara M. Preston and others.

Bernard G. Hiss, of Los Angeles, for defendants Edna Mae Myers and Ralph Le Roy Lewis.

Faries & McDowell, of Los Angeles, for defendant Charles C. Tustin (sued as John Doe One).

CURTIS, Justice.

The real property which is the subject of this action was on September 4, 1913, conveyed in trust to Title Insurance and Trust Company, as trustee, and on the 17th day of September, 1913, a declaration of trust was executed whereby the Title Insurance and Trust Company agreed to hold said real property for the purpose of selling the same at any time prior to June 1, 1916, at a gross price of not less than $1.50 per square foot, and provided further that if it was unable to sell said real property prior to that date for this price, it could sell the same for such lesser sum as it might deem to be for the best interest of the beneficiaries. The trustee was given power to lease or rent said real property for such price and on such terms and conditions as it might deem best "subject to the sale of said property under the conditions of this trust". The proceeds of sale or lease of the property were to be applied to pay trustee's costs, fees, expenses, real estate commissions and taxes, and the balance to be divided into 250 shares and paid to "the owners of certificates of beneficial interest issued and to be issued by said trustee representing the ownership of the balance of such proceeds of sale". The trust further provided that the trustee in all other matters connected with the trust should act upon the written order of the owners of at least two-thirds of the beneficial interest, said order to be binding on all beneficiaries. The trust was not to terminate until all the costs, fees and expenses of the trustee are paid. At the time the trust was created, it was the intention of those creating the trust to sell the property, but no purchaser could be found who would pay the price fixed in the trust instrument. It was not known at that time that the property was oil property and in fact oil was not found in that vicinity until a comparatively short time before the commencement of this ac-

tion. Upon the discovery of oil in territory included in the land covered by the trust, the trustee was approached by several reliable oil companies for an oil lease of the premises, but the trustee refused to give a lease, as its officers questioned its power under the terms of the declaration of trust to execute a lease under the terms demanded by said prospective lessees. It seems that those desiring an oil and gas lease of said trust property refused to enter into any such lease, if the lease were made subject to the sale of the property under the conditions of the trust. In the meantime many wells were drilled upon adjacent and contiguous properties and oil was being produced from said wells, which it was contended were draining oil from beneath the land covered by the trust property. Upon the refusal of the trustee to enter into any oil or gas lease of the property under the conditions demanded by the oil companies, this action was brought by plaintiffs, who represent more than 90 per cent of the beneficial interests under said trust, against the trustee and the remaining beneficial interest for declaratory relief, and also for equitable relief.

The complaint is in two counts. Count 1 is for declaratory relief and count 2 is for equitable relief, based upon allegations that oil and gas wells are being drilled on property adjacent and contiguous to the trust property and unless the trustee is permitted to enter into an oil and gas lease of said trust property, the oil companies leasing contiguous property will drain and remove oil and gas from beneath the trust property to the irreparable damage of unit holders, both plaintiffs and defendants. A number of the unit holders or beneficiaries who were made defendants failed to appear after being served with process, and their defaults were entered. Others appeared and filed answers to the complaint. Their answers consisted practically of denials of certain allegations of the complaint. The trustee filed an answer in which it joined with the plaintiffs in asking that the court declare its rights and duties under the declaration of trust, and furthermore, asked that the court direct it as trustee to accept the written order and direction of two-thirds in interest of the beneficiaries as to all matters pertaining to the operation of the trust and for attorneys' fees in the pending action. The trial court found all the allegations of the complaint true, excepting certain allegations of minor importance not involving any issue before us on this appeal. It further found that all the denials and allegations in the respective answers of the defendants were untrue "in so far as the same are inconsistent with the foregoing facts". It further found that unless the trustee is given power to enter into a mineral, oil and gas lease, free from the restrictions as to sale, said trust property will greatly depreciate in value. The conclusions of law were followed in the judgment, which provided that as a matter of necessity for the preservation of the corpus of said trust the trustee is authorized to enter into a mineral, oil and gas lease, community or otherwise, the same to extend within or beyond the terms of the trust, and that said lease or leases, or any extension thereof, shall not be made subject to the sale of the property under the condition of said trust, and furthermore and for the same reason, the trustee was specifically authorized to accept directions in all matters pertaining to the operation of said trust, whether expressly provided therein or not, upon the written order and direction of two-thirds in interest of the beneficiaries under said trust. Of the numerous parties made defendants in the action, only two have appealed from the judgment of the trial court, F. P. Newport and Letitia A. Newport. F. P. Newport is not only a beneficiary under the trust, but he was one of the two trustors who owned the property which is the subject of said trust. He is also the owner of a sizable amount of the capital stock of a corporation that is drilling an oil well in the vicinity of the trust property. He owns four beneficial interests out of 250 such interests in the trust property.

[1, 2] It is first contended by appellants that the court was without jurisdiction, in the absence of pleading, issue, evidence or proof in finding that unless said trustee is given power to enter into a mineral, oil or gas lease, "free from the restrictions as to sale, that said trust property will greatly depreciate in value". This contention is in our opinion without merit. While paragraph VII of the complaint is not in the precise language of said finding, it was sufficient to authorize the court to make said finding, provided there was evidence to support the same. It was therein alleged that unless the trustee was authorized to make an oil and gas lease to extend beyond the term of the declaration of trust, the trust property would be depleted and rendered worthless. The dec-

laration of trust provided that the trustee might lease the trust property, but any such lease "shall be made subject to sale of the property". No oil and gas lease of the trust property would be considered by the prospective lessees if it contained a condition that it was made subject to a sale of the trust property.

It was for the purpose of having the court, in the exercise of its equitable powers, relieve the trustee from this provision of the declaration of trust that plaintiffs instituted this action. They therefore alleged that unless the trustee was permitted to execute a lease "beyond the terms of the trust", the trust property would be rendered worthless, which was just another way of stating that unless the trustee was permitted to execute a lease free from the restrictions as to the sale of the trust property, it would become worthless. If the trust property should become worthless, it surely would "greatly depreciate" in value. There was then a proper pleading to support the finding in question. There was ample evidence in support of this finding. Wells were being drilled on adjacent and contiguous property and their admitted tendency would be to drain the oil and gas from the trust property, and Mr. Harris, of the Title Insurance and Trust Co., the trustee, stated that it would be impossible to lease the land for oil purposes subject to sale, for the reason that no oil company would pay a bonus for a lease with the possibility of having the property later sold. For the above reasons we are of the opinion that this first contention of appellants is without merit.

It is next contended that the trial court was powerless to change the terms of the declaration of trust so as to permit the trustee to enter into an oil and gas lease to extend beyond the terms of the trust indenture, or, in other words, a lease freed from the restrictions as to the sale of the trust property.

It is true as a general rule that courts are without authority to change the contracts of the parties, whether oral or written. This rule is well stated as follows: "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which has been made for themselves without regard to its wisdom or folly, as the court cannot supply material stipulations or read into the contract words it does not contain." 13 Corp.Juris. 525.

The authorities declaring this rule are legion, but the rule is so universally recognized that it seems unnecessary to mention them here. A number of them are to be found in the footnote in support of the above text from Corpus Juris.

[3] However, there is another factor present in the instant action, not present in the cases supporting the above rule, and that is that the property herein involved is held in trust, and the question before us is whether the powers of the trustee, as fixed by the declaration of trust, may, under the facts before us, be modified or in any way changed by a court of equity. That a court of equity has the power to change the method of administering a trust estate, when it is shown that such a change is necessary to prevent loss or destruction of the trust property, is well settled by the authorities. Pennington v. Metropolitan Museum of Art, 65 N.J.Eq. 11, 55 A. 468; 65 Corpus Juris 792; In re Pulitzer's Estate, 139 Misc. 575, 249 N.Y. S. 87; Mertz v. Guaranty Trust Co., 247 N.Y. 137, 159 N.E. 888, 57 A.L.R. 1114.

In the Pulitzer Estate, the deceased had by his will created a trust whereby there had been delivered to trustees large issues of stock in two publishing corporations, with directions to his trustees to hold the stock and pay the dividends to his children, the trust to continue during the lives of his two youngest sons, and, upon their death, the testator directed that said stock should be divided under varying conditions. No provision was made in the testator's will for a sale of the stock in any manner or under any conditions. After the death of the testator and during the lives of his two younger sons, an application was made to the court for an order authorizing the trustees to sell the stock in one of said publishing corporations on the ground that the said publication had during a number of years prior to said application been conducted at a loss and that the same condition prevailed at the time said application was before the court. After an extended review of the authorities, the court held that it had the power to authorize the sale of said stock, although there was no express power given in the testator's will, empowering his trustees to make said sale. Among the authorities relied upon by the court in hold-

ing that it had such authority was the case of Mertz v. Guaranty Trust Co., supra, in which the opinion was written by Chief Justice Cardozo. In the Mertz case, which presented a similar factual situation to that in the Pulitzer case, the court said, "Enough for present purposes that there is power." 247 N.Y. at page 144, 159 N.E. at page 890, 57 A.L.R. 1114.

The above citation from Corpus Juris states the rule as follows: "On a showing of reasonable necessity to effectuate the purpose of the trust, a court may authorize a trustee to make a lease beyond the termination of a trust." Citing Packard v. Illinois Trust & Savings Bank, 261 Ill. 450, 104 N.E. 275; Denegre v. Walker, 214 Ill. 113, 73 N.E. 409, 105 Am.St.Rep. 98, 2 Ann.Cas. 787.

The following additional authorities support this rule: Low v. First National Bank & Trust Co., etc., 162 Miss. 53, 138 So. 586, 80 A.L.R. 112; Stout v. Stout et al., 192 Ky. 504, 233 S.W. 1057; Cary v. Cary, 309 Ill. 330, 141 N.E. 156; Marsh v. Reed, 184 Ill. 263, 56 N.E. 306.

In the case of Pennington v. Metropolitan Museum of Art, supra, 65 N.J.Eq., at page 22, 55 A. at page 472, the court said: "If trustees disclose a situation of their trust in which a slavish adherence to the terms of the trust will operate to wholly prevent the benefits intended by its creator, and they seek instructions and directions as to their duty, I think that instruction and directions for a course of conduct which, though differing from that prescribed by the terms of the trust, will actually carry out the intent of the creator, may well be grounded upon and sustained by the necessity of the case. The benefits intended for the beneficiaries are the main subjects of consideration. The modes in which those benefits may be attained are incidental, and necessity may require a change of mode to produce the intended effect. The power of the court may well be exercised in a case of evident necessity. How far it may extend on other grounds need not be considered."

[4] The facts in the present case bring it within the rule established by the authorities just cited. The trust property was conveyed to the trustee for the benefit of the unit holders. It was the intent of the trustors that the unit holders or beneficiaries under the trust should secure the largest return possible on their investment. At the time of the creation of the trust it was not known, nor from what we gather from the evidence was it suspected that the trust property contained oil, gas or any mineral. It was thought, however, that the land had a prospective value for commercial purposes and the trustee was directed to sell the property at a fixed price, if it could be so sold before a given date. The trustee was unable to make a sale of the property under these conditions and no sale has been made. The trustee still holds the property and the unit holders are the owners of the entire beneficial interest therein. Recently oil has been discovered in the vicinity in which the trust property is located. The court found that the highest purpose for which said property is adapted is the production of oil and gas, and that it is unfit for any other purpose comparable to an oil and gas lease. The court found further, due to the fact that oil wells were being drilled upon land contiguous and adjacent to the trust property, that the corpus of the trust would be depleted and rendered worthless. It appears from these findings that, in the opinion of the trial court, the highest returns to the unit holders on their investments will be realized from a lease of the trust property for the production of oil and gas rather than a sale of the property or the use of the property for any other purpose.

It seems only reasonable to assume that had the trustors, at the time the trust was created any knowledge that oil and gas could be produced from the trust property, they would have had the declaration of trust provide for a lease thereof for that purpose. In giving to the trustee this right to lease the trust property for the production of oil and gas, the court is only doing what the trustors would have done had they had the same facts before them then that were before this court at the trial of this action.

"Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency." Curtiss v. Brown, 29 Ill. 201.

Another Illinois case involved an old-fashioned hotel, which was not fireproof. It was conveyed to trustees with a prohibition against a lease of the premises for a period longer than ten years. The trustees proved to the court that the income under a ten-year lease would be less than half the amount which could be realized from a ninety-nine-year lease, with a provision for the lessee constructing a new building. Since the income under the ten-year lease would be not sufficient to produce any income for the cestuis, the court authorized a ninety-nine-year lease. Marsh v. Reed, 184 Ill. 263, 56 N.E. 306.

[5, 6] It is perfectly clear from the above authorities that the rule against courts modifying the terms of a contract, and that they should construe it precisely as the parties had made it, does not apply to declarations of trust, where the primary purpose of the trust would not be accomplished by a strict adherence to the terms of the declaration of trust and that when it is made to appear in a court of equity, as was shown in the present case, that the benefits and advantages which the trustors desired to confer upon the beneficiaries would not accrue to them by "a slavish adherence to the terms of the trust", the court may modify the terms of the trust to accomplish the real intent and purpose of the trustors. This rule does not run contrary to any of the canons of construction of contracts contained in the Civil Code of this state, as these sections of the code are applicable to the legal interpretation of contracts as expressed by the parties, and have no reference to the equitable powers of a court of equity to modify the terms of a trust indenture in order to meet exigencies that have later arisen and which, unless the trust were modified, would defeat the prime purpose for which it was created.

We find no merit in the contention of appellants that the findings and judgment of the court are contrary to certain express rulings made during the trial of the case. Especially so is this true as the appellants have cited us to no ruling of the court made during the progress of the trial which is contrary to the findings and judgment as later made and rendered by the court.

[7, 8] Finally, appellants contend that the court erred in denying the offer of proof of appellants made during the course of trial as to the testimony of the witness, F. P. Newport. These appellants offered to prove by this witness that the trust property was salable at a certain price; that it was to the best interest of the beneficiaries that said property should be sold at or about said price, and that many of the beneficiaries were aged persons and a sale of the property would be far more to their advantage than a lease. We are unable to perceive how the appellants were prejudiced by the denial of this offer of proof. This action was tried by the court without a jury. The offer, stating the price at which it was claimed the property was salable, was before the court at the time it made its finding to the effect that the highest purpose for which the property of said trust is adaptable is for the production of oil and gas, and is unfit for any other purposes comparable to an oil and gas lease. We fail to see how this finding would have been any different had the court permitted the appellants to produce the evidence of the witness Newport. As to the contention that a number of the beneficiaries were aged persons and that a sale would be more to their advantage than a lease, we think the appellants are in no position to raise this issue. They were not aggrieved by the denial of the court to admit the offered proof, as the offered testimony did not purport to show that either of the appellants was in this class of beneficiaries. If there are any beneficiaries who, on account of their age, would be deprived of their rights by a lease rather than a sale of said property, they are not before this court making complaint against such a lease.

[9-11] We have heretofore considered the judgment in this action as one rendered strictly in a court of equity and not under section 1060 of the Code of Civil Procedure for declaratory relief. An action brought under this section of the code for declaratory relief is an equitable proceeding. Rolapp v. Federal Building & Loan Association, 11 Cal.App.2d 337, 342, 53 P.2d 974. The remedies therein provided for are cumulative. Code Civ.Proc., sec. 1062. The powers of a court acting under this section in granting declaratory relief are as broad and extensive as those exercised by such court in any ordinary suit in equity. Under section 1060 of the Code of Civil Procedure the court was empowered to render judgment authorizing the execution of the oil and gas lease without restrictions as to sale, as well as under its general equitable powers. Jones v.

Interstate Oil Corp., 115 Cal.App. 302, 1 P.2d 1051. That case in principle is in many respects like the instant case. It involved an oil and gas lease, which required the lessee to sink a well on the leased property to a stated depth. This was done. Thereafter it was discovered that there was a far more valuable deposit of oil sands at a greater depth and other wells in the vicinity began to drain oil from the leased premises. Thereupon the lessor brought an action under section 1060 of the Code of Civil Procedure and the court decreed therein that the lessee be required to drill a deeper well or permit the lessor to do so. This decree was sustained on appeal and it was held that it was proper under section 1060 of the Code of Civil Procedure and not in excess of the power granted therein. It would appear, therefore, that the judgment in this action may be sustained on either or both counts of the complaint.

We find no error in the record before us and are of the opinion that the judgment should be affirmed and it is so ordered.

We concur: WASTE, C. J.; CARTER, J.; SHENK, J.; GIBSON, J.; HOUSER, J.; EDMONDS, J.



15 Cal.2d 375

MARRA et al. v. ÆTNA CONST. CO.
L. A. 16755.

Supreme Court of California.
April 15, 1940.

1. Action ⇐6
Quieting title ⇐7(2)

A landowner may test enforceability of covenants or servitudes asserted against his property in suit for declaratory relief and to quiet title.

2. Covenants ⇐53

The statutory provision that covenant, made by landowner with owner of other land expressly for convenantor's assigns or to covenantee's assigns, to do or refrain from doing some act on covenantor's land for expressed benefit of covenantee's land, runs with both parcels of land, applies only to covenants between owners of property and not to covenants in grant of realty in fee, which are governed by statutory provision that covenant in grant of estate in realty for direct benefit of property or part thereof runs with land. Civ.Code, §§ 1462, 1468.

3. Covenants ⇐68

The statutory provision that covenant in grant of estate in realty for direct benefit of property or part thereof runs with land means that burdensome covenant of no benefit to property in deed thereof is not binding at law on grantee's transferees. Civ. Code, § 1462.

4. Covenants ⇐69(2)

Building restrictions in deed, reciting that grantees, their successors and assigns, covenanted that no structure except one-family residence, costing at least stated sum, would be built on lot conveyed for specified period, and that covenant was made for benefit of adjoining lot owned by grantors, were of no benefit to lot conveyed, and hence were not binding on persons to whom grantees subsequently conveyed such lot by ordinary deed. Civ.Code, § 1462.

5. Covenants ⇐84

A covenant not running with land may be enforceable in equity against covenantor's transferee, taking with knowledge of terms of covenant under circumstances which would make it inequitable to permit him to avoid restriction imposed by covenant.

6. Covenants ⇐84

The doctrine of equitable servitudes is not restricted to cases wherein uniform building restrictions have been imposed pursuant to general plan for improving entire tract or real estate subdivision, but also applies to covenants benefiting or restricting only single parcel of land.

7. Easements ⇐3(1)

A servitude cannot exist in gross, but must be appurtenant to other benefited property.

8. Covenants ⇐72

A building restriction in nature of servitude will not be enforced, where changed conditions in neighborhood of lands affected have rendered purpose thereof obsolete.

9. Covenants ⇐72

A covenant restricting use of property will be enforced, though unrestricted use of property would be more profitable to owner,

if original purpose of covenant can still be realized.

10. Action ⇐6

In suit to have lot declared free of building restrictions in deed conveying it to plaintiffs' grantor, it was incumbent on plaintiffs to show that they lacked knowledge of such covenant when they acquired property rather than on defendant to prove notice to plaintiffs of covenant.

11. Appeal and error ⇐882(3)

In suit to have lot declared free of building restrictions in deed conveying it to plaintiffs' grantor, plaintiffs' contention on defendant's appeal from judgment granting such relief that plaintiffs were not bound by such restrictions because there was no proof that they acquired property with notice of such restrictive covenant need not be considered, where plaintiffs framed their pleadings and tried their entire case on theory which assumed their original knowledge of covenant, but sought to avoid effect thereof by proof of changed circumstances.

12. Appeal and error ⇐171(1)

The Supreme Court is not inclined to decide appeal on state of facts plainly demonstrated by record to be contrary to assumption entertained by trial court and parties throughout trial of case.

13. Action ⇐6

In suit to have plaintiffs' lot declared free of residential building restrictions for benefit of adjoining lot in deed conveying burdened lot to plaintiffs' grantors, evidence that house on adjoining lot, owned by defendant, was no longer used as residence, that there were two bungalow courts, one of which immediately adjoined plaintiffs' lot, on same side of street in same block as both lots, that there were two apartment houses, gown shop, and apartment court on opposite side of street, and that boulevard at one end of block was devoted almost entirely to commercial uses, supported trial court's conclusions that conditions in neighborhood had undergone sufficient change since covenant was made to render restrictions obsolete and unreasonable, and that plaintiffs' lot was no longer sufficiently desirable for residential use to warrant enforcement of restrictions against plaintiffs.

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Anthony D. Marra and another against the Aetna Construction Company to quiet title to realty and declare it free of certain building restrictions. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Harold Larson, of Los Angeles, for appellant.

William L. Kuehn and Franz R. Sachse, both of Los Angeles, for respondents.

WASTE, Chief Justice.

This is an appeal from a judgment quieting the plaintiffs' title to real property and declaring the property free of certain building restrictions. The defendant and appellant, Aetna Construction Company, is the owner of adjoining property. The question decisive of the case is whether certain covenants in the plaintiffs' chain of title are binding upon them, either as covenants running with the land or as equitable servitudes.

The parties are substantially agreed upon the facts. In 1922 F. E. Woodley and his wife owned two adjoining lots (designated herein as lots 6 and 7) on Havenhurst drive in the city of Los Angeles. In that year they conveyed lot 6 to W. P. Stroh and his wife by a grant deed which recited that "the grantees, their successors and assigns" covenanted that for forty years thereafter no structure other than a one-family residence costing at least $8,000 would be built upon the land. The deed also declared that this provision should be deemed a "covenant running with the land" and should at all times be binding upon and enforceable against the grantees, their successors and assigns, or against any and all persons who should at any time thereafter become the owner of the land conveyed by the deed. This covenant was not made in contemplation of any general or uniform plan of improvement for establishing a district of one-family residences, but the deed did recite that the covenant was made for the benefit of lot 7.

In 1937 the Strohs conveyed lot 6 to the respondents by ordinary deed. The appellant maintains that the respondents took title to the property with actual knowledge of the restrictions contained in the 1922 deed, but the respondents point out that the record contains no

evidence that they had such knowledge. The appellant is the owner of lot 7, having acquired the title of the Woodleys by mesne conveyances with knowledge of the restrictions contained in their grant of lot 6.

Findings of the trial court state that conditions in the neighborhood where lots 6 and 7 are situated have changed substantially since 1922, and recite with particularity facts showing the nature and scope of the change. It was also found that if its use were unrestricted, lot 6 would be reasonably worth $12,000, while the value, subject to the restrictions, is only $2,000. The court concluded that the covenant did not run with the land, that it would be inequitable to enforce the restrictions against the respondents as a servitude and consequently that the covenant was not binding upon them.

[1] At the outset, the appellant challenges the propriety of giving affirmative equitable relief against restrictive covenants, even assuming a substantial change of conditions in the neighborhood. Strong v. Shatto, 45 Cal.App. 29, 187 P. 159. However, since the decision of this court in Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782, it has been settled that an owner may test the enforceability of covenants or servitudes asserted against his property in a suit for declaratory relief and to quiet title. He is not required to violate the restrictions at the risk of suffering the penalties which might result from such a breach in order to ascertain his legal rights. See 50 Harv. L.Rev. 171, 217; Osius v. Barton, 109 Fla. 556, 147 So. 862, 88 A.L.R. 394, 405.

[2-4] To support its contention that the covenant contained in the 1922 deed runs with the land, the appellant relies upon section 1468 of the Civil Code. That provision reads: "A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land." But it is apparent that this section of the code applies only to covenants entered into between owners of property. Covenants, like the present one, contained in a grant in fee of real property, are governed solely by section 1462 of the Civil Code, which provides: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." The decisions have interpreted this provision to mean that a burdensome covenant contained in a deed which in no way benefits the property conveyed is not binding at law upon the transferees of the grantee. Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 P. 308; Bresee v. Dunn, 178 Cal. 96, 172 P. 387; Werner v. Graham, 181 Cal. 174, 183 P. 945; 4 So.Calif.L.Rev. 343, 355. Since the restrictions involved here are of no conceivable benefit to lot 6, it is clear that they are not binding upon the respondents under the provisions of the code.

[5-9] Even though a covenant does not run with the land, it may be enforceable in equity against a transferee of the covenantor who takes with knowledge of its terms under circumstances which would make it inequitable to permit him to avoid the restriction. Bryan v. Grosse, 155 Cal. 132, 99 P. 499; Martin v. Holm, 197 Cal. 733, 242 P. 718; Coulter v. Sausalito Bay Water Co., 122 Cal.App. 480, 495, 10 P.2d 780; 10 So. Calif.L.Rev. 281; 11 Calif.L.Rev. 48. The doctrine of equitable servitudes has been invoked chiefly in cases where uniform building restrictions have been imposed pursuant to a general plan for improving an entire tract or real estate subdivision, but it is by no means true, as the respondents contend, that the doctrine is restricted to such cases. Tulk v. Moxhay, 41 Eng.Rep. 1143, in which the doctrine was first applied, was itself a case involving restrictions imposed upon a single lot. Byran v. Grosse, supra, and Relovich v. Stuart, 211 Cal. 422, 295 P. 819, furnish examples of decisions in this state which have enforced covenants in equity although they benefit or restrict only a single parcel of land. It is true, however, that a servitude cannot exist in gross, but must be appurtenant to other benefited property. Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677, 37 L.R.A.,N.S., 5. Also well recognized is the rule that a building restriction in the nature of a servitude will not be enforced where changed conditions in the neighborhood have rendered the purpose of the restrictions obsolete. Downs v. Kroeger, 200 Cal. 743, 254 P. 1101; Hess

v. Country Club Park, supra; Hurd v. Albert, 214 Cal. 15, 3 P.2d 545, 76 A.L.R. 1348; 1 So.Calif.L.Rev. 486, 489. But, if the original purpose of the covenant can still be realized, it will be enforced even though the unrestricted use of the property would be more profitable to its owner. Strong v. Hancock, 201 Cal. 530, 258 P. 60; 16 Calif.L.Rev. 58.

[10-12] In the present case the respondents assert that they cannot be bound by the restrictions because there is no proof that they acquired their property with notice of the covenant. However, since they were seeking affirmative relief, it was incumbent upon them to show that they lacked such knowledge rather than upon the appellant to prove the contrary. Moreover, the respondents' pleadings were framed and their entire case was tried upon a theory which assumed their original knowledge of the covenant but sought to avoid its effect by proof of changed circumstances. This court is not inclined to decide an appeal upon a state of facts which, as the record plainly demonstrates, is contrary to an assumption entertained by the court as well as by the parties throughout the trial of the case.

[13] We think, however, that the trial court was warranted in concluding that conditions have undergone a sufficient change since the covenant was made to render the limitation upon the use of the respondents' land obsolete and unreasonable in its purpose. The evidence shows that the house on lot 7 is no longer used as a residence but has been converted into a nursery school and kindergarten. Hence, if the sole purpose of the restriction on the servient property was to protect the value of the dominant estate for residential use, that purpose is at present not being realized.

The evidence also shows that the nature of the neighboring property has substantially changed. The two lots are located on the west side of Havenhurst drive between Sunset boulevard and Fountain avenue in the city of Los Angeles. While the west side of the street in that block is still predominantly residential, it contains two bungalow courts, one of which immediately adjoins lot 6. Directly across the street from lot 6 is a seven-story apartment house, and adjoining it on the north is a gown shop and beyond that a large one-story apartment court. South of the seven-story apartment is a three-story apartment house, and beyond that are one- and two-story residences. Sunset boulevard at this location is devoted almost entirely to commercial uses. This evidence supports the trial court's conclusion that the property in question is no longer sufficiently desirable for residential use to warrant the enforcement of the restrictions against the respondents.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; CARTER, J.; GIBSON, J.; EDMONDS, J.; HOUSER, J.



SHIVERS v. LIBERTY BUILDING–LOAN ASS'N et al.*

L. A. 16834.

Supreme Court of California.
April 18, 1940.

Rehearing Granted May 16, 1940.

Contracts ⇐141(3)
Mortgages ⇐86(3)

In suit to restrain foreclosure sale under second deed of trust given to mortgagee by mortgagor together with Home Owners' Loan Corporation bonds and a cash payment as part of refinancing plan, evidence sustained validity of note and the deed of trust, as against contention that fraud had been practiced upon mortgagor and that note and second deed of trust had been exacted without consent of the Home Owners' Loan Corporation.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Shedrick E. Shivers against the Liberty Building-Loan Association and others to restrain foreclosure sale, to set aside note and deed of trust, and to quiet title. Judgment for defendants, and plaintiff appeals.

Affirmed.

Charles S. Darden, of Los Angeles, for appellant.

* Subsequent opinion 106 P.2d 4.

M. J. Rankin, Milo V. Olson, and Walter S. Home, all of Los Angeles (Milo V. Olson and Walter S. Home, both of Los Angeles, of counsel), for respondents.

EDMONDS, Justice.

The decisive question in this case concerns the validity of a $300 note secured by a second deed of trust exacted of the appellant by the respondent Liberty Building-Loan Ass'n as a condition of its assent to the refinancing of a mortgage debt by the Home Owners' Loan Corporation.

The record shows that in 1934 the appellant sought the help of the Home Owners' Loan Corporation. He then owed the building and loan association a balance of $2,228 upon a note secured by a deed of trust on his home. The association agreed to accept in full satisfaction of this obligation bonds of Home Owners' Loan Corporation of a face value of $1,579, $25 in cash, and a $300 note to be executed by the appellant and secured by a second deed of trust on the property.

The refinancing was consummated on these terms. The appellant thereafter defaulted in making payments upon the $300 note and upon the institution of proceedings to foreclose the deed of trust securing it, he filed the present action asking that the sale of the home be restrained, that the $300 note and second trust deed be declared void, and that his title to the property be quieted against that encumbrance.

Upon trial of the cause the appellant testified that although his signature appeared on the note and trust deed, he had no remembrance of signing either of them and had refused at all times during the refinancing negotiations to agree to give the building and loan association any consideration in addition to the bonds. In conflict with this testimony was evidence offered on behalf of the association indicating that it had always insisted upon a second deed of trust as a condition of its assent to the refunding, and that it had never made any attempt to conceal its demand. Its secretary and manager testified to several conversations with the appellant in which he stated the association would not agree to proposed refinancing plan without the note and deed of trust which it eventually secured. He also said that he had discussed the matter with the Home Owners' Loan Corporation. "I made an effort," he said, "to find out whether it was agreeable to them or not. I was in the office of the Home Owners' and discussed it with the individual that was handling it at the time, and he said: 'Send in your instructions to escrow, providing for a second trust deed of $300.00.' I have no letters. That was just a conversation with one of the officials or clerks in the Home Loan office handling the matter at that time. That was the manner in which they handled those things at that time—they gave me certain papers to sign and in reference to the second trust deeds, you had to put your instruction into the escrow company, and it was understood with one of the officers in the Home Owners' Loan Corporation that we would sign those papers and then put our instructions in the escrow company regarding the second."

The escrow instructions of the association show a demand for the note and deed of trust now in controversy as part payment of the note it then held. No express approval of these instructions by the Home Owners' Loan Corporation appears but a representative testified that its files contain nothing to indicate it had refused to permit a second deed of trust on the property. He explained also that under some circumstances the corporation consented to a requirement by the creditor for a second trust deed. Upon this evidence the court found that no unfair advantage had been taken of the appellant and no fraud had been practiced upon him. A further finding was that the note and deed of trust were not delivered without the consent of the Home Owners' Loan Corporation.

In the case of McAllister v. Drapeau, 92 P.2d 911, 125 A.L.R. 800, this court held that a deed of trust to be a second lien which is executed with the knowledge or consent of the Home Owners' Loan Corporation is valid and enforceable, but that where such instrument is secretly or fraudulently exacted by the creditor, it is void and unenforceable. This holding follows the weight of authority. 28 Cal.Law Rev. 232; 13 S.C.L.R. 162; 52 Harvard Law Rev. 842; Note 110 A.L.R. 250 and 121 A. L.R. 119. The Home Owners' Loan Corporation, under its regulations, will refuse as a matter of policy to refund a first mortgage in any case where the creditor demands a second, unless it appears that the financial arrangements and the financial ability of the debtor are such that he will have a reasonable opportunity to pay off both encumbrances It is essential, therefore, in order that the corporation may as-

certain the facts in a given case, that a full disclosure be made to it of the amount and terms of a proposed second lien, and whether it is reasonably probable that the home owner will be able to fulfill his obligations.

But in the conflicting evidence which was before the trial court, there is ample support for the judgment. The testimony of the association's secretary shows that there was no secrecy, fraud or concealment in connection with its requirement for a note of $300 in addition to the bonds of the government agency. On behalf of the creditor he demanded such a note in the escrow instructions after discussing its terms with an officer or employee of the Home Owners' Loan Corporation. This and other evidence shows that the requirement of the creditor was fully disclosed in the refunding transaction.

The judgment is affirmed.

We concur: WASTE, C. J.; GIBSON, J.; SHENK, J.; CURTIS, J.

HOUSER, J., does not participate in the foregoing decision.

CARTER, Justice (dissenting).

I dissent.

Upon a reading of the transcript herein I am unable to accept the reasoning and conclusion announced in the majority opinion in this case. In McAllister v. Drapeau, 92 P.2d 911, 915, 125 A.L.R. 800, wherein this court affirmed a judgment canceling a secret second trust deed executed by the debtor upon insistence of the creditor, it is declared: "It is obvious, from a reading of the statute and the rules and regulations above quoted, that the main and controlling purpose of the act was to assist small home owners who, because of the then existing financial conditions, faced loss of their homes through inability to meet the charges due on mortgages on their home property. It is to be noted that the act places no compulsion, direct or indirect, on the creditor. The creditor had complete liberty of action. If he refused to accept the offer of the H. O. L. C. as to the amount of bonds and cash it would advance to refund the debt, there was nothing the H. O. L. C. or the debtor could do about it. It was contemplated, however, that many creditors would, and experience under the act proved that many did, accept a reduction in the amount of the existing loan in order to secure liquid assets such as bonds of the H. O. L. C. rather than foreclose on the property and have to hold it until conditions in the real estate market improved. The act provides that such reduction should be passed on to the home owner, the debtor. The rules and regulations contemplated that under some circumstances it would be to the interest of the home owner to give a second mortgage to the creditor to secure a part of the refunded debt, but such rules and regulations provided that the H. O. L. C. would not refund the first mortgage if the creditor demanded a second unless the financial ability of the debtor and the financial arrangements were such that the debtor would have a reasonable opportunity to pay off both mortgages. Obviously, before these facts could be ascertained, a full disclosure of the amount and the terms of the proposed second lien would have to be made to the H. O. L. C. The securing of a second lien by the creditor without such disclosure is clearly in violation of the letter and spirit of the statute and regulations."

While it may be true that the same degree of "secrecy" was not here employed by the creditor in exacting the second trust deed, the fact still remains that there is a dearth of evidence to establish "full disclosure to the Home Owners' Loan Corporation of the amount and the terms of the proposed second lien", as contemplated and required by the decision in McAllister v. Drapeau, supra, in order to permit the Home Owners' Loan Corporation before granting its loan to determine whether the debtor upon refinancing could carry the two loans. True, one of the officers of the creditor testified that he had a conversation with respect thereto "with one of the officials or clerks" in the Home Loan office but nowhere is there any showing that said individual, whoever he may have been, had any authority or power to consent on behalf of the Home Owners' Loan Corporation to the then contemplated second lien. In Council v. Cohen, Mass., 21 N.E.2d 967, 968, wherein a lien second to a Home Owners' Loan Corporation lien was declared void, it is stated that "there was some evidence * * * offered that the attorney communicated with some one connected with the corporation [Home Owners' Loan Corporation] with respect to the second mortgage, but I do not find that it was authorized or even known to the proper officers of the corporation [Home Owners' Loan Corporation] although the attorney doubtless acted in good faith."

In the case now before us the trial judge declared at the conclusion of the evidence that "There is no evidence in this record that the Home Owners' Loan Corporation consented to the execution of the second trust deed. They handed in certain (escrow) instructions but there is no evidence in this record that they were familiar with the contents of the escrow." It is true that the trial judge apparently later changed his mind and found: "That it is not true that the said plaintiff made, executed and delivered the promissory note and (second) trust deed for the sum of $300.00 above described, without the consent of said Home Owners' Loan Corporation," but this finding may not rely for support upon the fact that the Home Owners' Loan Corporation, along with the parties, offered certain escrow instructions for, as stated by the trial court at the conclusion of the trial, "there is no evidence in this record that they (Home Owners' Loan Corporation) were familiar with the contents of the escrow." In addition, one of the Home Owners' Loan Corporation officers testified that there was "no instrument in the files in the form of a request by the creditor to place a second trust deed on the real property * * * or of any consent on the part of the Home Owners' Loan Corporation to the debtor or to the creditor to place a second trust deed for $300.00 on said property". In other words, the evidence in this case is far from satisfactory in establishing notice to and consent of the Home Owners' Loan Corporation to a second lien, as contemplated in McAllister v. Drapeau, supra, which decision came down subsequent to the trial and judgment herein and was not therefore available for the guidance of the court below. Under the circumstances, a reversal of the judgment in this case should be ordered to permit of a full and clear showing on this issue.

Moreover, McAllister v. Drapeau, supra, announces a second and distinct ground of decision which is not mentioned in the opinion herein of Justice Edmonds, and which would appear to require a reversal, rather than an affirmance, of the judgment. It definitely appears from the record herein, as in McAlister v. Drapeau, supra, that the creditor signed the usual consent and release required by the Home Owners' Loan Corporation which, among other things, declared that the creditor "hereby consents, if said refunding can be consummated, to accept in full settlement of the claim of the undersigned the sum of $1,579.00 face value of the bonds of Home Owners' Loan Corporation, to be adjusted with not exceeding $25 cash and thereupon to release all the claim of the undersigned against said property". The express mention by the creditor in said consent and release of a $25 cash adjustment to accompany the Home Owners' Loan Corporation bonds, and its complete silence as to the additional note for $300 and accompanying second lien, definitely tends to indicate an attempt to conceal the note and second lien from the Home Owners' Loan Corporation. But aside from this, in McAllister v. Drapeau, supra, 92 P.2d at page 916, 125 A.L.R. 800, it is held that where, as here, the creditor agrees to accept the bonds in "full settlement", without any mention of a second lien, an accord and satisfaction, novation or release results. In this connection the cited case declares that "Several of the courts to which the problem here involved has been presented, in addition to holding the secret second mortgage illegal, have held that in signing the 'Mortgagee's Consent to Take Bonds', above quoted, the creditor agreed to accept such bonds 'in full settlement' of his claim, and that such agreement constitutes an accord and satisfaction, a release or a novation. Cook v. Donner, supra [145 Kan. 674, 66 P.2d 587, 110 A.L.R. 244]; Chaves County Building & Loan Ass'n v. Hodges, supra [40 N.M. 326, 59 P.2d 671]. The holding of these courts is sound. The agreement signed by the creditor was to accept the bonds 'in full settlement of the claim of the undersigned * * * and thereupon to release all the claim of the undersigned against said property'. The argument of amici curiæ that this broad language only constitutes an agreement by the creditor to release his security and does not constitute an agreement to release the debt secured is unsound. In the instant case, at the time California Security Loan Corporation signed the consent, the debtor owed it but one debt, which was secured by the recorded first mortgage, and partially secured by the secret unrecorded second mortgage. By signing the consent, that company agreed to release its entire 'claim'. This could have no reasonable meaning other than that it was an unqualified agreement in writing to release the existing debt for the amount of bonds offered. This constitutes a valid release, and an accord and satisfaction. Sections 1524, 1541, Civ.Code."

This latter ground would appear equally applicable here, for the creditor, as in the cited case, agreed in writing to accept $25 in cash and the Home Owners' Loan Corporation bonds "in full settlement of (its) claim", without any reference being made to the $300 note and the second lien to secure the same. It is also interesting to note that McAllister v. Drapeau, supra, 92 P. 2d at page 917, 125 A.L.R. 800, expressly declares "That this illegality argument [i. e., the first ground of the decision therein having to do with the secrecy of the second lien] has no application to the second ground set forth in this opinion, namely, that the 'Mortgagee's Consent' constituted a release, and an accord and satisfaction." In other words, regardless of any secrecy in the execution of a second lien, such second lien is void and unenforceable where, as here, the creditor accepts the Home Owners' Loan Corporation bonds "in full settlement" of his claim. A satisfaction and release of the claim thereupon results.

A review of the authorities relative to the validity of a secret second encumbrance when the first mortgage is held by the Home Owners' Loan Corporation, and a discussion of the principles of law contained in these authorities is contained in the January, 1940, issue of the California Law Review, volume 28, pages 232, 235, inclusive. It appears from this article that second trust deeds on mortgages executed under the circumstances as disclosed by the record in the case at bar have been uniformly held invalid and canceled by the courts.

For the foregoing reasons, I cannot join in the majority opinion in the instant case as I am persuaded that the ends of justice, as well as the weight of authority, requires a reversal of the judgment.



15 Cal.2d 195

SUTPHIN v. SPEIK.

L. A. 17142.

Supreme Court of California.

April 23, 1940.

Judgment ⊂=587

Where prior judgment determined that plaintiff had a right to a specified percentage of the production of oil, plaintiff could not be compelled to relitigate that right on defendant's discovery of a new theory on which to attack the right.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

On rehearing.

Rehearing denied.

Prior opinion, 99 P.2d 652.

John W. Preston, Wood, Crump & Rogers, Crump & Rogers and John Perry Wood, all of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondent.

PER CURIAM.

Defendant in his petition for rehearing challenges certain portions of our opinion, which he interprets as meaning that in a second suit on a different cause of action, any issue which could have been raised in the first suit is res judicata in the second, even though not actually determined in the first. This is not our holding, and the opinion must be read in connection with the facts of this case, and with an understanding of the issue which was, in fact, decided in the former action, 99 P.2d 652.

The judgment in that action awarded plaintiff five per cent of the total production from the lots in question whether produced from one or more wells. That judgment, correctly or incorrectly, did not limit the right of plaintiff to production from wells which bottomed under the land. After that judgment became final, plaintiff's right to a portion of the production from those wells was conclusive as between the parties, even in the present suit on a different cause of action, because the basic issue thus decided in the first case is identical with that in the present case. Defendant, in his petition, has again urged that the former judgment cannot be res judicata as to the new issue of the title to oil from wells bottomed on state land, which title was acquired after the conclusion of the first action. The difficulty with this argument is that the asserted "new issue" is not such, in fact. Defendant has simply offered another legal theory by which the same issue might be differently decided. If he may have a new trial of the issue of right to the production of the oil from these wells because of the new argument

that the source of the oil must be considered, then it would seem that in subsequent actions he can raise a "new issue" as to the title of A, B, C, or other possible claimants in addition to the state. In short, defendant's contention is that though the prior judgment determined that plaintiff had a right to a specified percentage of the production of oil from any wells on certain land, plaintiff may be compelled to relitigate that right whenever defendant can discover a new theory upon which to attack it. This proposition is without support in principle or authority.

Rehearing denied.



15 Cal.2d 393

PEOPLE v. DAWA.

Cr. 4265.

Supreme Court of California.

April 15, 1940.

1. Homicide ⇨237

Evidence *held* to authorize conviction of murder, as against defense of insanity.

2. Criminal law ⇨48

The accepted test of "sanity" in criminal cases is whether defendant could distinguish between right and wrong.

See Words and Phrases, Permanent Edition, for all other definitions of "Sanity".

In Bank.

Appeal from Superior Court, Sacramento County; Martin I. Welsh and Raymond T. Coughlin, Judges.

Vincent Dawa was convicted of murder, and he appeals.

Affirmed.

John L. Brannely, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

CARTER, Justice.

This appeal from a judgment imposing the extreme penalty comes before us pursuant to the provisions of section 1239 of the Penal Code, which section authorizes an "automatic" appeal in all death penalty cases. No brief has been filed on behalf of the defendant, though a "memorandum" has been filed by the attorney general stating the general nature of the case. An examination of the entire transcript has failed to reveal anything of a prejudicial or reversible character.

It appears that the district attorney of Sacramento county filed an information charging the defendant with the murder of one Lim Ding, a Chinese, on April 19, 1939. Upon his arraignment the defendant entered the dual plea of not guilty and not guilty by reason of insanity. The trial on the general issue was exceedingly brief. The defendant, following an unsuccessful attempt of his counsel to withdraw the "not guilty" plea, offered no evidence by way of explanation of or defense to the homicide charge. The evidence of the prosecution showed, in substance, that on the night of the homicide the defendant, a Filipino laborer of the age of 28 years, attended a Chinese social club or gambling establishment in the city of Sacramento, which he had frequented on prior occasions. At one of the tables he lost approximately $1.65, whereupon he left the establishment. He returned within a few minutes and walked to within a few feet of the deceased, who was the dealer or keeper of the table where defendant had lost his money, and fired a shot from an automatic pistol through the head of the deceased. Defendant immediately ran from the place and was taken into custody by the police a short distance away while he held a pursuing crowd at bay with the pistol. He readily admitted the shooting to the arresting officer, giving as his reasons that he did not like the deceased's manner of dealing and that the deceased had laughed at him. The autopsy surgeon testified that the gunshot wound had caused the death of the deceased.

As stated, the defendant offered no evidence upon the general issue, and the jury, under the circumstances, returned a verdict of murder of the first degree without recommendation. The trial upon the defendant's insanity plea then proceeded, as authorized by statute, before the same jury. In view of the ultimate inability of the jury to reach a verdict upon the issue raised by said plea, it was discharged and a new jury sworn to try the sanity issue. At the conclusion of a lengthy trial, wherein evi-

dence making up a transcript of several hundred pages was introduced, the jury returned a verdict finding the defendant sane at the time of the commission of the homicide. Under the verdicts and the law, the trial court had no alternative but to enter judgment imposing the extreme penalty.

[1, 2] The evidence, lay and expert, addressed to the insanity issue, is in sharp conflict and leaves no room for an appellate court to interfere with the finding of the jury thereon. Therefore, it will serve no useful purpose to narrate the evidence in great detail. Suffice it to say that the defendant produced as witnesses his brother, a cousin, a fellow laborer and several inmates of the county jail who occupied the same "tank" with him during his confinement awaiting trial. These persons testified as to the defendant's apparent desire not to associate with others because of his expressed belief that they were "against him". They testified that he was given over to mumbling to himself, to publicly practicing self-abuse, to tearing up papers and scattering them about, to pasting magazine pictures on the walls of his cell and talking to them, and to hollering. Each of these lay witnesses expressed the opinion that defendant was insane. All but one of the county jail associates of the defendant were impeached on cross-examination by reason of prior felony convictions. Under the circumstances, the jury apparently attached but little weight to their testimony, concluding, unquestionably, that their sole desire was to assist a fellow prisoner. The relationship to and friendship for the defendant of the other lay witnesses was undoubtedly considered by the jury in its resolving of the conflicts in the evidence. Defendant also produced two medical experts who testified that they had examined him while in jail and found that he was suffering from paranoia, i. e., from delusions of persecution. In answer to a hypothetical question propounded by defense counsel each expert gave it as his opinion that the defendant could not distinguish between right and wrong—the accepted test of sanity in criminal cases in this state. People v. Walter, 7 Cal.2d 438, 440, 60 P.2d 990. However, one of said experts in response to a hypothetical question propounded on cross-examination, and containing many of the facts surrounding the commission of the homicide, readily answered that the enumerated circumstances "would certainly be evidence of sanity".

As against this showing of the defendant, the prosecution produced as a witness the deputy sheriff who had charge of the county jail and who over a period of months had opportunity to observe the defendant. He testified that he had never seen anything unusual in the defendant's conduct and that none of his fellow inmates ever had complained of the defendant's actions. Without narrating his testimony, another witness, who had been employed by the district attorney to "serve" a term in the county jail in order to observe the defendant, contradicted much of the testimony of the other inmates. The prosecution called as witnesses three medical experts, two of whom had been appointed by the trial court to examine the defendant. The first expert, Dr. Wilder, an expert in diagnosing and treating mental diseases and who had served on the staff of the Napa State Hospital and since 1905 had been an examiner in insanity in Sacramento county, testified that he examined the defendant pursuant to appointment by the court and was of the opinion that the defendant did know the difference between right and wrong. In the course of his testimony, the witness stated that the defendant had told him he smoked marijuana and knew that it was wrong and that the government put users thereof in the "big house"—showing on the part of the defendant an appreciation of the difference between right and wrong.

Another expert, a psychiatrist, who had been employed by the district attorney to examine the defendant, testified that during his examination the defendant stated he had shot the deceased "because he tried to cheat him". The witness related that the defendant gave no evidence of having any delusions or hallucinations. It was the opinion of the doctor that the defendant knew the difference between right and wrong.

Finally, the prosecution called Dr. Smythe, superintendent of the Stockton State Hospital, who likewise had been appointed by the court to examine the defendant. The witness testified that defendant said he nearly always lost at the gambling house where deceased worked and was shot, and that the defendant appeared to be resentful toward the deceased because he (the defendant) had been called "a cheap gambler" and told "not to come back any more". As a result of this, the defendant told the witness that "he was angry, very angry". To this witness the

defendant likewise mentioned his use of marijuana and his knowledge of the fact that users of the drug were put in "this here jail". The doctor expressed the opinion that the defendant "belongs to that class of people who have a constitutional anti-social understanding, and that he did know the difference between right and wrong".

The foregoing adequately discloses that there is in the record ample evidence of a substantial nature to support the verdict of the jury that the defendant was sane at the time of the commission of the homicide. In view of such verdict and the prior verdict on the general issue finding the defendant guilty of murder of the first degree without recommendation, the trial court, as already stated, had no alternative but to enter judgment imposing the extreme penalty. We have found nothing in the rulings of that court or in its instructions, which were full and fair, that in any way tended to prejudice the defendant. Under the circumstances, we can do nothing but affirm the judgment.

The judgment and order denying a new trial are, and each is, affirmed.

We concur: WASTE, C. J.; SHENK, J.; EDMONDS, J.; HOUSER, J; CURTIS, J.



38 Cal.App.2d 439

In re HOVLAND'S ESTATE.
WIKA et al. v. BALY et al.
Civ. 12498–S.

District Court of Appeal, Second District, Division 1, California.

April 15, 1940.

Hearing Denied June 14, 1940.

1. Courts ⇐200½

The Superior Court sitting in probate is clothed with jurisdiction to determine title to claims when the representative of the estate asserts such title in individual capacity as against the estate.

2. Courts ⇐200½

The Superior Court sitting as a court of probate had jurisdiction to try issue between estate and representative as to whether certain sums delivered to representative prior to death of testator was properly charged against such representative in his official capacity or was given to him in his personal capacity and therefore did not constitute property belonging to the estate of the deceased.

3. Executors and administrators ⇐513(12)

Where testator, prior to his death, delivered money to representative and representative in his first account current charged himself with such sum and inventoried sum as asset of estate and account was settled, and approved by court as were subsequent current accounts, orders settling accounts were not "res judicata" on question whether sum was properly charged against such representative in his official capacity or was given to him in his personal capacity. Probate Code, § 921.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

4. Executors and administrators ⇐513(9)

Order settling executor's account or ordering distribution can only be conclusive as to such items or issues as are included in the account or raised in connection with petition for partial distribution. Probate Code, § 921.

5. Executors and administrators ⇐72

Where testator provided for the disposition of all of his property by will and thereafter borrowed money for purpose of doing construction work and placed borrowed money in hands of person who became his executor with letter directing such person to make disbursements in accordance with contract for construction, testator intended to create a "trust" and fact that executor inadvertently included the trust fund in inventory as asset of estate did not alter character of fund. Civil Code, §§ 2221, 2222.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

6. Trusts ⇐39

Knowledge on the part of a beneficiary or acceptance by him of the provisions of a trust is not determinative of whether a trust exists.

7. Trusts ⇐33

Where testator before death gave to person named executor in will a certain sum with instructions to pay contractor in accordance with building contract, transfer of

sum passed title beyond testator's control and that of legatees named in will and vested in contractor immediate title to fund which he could reduce to possession by performance of contract and enforcement of agreement and "trust" in favor of contractor was created.

8. Trusts ⇐39

Where testator before death, created trust to pay contractor in accordance with building contract, contractor's filing of claim against testator's estate did not constitute an "election" not to take under the trust, since there was no inconsistency between filing of claim and reliance on provisions of trust.

See Words and Phrases, Permanent Edition, for all other definitions of "Election".

9. Courts ⇐202(5)

Where order appealed from probate court expressly withheld decision on matter of abatement of legacies and reserved determination for subsequent action, question reserved for decision was not properly before reviewing court.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Proceeding in the matter of the estate of Andrew W. Hovland, deceased, wherein Regina Wika and others filed a petition against Robert C. Baly, executor of the last will and testament of Andrew W. Hovland, deceased, and others to determine who were entitled to distribution of the estate and to establish heirship. From an adverse order petitioners appeal.

Affirmed.

Otto A. Hoecker, of San Francisco, and Edw. F. Wehrle, of Los Angeles, for appellants.

G. P. Adams and Charles E. Beardsley, both of Los Angeles, for respondent Robert C. Baly, Ex'r.

WHITE, Justice.

Appeal from an order made by the probate court upon a petition to determine who were entitled to distribution of an estate and to establish heirship.

Andrew W. Hovland executed his last will and testament on April 22, 1925. In the parts thereof pertinent to this appeal he disposed of his estate as follows: First, to Mrs. Elsie Garrison he bequeathed two parcels of real property, all rents accruing therefrom after his death, and a Buick automobile. Second, to Kari Bjelland he gave the sum of $1,000. Third, five-sixths of the balance of all moneys, securities and mortgages of which the testator died possessed were willed share and share alike to the children of his brother, S. S. Hovland, namely, Anna Larsen, Regina Wika, Celia Odlund, Hanna Hovland and Bertha Strand. The remaining one-sixth he bequeathed to the then living issue of his deceased niece, Marianna Strand, to-wit, Sigurd Strand, Bernt Strand, Berit Strand, John Strand and Gjorgine Strand. Fourth, all the balance of his estate, both real and personal, he gave in equal shares to nine nephews and nieces, namely, Ben Hovland, Adolph Hovland, Chris Hovland, Ida Hovland Hagen, Kristine Eadkins, Helen Guida, Pete Hovland, Henry Hovland and Emily Hovland.

Prior to the execution of his will decedent, on April 17, 1925, borrowed $300 from the Bank of San Pedro upon his unsecured note. This obligation was discharged by payment thereof in the course of administration.

Subsequent to the execution of his will decedent, on June 27, 1925, borrowed from the same bank $4,000 upon his unsecured promissory note. Two days later, on June 29, and during his last illness, decedent delivered to Robert C. Baly, named as executor in his will, his personal checks for $4,000, accompanied by a letter reading as follows:

"I hand you herewith check in the sum of $4,000.00. You are instructed to hold this amount in your name and pay to Hugo Johnson any moneys due him in accordance with the terms of a certain contract for the erection of four garages and apartment on the property described as

"Lot 9, Block 1 of the Palos Verdes Tract.

"Yours very truly,

"Andrew W. Hovland."

Mr. Baly deposited the $4,000 in the bank in his own name and made no disbursements therefrom during the lifetime of decedent.

On June 30, 1925, decedent contracted in writing on behalf of himself, his heirs, executors, administrators and assigns, with Hugo Johnson, the latter's heirs, executors, administrators and assigns, for the erection of a combination dwelling and

garage on certain property belonging to the testator for the agreed sum of $3,833. This is the property devised in the will to Elsie Garrison. Six days later, on July 5, 1925, Andrew W. Hovland died, and on August 5, 1925, his will was admitted to probate.

In due course Mr. Baly, as executor under the will, filed an inventory, and the item therein of "Moneys belonging to said deceased which have come to the hands of the executor, $4,284.55," included the aforesaid sum of $4,000 transferred to Baly on June 29, 1925, as hereinbefore set forth, and which sum remained continuously in Baly's possession until after the demise of Mr. Hovland.

On June 29, 1926, the claim of the Bank of San Pedro for $4,000 on the hereinbefore mentioned promissory note was approved by the court, the same having been theretofore, on September 26, 1925, allowed by the executor. On September 26, 1925, the claim of Hugo Johnson on the above-mentioned contract for $3,833 was allowed by the executor, and approved by the court on June 29, 1926.

On January 23, 1929, the executor filed his verified first account, in which he charged himself, among other things, with the item of $4,000 heretofore mentioned and which will hereinafter become the subject of discussion in this case. This account also showed the collection of certain mortgages and liquidation of certain stock. In the verified report and petition accompanying the first account the executor alleged that the residuary estate, "which consists of real property is charged with the debts of said deceased together with the charges of administration. The personalty of said Estate having been specifically bequeathed under paragraph 3 of said will." Objections were made by appellants here to the application of the personalty which had been bequeathed to them and Anna Larsen for the payment of claims, debts, improvements and administration costs. Subject to said objections, which were reserved by stipulation for determination at a subsequent account or hearing, the first account was settled, as was the second account upon similar objections and a similar stipulation. Thereafter the third and fourth accounts current were similarly settled over like objections.

On October 21, 1927, appellants filed a petition for partial distribution, and after setting forth the bequests to them verbatim, alleged that such bequests consisted of $4,284.55 cash, securities and mortgages, and included the aforesaid $4,000 delivered to Mr. Baly by the testator prior to the latter's death. On November 18, 1927, partial distribution in the amount of $15,000 was had. On May 3, 1928, a petition for partial distribution containing similar allegations was filed by Anna Larsen, upon which an order was made for partial distribution to her of $13,000.

A dispute having arisen as to the interpretation of the will and its application to the assets as set forth in the inventory and then on hand, appellants filed a petition to determine heirship. Following a hearing had on the petition of appellants to determine who are entitled to distribution of the estate and to establish heirship, the court made findings determining that the aforesaid sum of $4,000 delivered to Robert C. Baly prior to the demise of the testator was held by Baly in trust to be used in accordance with the instructions contained in the letter transmitting it, and that the whole of said sum should not have been included by Baly as executor in his inventory of the property belonging to the estate of decedent. The court further found that Baly paid out of said sum of $4,000 a total of $3,833 to Hugo Johnson, the person named in the letter, upon the contract for the erection of the buildings referred to in said letter, and that only the balance of $167 of said total sum was properly returnable in the inventory as part of the estate of decedent.

With reference to the third paragraph of the will hereinbefore set forth, the court found that the petitioners, Bernt Strand, Sigurd Strand, Berit Strand, John Strand and Gjorgine Strand, are the issue of said decedent's niece, Marianna Strand, and that each and all survived the decedent. With reference to the question as to the rights and interests of John H. Garrison, assignee of Elsie Garrison, and the prior rights and interests of petitioners and the possible abatement of either, the court found that such question had not been adjudicated and reserved decision thereon. Based upon the foregoing findings and subsequent conclusions of law, the court made its order decreeing that the $4,000 delivered to Robert C. Baly by decedent during the latter's lifetime constituted a trust fund, and that only the surplus of $167 thereof which remained in the hands of Baly as trustee after discharging his trust is properly to be included in the inventory of the

estate, and that said sum of $4,000 did not constitute moneys of which decedent died possessed; and which order further provided "that the balance, if any, due and payable to the petitioners herein upon the bequest contained in paragraph third of the said will shall be determined after payment of the debts and administration expenses of the within estate, and that if the balance of funds and property in the hands of the executor is insufficient to pay such debts and expenses of administration, contribution thereto from those to whom bequests and legacies have already been distributed shall be enforced by the executor upon the order of this court".

[1] Appellants first assail the order made by the probate court on the ground that no jurisdiction existed in the court to determine that the sum of $4,000 did not belong to the decedent or his estate. Conceding it to be the rule that the superior court sitting in probate does not possess jurisdiction to try the question of title to property as between a representative of the estate and strangers thereto, there is ample and creditable authority for the statement that the superior court, sitting in probate, is clothed with jurisdiction to determine title to claims when the representative of the estate asserts such title in his individual capacity as against the estate. Bauer v. Bauer, 201 Cal. 267, 256 P. 820, and cases therein cited; Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Estate of Roach, 208 Cal. 394, 281 P. 607, 608. In the last-cited case we find the following: "* * * It is now well settled that the court, sitting in probate, is clothed with jurisdiction to hear and determine, as against an administratrix the amount of money or property of the estate that has come into her hands, for the purpose of charging her therewith, and in determining that question to determine all issues necessarily incidental thereto. [Citing cases.] In the case of Stevens v. Superior Court, supra [155 Cal. 148, 99 P. 512], "where an executor alleged that the testator, prior to death, had transferred certain money to him in his individual capacity, which he claimed as his individual property, it was held that the probate court had power to determine the title".

[2] Obviously, therefore, in the instant case the probate court possessed jurisdiction to try the issue between the estate and the representative thereof as to whether the $4,000 delivered to the representative prior to the death of the testator was properly charged against such representative in his official capacity or was given to him in his personal capacity, and therefore did not constitute property belonging to the estate of the decedent.

[3, 4] It is next contended by appellants that the question as to whether the sum of $4,000 belongs to the estate and is distributable to the appellants is res judicata. This claim is based on the fact that in his first account current such executor charged himself with said sum; that he inventoried the same as an asset of the estate, and that such account was settled, allowed and approved by the court, as were subsequent current accounts. Also, that when appellants filed a petition for partial distribution, alleging that the $4,000 was part of the property bequeathed to them and Anna Larsen, the court, by ordering partial distribution in the sum of $15,000 to appellants, thereby impliedly found and determined that the $4,000 here in question was property of the estate. Appellant's contention with reference to the approval of the current accounts is answered by saying that none of these accounts was a final account, but all were in the nature of current accounts filed pursuant to section 921 of the Probate Code. In these proceedings it was only necessary for the court to examine into the accuracy of the account of the executor so far as the receipt and disbursement of money were concerned. The function of the court in these proceedings was simply to ascertain what money the executor had received and what proper disbursements of it he had made and to determine the balance of money in his hands. It is only upon a final account that the court must determine with what property in its entirety the executor is chargeable. Further, in neither the current accounts nor in the proceedings for partial distribution was the title to the $4,000 put in issue or determined. It requires no citation of authority for the statement that orders settling accounts or ordering distribution can only be conclusive as to such items or issues as are included in the account or raised in connection with the petition for partial distribution. The doctrine of res judicata therefore has no application here.

[5-8] Appellants next assert that contrary to the findings of the trial court no trust was created by the delivery of the $4,000 and the letter accompanying it to

Baly during the lifetime of the testator. With this claim of appellants we cannot agree, by reason of the factual situation involved in the transfer of the money and the reason and logic of the inferences to be deduced therefrom. Decedent made his will on April 22, 1925. In that testamentary document he made disposition of all moneys of which he might die possessed. On June 27, 1925, he borrowed the $4,000 from the bank for the ostensible purpose of doing certain construction work upon a parcel of real property which he owned. Three days thereafter, on June 30, he entered into a contract for the doing of such construction work. Five days later he died. On June 29, six days before his death, he placed the $4,000 in Baly's hands to use for the purposes set forth in his letter accompanying the transfer of the funds. Clearly the reason for the transfer of the $4,000 to Baly was the realization on the part of the testator that if he retained it in his possession it would be subject to the provisions of his will with reference to the disposition of all moneys in his possession at the time of his death; so he transferred such money to Baly to be disbursed in furtherance of the purpose for which he borrowed it, to-wit, the construction work upon his property. To us this appears clearly to indicate an intention on the part of the testator to place this $4,000 beyond the reach of the legatees mentioned in the third paragraph of his will. The only reasonable inference that can be drawn from this course of conduct on the part of the testator is that it was his intention to create a trust in connection with which he set forth the subject, purpose and beneficiary of the trust. (Civ.Code, secs. 2221 and 2222.) The fact that Baly inadvertently or mistakenly included the trust fund in his inventory as executor of the decedent's estate cannot and does not change or alter its character as established by the contract of the trustor when he created such trust. Knowledge on the part of the beneficiary or acceptance by him of the provisions of a trust is not determinative of whether a trust exists. This is especially true where, as here, the facts show that the intention of the deceased was to make a transfer of a present, immediate, and indefeasible title to the money for the benefit of the contractor, Hugo Johnson. The transfer was full and complete by the payment of the check to Baly, and passed from the donor the legal power, dominion over and title to the money, beyond his recall or control. It vested in the contractor, Johnson, an immediate title to the fund, with the right to reduce the same into his possession by performing the terms of his building contract with decedent and thereafter enforcing the obligation of Baly as trustee in accordance with the terms of the agreement establishing the trust. Wade v. City and County Bank, 25 Cal.App. 675, 145 P. 145, is not in point, because the trust alleged therein was for the benefit of the contracting building company, and there was no privity between the defendant and the materialmen who sought as plaintiffs therein to recover under the trust. In the case at bar, however, the trust was created for the benefit of the contractor Johnson and he could enforce its terms. The fact that the contractor Johnson named as beneficiary under the trust did not avail himself of his rights thereunder, but chose to file a claim in the estate, does not amount to an election by him not to take under the trust, because there is no inconsistency between such action and a reliance upon the benefit of the provisions of the trust. National Bank of California v. Exchange Nat. Bank, 186 Cal. 172, 180, 199 P. 1. The finding of the probate court that the transfer of the $4,000 by decedent to Baly prior to the death of the former created a trust in favor of the contractor Johnson was therefore correct.

[9] Finally, appellants contend that the legacy in favor of themselves and Anna Larsen is specific, and abates only after that in favor of Elsie Garrison. However, this question is not now properly before us, for the reason that in the order appealed from the probate court expressly withheld a decision in the matter of abatement and reserved determination thereof for subsequent action. As convincing proof that the court refrained from deciding the question of abatement one way or the other, we quote the following from the order which forms the basis of this appeal: "* * * provided, however, that the question as to whether the rights and interest of said John H. Garrison are prior to the rights and interest of said petitioners" (the appellants herein) "and the possible abatement of either has not been adjudicated in said order and has been expressly reserved for later adjudication herein."

For the reasons stated, the order appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

ACKER v. BALDWIN et al.*

Civ. 6395.

District Court of Appeal, Third District, California.

April 6, 1940.

Hearing Granted June 3, 1940.

1. Counties ⇐21½

A county had right and power to adopt zoning ordinance prohibiting use or construction of any building for any purpose other than single-family residence in residential zone.

2. Constitutional law ⇐48

Every intendment must be indulged by courts in favor of validity of exercise of police power, and measure will be deemed within purview of such power, unless clearly oppressive.

3. Municipal corporations ⇐601

The establishment of strictly private residential districts as part of systematic, carefully considered, and existing zoning plan by ordinance is legitimate exercise of police power delegated to municipality.

4. Counties ⇐23

Whether nonconforming uses of property in district zoned as residential by county ordinance impaired or injuriously affected public welfare was question for members of county board of supervisors or their authorized agents, and courts cannot substitute their judgment in such matters for that of municipal authorities.

5. Counties ⇐23

The courts have no right or power to interfere with zoning of district by county governing body, in absence of abuse of its discretion.

6. Counties ⇐21½

The zoning of district, in which dwelling house was used by owner in connection with his business as plumber, as residential by county ordinance, though located in area inhabited by many persons devoting their property to nonconforming agricultural and industrial uses when ordinance was adopted, was not abuse of discretion of county board of supervisors as having no real or substantial relation to general welfare.

7. Constitutional law ⇐296(2)

A county zoning ordinance *held* not unconstitutional and void as discriminatory, unreasonable, oppressive, arbitrary, and confiscatory so far as prohibiting home industries in residential zone, wherein many inhabitants were devoting their property to nonconforming agricultural and industrial uses when ordinance was adopted. Const. Cal. art. 1, § 3; U.S.C.A.Const. Amends. 5, 14.

8. Counties ⇐21½

In passing on constitutionality of county zoning ordinance as to area placed in residential district, it must be presumed that members of county board of supervisors were aware of fact that many inhabitants of such district were putting their property to uses not conforming to such legislation when ordinance was adopted.

9. Counties ⇐21½

County board of supervisors had right, in exercise of sound discretion, to adopt ordinance placing in residential zone district wherein many inhabitants were putting their property to uses not conforming to such legislation when ordinance was adopted, as existence of such uses did not absolutely preclude board's exercise of police power.

10. Municipal corporations ⇐601

Municipal zoning may take into consideration factors bearing no relation to public health, safety or morals, but within meaning of broader term "general welfare".

11. Evidence ⇐12

The District Court of Appeal of Third Appellate District can take judicial notice of extremely rapid growth in population of Los Angeles county during past few years.

12. Municipal corporations ⇐601

The fact that some occupations, not conforming to zoning regulations sought to be imposed in certain district, are carried on therein, is not insurmountable barrier to such zoning, as zoning looks to future, not past.

13. Municipal corporations ⇐601

Zoning regulations cannot be made retroactive, and previous nonconforming uses cannot be removed, nor pre-existing conditions affected, thereby.

14. Counties ⇐21½

Persons purchasing and occupying property in district previously zoned as residential by county ordinance cannot complain of inequity or injustice of such ordinance as applied to inhabitants living through home industries when ordinance took effect.

* Subsequent opinion 108 P.2d 899.

Appeal from Superior Court, Los Angeles; Frank G. Swain, Judge.

Action by Ivan R. Acker against R. O. Baldwin and others, as members of the Regional Planning Commission, and others, for a declaratory judgment respecting plaintiff's rights under a county zoning ordinance and an injunction restraining defendants from preventing plaintiff's use of his property in connection with his business as a plumber. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

J. H. O'Connor, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for appellants.

Sparling & Teel, of Los Angeles, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to secure a declaratory judgment in respect to the rights of plaintiff under a zoning ordinance of Los Angeles County, and to enjoin defendants from preventing plaintiff from using his property in connection with his business as a plumber. The trial court found for plaintiff, and granted the injunction. The appeal is from the judgment.

On March 29, 1930, the board of Supervisors of Los Angeles county adopted a zoning ordinance covering an area of some four square miles, and designated as "South Santa Anita District". The district contains 2496 acres. It is surveyed into lots and streets. Within its limits is a business section known as "Temple City". The area is sparsely settled. A considerable number of occupants were then engaged in devoting their real property to uses which did not conform to the uses prescribed and permitted by the ordinance. These are known as "non-conforming uses". Several months after the ordinance took effect, plaintiff purchased a home within the district, and near Temple City. He was a plumber, and the trial court found that: "It is not true that the residence premises of this plaintiff, or any building structure or improvement thereon is not used for any purpose other than a single family residence, but upon the contrary the court finds that the plaintiff is conducting a plumbing business thereon." This finding is not attacked or questioned, and we may therefore start with the premise that plaintiff was using his premises for business purposes, and in contravention of the terms of the ordinance.

The particular portion of the ordinance with which we are concerned is as follows: "No building, structure, improvement or premises shall be used, and no building, structure or improvement shall be erected, constructed, established, altered or enlarged in Zone R-1 which is designated, arranged or intended to be occupied or used for any purpose other than a single family residence, together with the outbuildings necessary to use such located on the same lot or parcel of land, including a private garage with a capacity not to exceed three automobiles."

The premises of plaintiff are located in Zone R-1. It therefore appears that plaintiff was using his property in violation of the section of the ordinance quoted. The trial court, however, further found "that said ordinance is unlawful, void and unconstitutional, and amounts to the taking of the property of this plaintiff without due process of law, and in violation of Articles V and XIV of the [amendments to the] Constitution of the United States, and section 3, Article I, of the Constitution of the State of California". The *facts* which the trial court finds as justification for the foregoing conclusion are stated as follows: "That said ordinance is unconstitutional and void as aforesaid for the following reasons among others, to-wit: that Temple City, which notwithstanding its name is in unincorporated territory, was founded with the intention that its inhabitants would use their residence properties for some light commercial purposes which would enable them to make a living; that chicken raising on a commercial scale has been, and is the most extensive of these light, commercial home industries, but throughout the residence district in Temple City there have been and are scattered real estate offices, stone masons' headquarters, cement contractors' offices, and the like; that this was the state of affairs when the zoning ordinance was passed; the court finds that this zoning ordinance is unreasonable because it attempts to make a strictly residential district out of a district where home industries have always been conducted; that said ordinance purports to prevent the living upon and use of said property for any purpose other than a single family residence and to prevent the living upon and the conduct of any business from and upon said premises; that said premises are in a sparsely built-up community without the corporate

limits of any municipality and in the unincorporated section of Los Angeles County; that said section is in the center of a poultry, truck gardening and fruit growing community wherein and whereat all residents, without substantial exception, are poor people who at least must of necessity, and do get their living, or a large portion thereof, from the use of the said property otherwise than in a strictly residential capacity; that much of the property in said restricted and zoned district has, for a long time, and prior to the enactment of said ordinance been, and now is, used for residential and business purposes; that said property is closely surrounded by numerous properties so used for residential and business purposes, and is near and in close proximity to railroads and railroad yards and other business areas; that plaintiff has long used his property as hereinbefore alleged; that the use of said property by plaintiff, or by the numerous others using their properties for residential and business purposes, has, in no wise, reasonably or otherwise, impaired or injuriously affected the public health, safety, morals or general welfare of the community of Temple City or any other community or section of Los Angeles County; that the said zoning ordinance is not reasonably, or at all, necessary to said public health, safety, morals and general welfare, and that the enforcement of said ordinance, as valid, will jeopardize and deprive the plaintiff of his rights to the free use and enjoyment of his said property as guaranteed by the Federal and State Constitution."

It is contended by appellants that the findings do not support the judgment, which is as follows:

"It is therefore hereby ordered, adjudged and decreed that Los Angeles County Ordinance No. 1494 (New Series) as amended by Ordinance No. 1648 (New Series) and by Ordinance No. 1813 (New Series) and/or other acts, ordinances or sections amendatory thereof, is discriminatory, unreasonable, oppressive, arbitrary and confiscatory in nature, and by its terms, and is unconstitutional and void in so far as it attempts to prohibit home industries in an R-1 zone.

"That plaintiff is adjudged the right to use his said property described as: South fifty feet of Lot 110, Tract 6561, as per Book 72, pages 34-35 of Maps, Records of Los Angeles County, California, in accordance with the uses heretofore made of said property by plaintiff, and to continue the conduct of his plumbing business thereat, or any other lawful use and occupation thereof. That defendants, and each thereof, their agents, employees, servants and attorneys, or any thereof, are hereby perpetually restrained and enjoined from attempting to prevent plaintiff from using and occupying his said property as aforesaid, or otherwise, insofar as the provisions of said unconstitutional ordinance or amendments thereto are concerned."

[1-3] It is unnecessary to restate the general rules governing the right of a municipality to adopt zoning ordinances similar to the one here involved. The excellent and comprehensive review of all the phases of this question, and the law relating thereto, as found in the cases of Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, and in Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, is decisive of the right and power of the county here to adopt the ordinance in question. The former case lays down the quantum of proof necessary to support a judgment voiding the ordinance. Referring to the exercise of the police power, it is there said [195 Cal. 477, 234 P. 385, 38 A.L.R. 1479]: "Every intendment is to be indulged [in] by the courts in favor of the validity of its exercise and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power." Referring to the right to adopt a plan of zoning which establishes strictly private residential districts, the court there says: "We are of the opinion that it may be done; that the establishment of such districts as a part of a systematic and carefully considered and existing zoning plan is a legitimate exercise of the police power delegated to the municipality."

[4-7] The foregoing general principles are not disputed by respondent. As we view his contention, he insists that the territory included in the district was, when zoned, not residential in character, and that the evidence shows the following facts in relation thereto: that the first parties who laid out the town (of Temple City) had in mind farming and chicken raising, and that some parcels of property are used for chicken raising and light commercial industries. This refers to the time when the ordinance became effective. The record shows that there is evidentiary support for a finding embracing such facts. As to the number of such nonconforming uses, it ap-

pears that there were twenty or more of them when the ordinance became effective. They were scattered over the entire area, though more of them were in the immediate vicinity of Temple City—particularly those connected with some business enterprise. It thus appears that the *facts* found by the trial court are supported by the evidence. As to the finding that the use made by plaintiff of his property, and the uses made by other occupants, do not impair or injuriously affect the public welfare, this was a question to be decided by the board of supervisors or their authorized agents, and the courts are not permitted to substitute their judgment in such matters for that of the municipal authorities. See quotation from Miller v. Board of Public Works, supra, for a full discussion of the law. We cannot say, nor do we think that the trial court could find, under the evidence, that the zoning of plaintiff's property as residential had no real or substantial relation to the general welfare. If the governing body did not abuse its discretion in zoning the district, the courts have no right or power to interfere. We hold that there was no abuse of discretion shown here. This "finding", therefore, may be disregarded. We do not agree with the conclusions of law embodied by the findings, and also appearing under the heading as "Conclusions of Law", which are that the ordinance "is discriminatory, unreasonable, oppressive, arbitrary and confiscatory in nature, so far as it attempts to prohibit home industries in the R-1 Zone, and by its terms is unconstitutional and void".

As we have stated, the right and power of the supervisors to enact the ordinance is beyond question or doubt. As we understand the real position taken by respondent, both from his oral argument and his brief, it is that the ordinance is not unconstitutional per se, but that it is only void as applied in respect to the area involved.

Did the county have the right to subject the area in question to the provision of the ordinance? Respondent states that the county had no right to zone an area, at least partly agricultural in character, and to place over eighty per cent of that area within the R-1 class, which is residential. He points out that, when the ordinance took effect, there were a large number of nonconforming uses existing in the district. These uses he designates as "home industries"—a term also employed by the trial court in the findings, but never defined. It presumably would include any business or occupation carried on by a property owner for the purpose of increasing his income. The evidence as to the number of these uses is a matter upon which the parties do not agree. According to a computation made by appellants, the record shows but sixteen. The court, during the trial, viewed the district and the premises of respondent. It is contended by respondent that what the trial judge saw is evidence in the case, and that there might have been more than the actual record indicates. We do not believe, however, that the exact number of such uses would be a material factor in the case. The first step toward the exercise of the zoning power is the passage of the necessary legislation. The next step is the selection of the district or territory which will be subjected to the operation of the ordinance. In this case the chief objection is to the establishment of a residential zone. Referring to that situation, our Supreme Court has said, in Miller v. Board of Public Works, 195 Cal. 477–493, 234 P. 381, 386, 38 A.L.R. 1479: "In addition to all that has been said in support of the constitutionality of residential zoning as part of a comprehensive plan, we think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence, of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement, not only of community life, but of the life of the nation as a whole."

In the same case it is also said: "It is scarcely necessary to reiterate here the well-recognized principle that courts are loath to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. Mehlos v. Milwaukee, 156 Wis. 591, 146 N.W. 882, 51

L.R.A.,N.S., 1009, Ann.Cas.1915C, 1102; Carter v. Harper, supra [182 Wis. 148, 196 N.W. 451]. Every intendment is to be indulged by the courts in favor of the validity of its exercise and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts. The courts may differ with the Legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which could have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation. State ex rel. Civello v. City of New Orleans, supra [154 La. 271, 97 So. 440, 33 A.L.R. 260]. In Ex parte Hadacheck, supra [165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248], the court held in effect that, when the necessity or propriety of an enactment was a question upon which reasonable minds might differ, the propriety and necessity of such enactment was a matter of legislative determination."

[8-10] It must be presumed that the board of supervisors were aware that many of the occupants of the district were putting their property to uses which did not conform to the legislation. The finding of the trial court quoted above is nothing more than *that.* Under such conditions the supervisors, in the exercise of a sound discretion given them by law, nevertheless had the right to zone the property in the manner stated. We cannot say that the existence of such uses absolutely precluded the exercise of the police power. This power is extremely broad. Zoning "may take into consideration factors which bear no relation to the public health, safety, or morals, but which come within the meaning of the broader term 'general welfare.'" Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14, 20. We therefore conclude that the findings quoted do not support the judgment, and under the record here, they should be omitted entirely. They do not lay the foundation for the conclusion that the ordinance is unconstitutional and void.

[11, 12] It has often been said that *zoning looks to the future, not the past.* Jones and Biscay cases, infra. This court can take judicial notice of the extremely rapid growth in the population of Los Angeles county during the past few years. An orchard or grain field of today is a thriving, built-up residential section tomorrow. To hold that because some occupations are carried on in a proposed district which are nonconforming in character to zoning regulations sought to be imposed, an insurmountable barrier to zoning would arise, is to adhere strictly to the past and ignore the future, and is contrary to the spirit and intent of zoning legislation, as it has been unfolded and developed in the past few years.

[13, 14] Respondent refers to the great injustice which might be done to occupants of little means who were, when the ordinance took effect, engaged in nonconforming uses as a means of sustaining themselves. It is the rule in this state that zoning regulations cannot be made retroactive, and that nonconforming uses cannot be removed and existing conditions cannot be affected. Any attempt to enforce a zoning ordinance in such manner would be unconstitutional. Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; Biscay v. City of Burlingame, 127 Cal.App. 213, 15 P. 2d 784. Therefore the suggested injustice to those living through "home industries" at the time the ordinance took effect, is not a factor in the case. As to the occupants who purchased property subsequent to the effective date of the ordinance (plaintiff is one of them), they moved into the area with due notice that the law would not permit them to indulge in nonconforming uses, and they cannot complain of inequity or injustice.

We see no necessity of ordering a retrial of the issues. Findings, one to nine inclusive, should be retained. There should also be a finding to the effect that the ordinance is valid and constitutional, both generally and in respect to its application to plaintiff. All other findings should be eliminated. Judgment should be entered in conformity with this opinion.

The judgment is reversed, with directions to the trial court to enter findings and judgment in accordance with this opinion.

We concur: PULLEN. P. J.; THOMPSON, J.

In re ESTREM'S ESTATE.*

SANGUIN et al. v. HILL, Public Administrator.

Civ. No. 11388.

District Court of Appeal, First District, Division 2, California.

April 18, 1940.

Hearing Granted June 17, 1940.

1. Wills ⇐421

If an order admitting a will to probate was void on its face, the order could be attacked at any time.

2. Wills ⇐355

If an order admitting a will to probate was obtained by fraud, devisees could attack the order by making a motion in the probate proceedings, such motion being a "direct attack" on the order, but devisees were bound to make the attack within a period of time not extending beyond limit fixed by statute. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Attack".

3. Wills ⇐249

An order of superior court for Alameda county admitting to probate a will of decedent who died in Belgium and who, at time of death, was a resident of France was not void on ground that superior court had no jurisdiction over estate of a resident of France who died leaving no property in Alameda county, where administrator's petition recited that decedent left property in Alameda county.

4. Wills ⇐249

An order of superior court for Alameda county admitting to probate a will of a decedent who died in Belgium and who was a resident of France at time of death was not void on theory that jurisdiction of California courts was limited to following authentic record of court of domicile and admitting the will established by that court as the last will of decedent, where administrator's petition recited that decedent left property in Alameda county. Probate Code, § 301(3).

5. Wills ⇐355

Where devisees on January 5, 1939, filed, in probate proceeding, notice of motion to set aside order of August 16, 1937, admitting to probate the will of decedent who died in Belgium and who, at time of death, was a resident of France, and administrator's petition recited that decedent left property in Alameda county, and order was not void on face, and devisees did not claim that order was obtained through mistake, surprise or excusable neglect, superior court did not have jurisdiction to determine motion on theory that facts showing that order was void were made a matter of record by administrator's procedure by reason of recitals in inventory and appraisement, where such document did not show that any item of personalty was or was not in Alameda county on date of decedent's death. Code Civ.Proc. § 473; Probate Code, § 301 (3).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of Jean Estrem, deceased, by Auguste Sanguin and others, contestants, opposed by Albert E. Hill, Public Administrator of the County of Alameda, State of California, and Special Administrator of the estate of Jean Estrem, deceased. From an order denying contestants' motion to set aside an order of August 16, 1937, admitting to probate a will of Jean Estrem, deceased, contestants appeal.

Affirmed.

Joseph L. Lewinson, Donald Armstrong, A. L. Abrahams, Harry G. Sadicoff, and Morris E. Cohn, all of Los Angeles, for appellants.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and Owen E. Hotle, Jr., Deputy Dist. Atty., all of Oakland, for respondent.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, Frank J. Hogan, Wellborn, Mitchell, Barrett & Rodi, Frederick D. Anderson and Bertram L. Linz, all of Los Angeles, and Robinson, Price & Macdonald, of Oakland, amici curiae in support of respondent.

STURTEVANT, Justice.

On August 16, 1937, the superior court in and for the county of Alameda, state of California, Honorable John J. Allen, Judge, made and entered its order admitting to probate a will of one Jean Estrem dated August 13, 1930. The order found that notice had been regularly given according to law of the time and place of hearing of the petition for probate of said will, that the decedent died on May 28, 1937, in Belgium, that at the time of his death he was

* Subsequent opinion 107 P.2d 36.

a resident of the republic of France, and that he left estate within the counties of Alameda and Fresno, state of California. Continuing the order provided: "Ordered, adjudged and decreed that the said document heretofore filed, purporting to be the last will of said deceased, be and it is hereby admitted to probate as such; that Edward R. Eliassen be and he is hereby appointed executor thereof and that letters testamentary issue to him upon his taking the oath required by law, no bond being required under said will." No appeal was taken from that order and the time for appeal has long since expired.

Edward R. Eliassen, duly qualified as such administrator, commenced said administration, and continued to discharge such duties until his death on February 10, 1939. Thereafter, on February 14, 1939, Albert E. Hill, public administrator of Alameda county, was appointed special administrator. He duly qualified and is now so acting.

On January 5, 1939, appellants, certain devisees, filed in said probate proceeding in Alameda county their notice of motion to set aside and annul said order of August 16, 1937, admitting the will to probate and to recall and cancel the letters testamentary issued to Edward R. Eliassen as executor of said will. After several continuances the motion of appellants came on for hearing before the superior court for Alameda county on March 23, 1939, and on May 10, 1939, the judge of that court made and entered an order denying the motion of appellants. From the order denying the last-mentioned motion the said devisees have appealed.

[1, 2] The appellants contend the motion made in the probate proceeding to set aside the order admitting the will of the decedent to probate was a direct attack on such order, and the superior court was in duty bound to consider extrinsic evidence to ascertain whether the order was void. As will hereinafter appear we are of the opinion that the order under attack was not void on its face. If it was void on its face it could be attacked at any time. The appellants do not claim that the order was obtained through their "* * * mistake, inadvertence, surprise, or excusable neglect". However, we understand they claim that by reason of certain things the order was obtained by fraud. If so they could attack it by making a motion in the probate proceedings. Young v. Fink, 119 Cal. 107, 50 P. 1060. True such motion is a direct attack. Parsons v. Weis, 144 Cal. 410, 415, 77 P. 1007. However, the appellants were bound to make that attack within a period of time not extending "* * * beyond the limit fixed by section 473, Code Civ. Proc." Young v. Fink, supra [119 Cal. 107, 50 P. 1061]; Smith v. Jones, 174 Cal. 513, 515, 163 P. 890.

[3] In their next point the appellants contend the order dated August 16, 1937, was void because the Alameda superior court had no jurisdiction whatever over the estate of a resident of France who died leaving no property in Alameda county. If such facts appeared on the face of the judgment roll that contention would have merit, but the respondent's petition recited that the decedent left property in Alameda county. The allegations of that petition fixed the jurisdiction of said court and not the facts, whatever they were, which subsequently developed. Estate of Helm, 6 Cal.App.2d 752, 755, 45 P.2d 250.

[4] The third point made by the appellants is that the order was void because the jurisdiction of the California courts was limited to following the authentic record of the court of the domicil and admitting the will established by that court as the last will and testament of the decedent. Whatever may be the rule in other jurisdictions the contention of the appellants is not supported by the law of the state of California. Section 301 of the Probate Court provides: "Wills must be proved, and letters testamentary or of administration granted and administration of estates of decedents had, in the superior court: * * * (3) Of any county in which he leaves estate, the decedent not being a resident of the state at the time of his death, and having died out of the state * * *." Section 301 of the Probate Code was copied from section 1294 of the Code of Civil Procedure, and no change was made material to the issues before us. As to the meaning of section 1294 of the Code of Civil Procedure, in Estate of Clark, 148 Cal. 108, commencing on page 110, 82 P. 760, on page 761, 1 L.R.A.,N.S., 996, 113 Am.St.Rep. 197, 7 Ann. Cas. 306, the court said: "Section 1294 of the Code of Civil Procedure declares: 'Wills must be proved and letters testamentary or of administration granted: (1) In the county of which the decedent was a resident at the time of his death, in whatever place he may have died.'" And, on page 112, of 148 Cal., on page 761 of 82 P.,

1 L.R.A.,N.S., 996, 113 Am.St.Rep. 197, 7 Ann.Cas. 306, the court said: "Recognition would be given to the indisputable principle that every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons found within its jurisdiction. Thus the courts of a state may and do grant original probate upon wills of deceased nonresidents who leave property within that state. In California this is expressly provided for by section 1294, supra, and the rule as to other states is the same. 1 Woerner's Adm. *439; Shields v. Life Ins. Co., 119 N.C. 380, 25 S.E. 951; Gordon's Case, 50 N.J.Eq. 397, 26 A. 268; Putnam v. Pitney, 45 Minn. 242, 47 N.W. 790, 11 L.R.A. 41; Walton v. Hall's Estate, 66 Vt. 455, 29 A. 803; Jaques v. Horton, 76 Ala. 238." Then, on the application for rehearing, on page 125, of 148 Cal., on page 767 of 82 P., 1 L.R.A.,N.S., 996, 113 Am.St.Rep. 197, 7 Ann.Cas. 306, the court said: "The fact that in this state, as in other states and countries, wills of nonresidents are admitted to probate on original proceedings for the purpose of administering upon their property within the state is no impeachment of this proposition. In such cases it is the property within this state and subject to its jurisdiction which constitutes the res, and proof of the will is allowed as a mere incident or means of determining the disposition of that property. And the decree which has only that purpose is conclusive only to that extent. It binds that property here and everywhere that the decrees of our courts are accorded full faith and credit, whether by comity or by force of the federal Constitution. But such a decree is not binding as to the will itself in other jurisdictions where the decedent may have left property, and still less is it binding upon the courts of his domicile. It is not conclusive in other jurisdictions, simply because, as a will and for all purposes, it has not been duly proved and allowed. It has been proved and allowed so far as it affects the disposition of the property within the particular jurisdiction, but no further." In Estate of Edelman, 148 Cal. 233, at page 239, 82 P. 962, 964, 113 Am.St.Rep. 231, the court said: "It may, however, be added that the court had jurisdiction to grant original probate of the will of the deceased, although a nonresident, since she had left property within this state. Estate of Clark [148 Cal. 108] 82 P. 760 [1 L.R.A.,N.S., 996, 113 Am.St.Rep. 197, 7 Ann.Cas. 306]." The appellants cite and rely on Dunsmuir v. Coffey, 148 Cal. 137, 82 P. 682; Estate of Dunsmuir, 149 Cal. 67, 84 P. 657; Estate of Reynolds, 217 Cal. 557, 20 P.2d 323; Estate of Sankey, 199 Cal. 391, 249 P. 517. No one of those cases is of the least help in deciding the point we are discussing. It is conceded by both parties that these matters are largely, if not wholly, statutory. Therefore authorities from other jurisdictions are not necessarily controlling. However, in other jurisdictions there are authorities directly in line with the statement quoted from the Estate of Edelman, supra. In re Holden's Estate, 110 Vt. 60, 1 A.2d 721, 119 A.L.R. 487, and cases collected in note page 492.

[5] The last point made by the appellants is that without regard to the facts shown by the record as originally made up, the superior court had jurisdiction to hear and determine the motion because the facts showing the order was void were not only admitted but made a matter of record by respondent's procedure. In other words the appellants contend the rule stated in the matter of the Estate of John Ivory, Cal. App., 98 P.2d 761, is controlling in the instant case. That contention they predicate on the recitals contained in the inventory and appraisement. That document was filed January 3, 1938. An examination of its contents does not disclose that any item of personal property was or was not in Alameda county on the date of the death of the decedent. It is recited that two different certificates of corporate stock and a promissory note payable to the decedent in the principal sum of $2,000, dated June 17, 1922, came into the possession of the executor. The appraiser marked "nil" as the value of each item. The inventory included two parcels of land located in Fresno county, one of the value of $4,000 and one of the value of $2,400. We think it is obvious that such facts are not even akin to the facts on which the decision in the Estate of John Ivory, supra, was based. See Smith v. Jones, 174 Cal. 513, 517, 163 P. 890.

In what we have just said we have assumed that the entire record was before the probate court and is before this court on appeal. However, an examination of the record does not disclose that the appellants made any motion in the probate court or if they did that they presented to said court

any evidence whatever in support of their motion.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



PEOPLE v. WERNER et al.*

Cr. 3228.

District Court of Appeal, Second District, Division 1, California.

April 11, 1940.

Hearing Granted May 11, 1940.

1. False pretenses ⇐49(1)

Evidence sustained conviction for attempted grand theft of a sum of money from prosecuting witness, to whom defendant represented that the money was to be used to corruptly influence dismissal of criminal charges against prosecuting witness, as against defenses that testimony of prosecuting witness was inherently improbable and established at most an attempt to bribe, that attempted grand theft was by invitation of prosecuting witness, and attempt to steal was not to be formed until a future time.

2. Criminal law ⇐742(1)

Jury is vested with exclusive power to pass judgment on credibility of witnesses.

3. False pretenses ⇐22

Fact that defendant had obtained a judgment against prosecuting witness based on a claim for legal services would not preclude defendant's conviction of attempted grand theft of a sum of money from prosecuting witness, since in a criminal action offense is against the state and not against the individual, and hence action taken by defendant in a civil controversy would not be binding on the state.

4. False pretenses ⇐41

In prosecution for attempted grand theft of a sum of money from prosecuting witness, wherein defendant sought to establish that witness was indebted to him for legal services, rejection of evidence as to value of such services was proper.

5. False pretenses ⇐49(2)

In prosecution for attempted grand theft, if it can be shown that the amount attempted to be stolen meets statutory definition of grand theft, proof is sufficient and the amount, if any, actually stolen is immaterial. Pen.Code, § 487.

6. False pretenses ⇐21

In prosecution for attempted grand theft of $2,500, fact that $2 was the only money actually taken did not preclude conviction, since crime of "attempted grand theft" may be complete in absence of proof of an actual theft of anything of value. Pen.Code, § 487.

See Words and Phrases, Permanent Edition, for all other definitions of "Attempted Grand Theft".

7. Criminal law ⇐569

Evidence did not warrant reversal of conviction for attempted grand theft on ground of entrapment.

8. False pretenses ⇐52

In prosecution for attempted grand theft, an instruction that crime of "attempted grand theft" is defined as an attempt to commit theft of money or property of a value in excess of $200 was a sufficient definition of theft and its degrees.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Erwin P. Werner and Helen M. Werner were convicted of attempted grand theft, and Erwin P. Werner appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant herein, Erwin P. Werner, an attorney at law, and his wife, Helen M. Werner, were charged in an indictment returned by the grand jury in count I thereof with soliciting one William McNeil, on or about August 27, 1937, to offer and join in the offer of a bribe to William E. Simpson, chief deputy district attorney of Los Angeles County, to corruptly influence the latter in respect to the prosecution of McNeil on charges of grand theft. In the second count, appellant and his wife were charged with the crime of attempted grand

* Subsequent opinion 105 P.2d 927.

theft of $2,500 from said William McNeil.

The first trial ended in a disagreement of the jury. A second trial by jury was had, at which time appellants were convicted on both counts. On appeal, however, the District Court of Appeal of the Fourth District reversed the convictions as to each defendant on the ground that the two counts were inconsistent and that a verdict finding the defendants guilty on one count was necessarily inconsistent with a finding of guilt on the other count. See People v. Werner, 29 Cal.App.2d 126, 84 P.2d 168.

The Supreme Court denied a hearing and the cause was remanded for a new trial, resulting in the instant case, in which the jury returned verdicts finding defendant Werner and his wife not guilty as charged in count I (solicitation of a bribe), but guilty as charged in count II (attempted grand theft). Each of the defendants made a motion for a new trial, which motions were denied. Oral notice of appeal was given on behalf of both defendants; however, the appeal of defendant Helen M. Werner was subsequently dismissed.

Defendant Erwin P. Werner appeals from the order denying his motion for a new trial.

The facts as revealed by the record, relating them in chronological order as far as possible, are substantially as follows: Some time in the year 1933, said William McNeil became acquainted with a Mrs. Mabel Edith Bovell. The latter made her home with a Mr. and Mrs. Edward Bovshover, and, in fact, Mr. Bovshover was retained by Mrs. Bovell as her business manager and adviser. Commencing in 1934, and continuing until 1936, McNeil engaged in certain business transactions with Mrs. Bovell, during the course of which she delivered to McNeil the sum of $155,000 in cash and bonds.

Mrs. Bovell subsequently made certain efforts to compel McNeil to return the money, and, in the early part of the year 1936, employed one Albert G. Bergman, an attorney, to make further demands upon McNeil. In connection with this effort on the part of Mrs. Bovell, McNeil was represented by Mr. Werner. Thereafter, in the fall of 1936, McNeil delivered to Mrs. Bovell, through Mr. Werner, two trust deeds on a ranch of 520 acres located in Merced, California, which trust deeds were in the amounts of $14,000 and $2,000 respectively. Some time in April of 1937, according to Mr. Werner's testimony, Mr. Bovshover informed him that they were about to lose the ranch, and appellant thereupon filed an application, under his permit, with the Veterans' Welfare Board of the State of California requesting them to purchase the ranch, which they did. The board in turn executed a contract upon the terms of which Mr. Werner purchased the property from them.

On April 2, 1937, Mr. Werner filed a civil action against Mr. and Mrs. McNeil to recover the sum of $7,500 claimed by him as attorney's fees in connection with the Bovell settlement. McNeil disputed the claim and employed Paul Shapiro as an attorney to represent him in this action. It appears from the record that the institution of this suit by Mr. Werner, in which Mrs. McNeil was named as a party defendant, was the cause of some trouble between Mr. and Mrs. McNeil, and that McNeil harbored a feeling of resentment toward appellant by reason thereof.

In the early part of 1937 McNeil was visited by members of the Los Angeles Police Department in connection with Mrs. Bovell's representations. Several meetings were held between McNeil, the so-called bunco detail of the Los Angeles Police Department, and the district attorney's office, and on July 6, 1937, a criminal complaint was filed against McNeil by the district attorney's office, charging him with one count of grand theft in connection with the Bovell matter and six counts of grand theft relating to certain other transactions with a Mrs. Almand. A preliminary examination was held on August 2, 1937, at which time McNeil was represented by attorney Earl Newmire. At the conclusion of the examination McNeil was bound over to the superior court for trial on seven counts of grand theft.

McNeil and appellant, Erwin P. Werner, and Mrs. Werner, thereafter met and held several conferences, during the course of which certain alleged proposals were made, which later formed the basis of this action.

Mr. Paul Shapiro, McNeil's attorney in the civil action filed by Mr. Werner for attorney's fees, testified that some four or five days prior to, and also a few days after, McNeil's preliminary examination in the criminal action, Mr. Werner called him on the telephone and said that he had

tried to contact McNeil and had been unsuccessful and further asserted, in substance, "You know, I can have that case of the People against McNeil dismissed." Mr. Shapiro informed Mr. Werner that Mr. Newmire was representing McNeil in the matter and that Mr. Werner should call Mr. Newmire. Mr. Shapiro then informed McNeil of his conversation with appellant.

Mr. Earl Newmire, the attorney for McNeil in the criminal action, likewise testified that several days prior to the preliminary examination of McNeil, Mr. Werner called him by telephone and stated that he (Werner) would like to get in touch with McNeil, whom he had been unable to contact; that Mr. Werner then asserted, in substance, that he "wanted to get in touch with Mac because he was in a position to square the beef for Mac". Mr. Newmire informed Mr. Werner that he would communicate with McNeil, and within a day or two thereafter Mr. Newmire did in fact repeat the conversation to McNeil. Some three or four days after the preliminary examination of McNeil, Mr. Werner again called Mr. Newmire and stated that he was returning to Merced that same evening, and that "if Mac wanted to get in touch with him to write him general delivery at Merced; that it was not too late yet to fix the matter".

On Tuesday, August 17, 1937, McNeil sent a telegram to Mr. Werner, at Merced, California, which read as follows:

"Wire me immediately upon receipt of this if you can be in Los Angeles Tuesday or Wednesday of this week. Contact me personally at my home. Regard this strictly confidential.

"William McNeil."

Mr. McNeil testified that his attitude toward Mr. Werner at the time he sent the telegram was one of dislike: "I didn't feel very good toward him, after he robbed me. He had robbed me, and you don't love a man that has robbed you." His reason for sending the telegram was given by him as follows: "He (referring to appellant) had, as you know, tried to get in touch with me by coming to the house and by seeing Newmire and by seeing Shapiro, and I had discovered some of the things that he had done, and I was trying to find why he was still anxious to see me, and I sent the telegram."

On Friday of that week, August 20, 1937, after receipt of the above-mentioned telegram, Mr Werner visited McNeil at his home. McNeil testified that appellant told him that "* * * Mrs. Werner had some good ideas, and that he had some good ideas, as to how to handle it" (the criminal action against McNeil instituted by Mrs. Bovell) "in the District Attorney's office; * * * and he said that Mrs. Werner was very well acquainted with Mr. Simpson, the Chief Deputy District Attorney there, and that for about $2500.00 he could get Mr. Simpson to, as he said, kick this case out of the District Attorney's office; in other words, he could square it up, but it would be necessary, naturally, to satisfy Mrs. Bovell, so that she would not * * * have any complaint coming. And he began talking about what he thought would be necessary to handle the whole thing, all the way around, with Mrs. Bovell and with the Deputy District Attorney * * * and he (Mr. Werner) went ahead to say that he believed that if I would give him a deed to my house * * * He said I would have to trust him. That we could not have any memorandum of any agreements, at all, or any contracts; but if I would give him a deed to my house * * * and a bill of sale of the furniture, and an interest that I had in a couple of bungalows down towards Culver City, and $10,000.00, that he was satisfied that he could take care of it in the District Attorney's office, by paying Mr. Simpson $2,500.00, and * * * he went ahead to say that if there was anything saved out of the property, he would turn it back to me, and that I had to trust him and Mrs. Werner entirely."

McNeil further testified that Mr. Werner stated he was returning to Merced and would telephone McNeil on the following Monday to get McNeil's decision as to whether he "wanted to do all that or not". Before appellant left, McNeil drove him over to a street a short distance from the Bovshover home, where appellant left the car. McNeil called for Mr. Werner at the same place approximately two hours later, at which time, McNeil testified, Mr. Werner told him that he had gone over the Bovell matter with Mr. Bovshover and Mrs. Bovell, and that Mr. Bergman naturally represented Mrs. Bovell but that he, appellant, was working himself in the good graces of Mrs. Bovell

and Mr. Bovshover and that he thought eventually Mr. Bergman would "get bounced out of the case, and he would be able to handle it".

It appears that some time during that week McNeil had discussed with a Mrs. Daugherty, who was a friend of the McNeils, his "difficulties" with the Werners, and the belief on his part "that the Werners were trying to shake him down". Mrs. Daugherty called upon the district attorney and was referred to Mr. Herman Arterberry, the deputy district attorney who was then handling the criminal action pending against McNeil, to whom Mrs. Daugherty related the story of McNeil's asserted mistrust of Mr. Werner. Mr. Arterberry thereafter called McNeil on the telephone and asked him to come in and see him.

The following Monday, August 23, 1937, McNeil called at the office of the district attorney and talked to Mr. Arterberry, and also Mr. Logan Lindley, chief of the corporate securities department of the district attorney's office. McNeil related to them his version of the incidents that had taken place between him and appellant. During the course of their conversation, Mr. Ted Allen, an investigator in the district attorney's office, was called into the room. Thereafter Mr. Allen accompanied McNeil to his home.

On the following Wednesday, August 25, 1937, appellant and Mrs. Werner arrived at McNeil's home. Previous to that time Mr. Allen had installed a dictaphone microphone in the furnace radiator in the McNeil living room. The rest of the device was placed in the basement directly under the microphone. At the time appellant and Mrs. Werner arrived, Mr. Allen and a stenographer in the district attorney's office were present in the basement. After a short conversation between McNeil and Mr. and Mrs. Werner, appellant went upstairs to shave. McNeil testified as follows as to the alleged discussions which ensued: that Mrs. Werner told him that "anything that was to be handled in the settlement of this matter in the District Attorney's office, she would handle, herself; and if she didn't get to handle the money she would not have anything to do with it * * * and that she could have this case dismissed in the District Attorney's office by paying to Bill Simpson, the Chief Deputy District Attorney, $2,500.00. * * * I asked her if she knew Mr. Simpson well, and she said yes, she did; that she used to office in the same building with him in Pasadena, when she was tax appraiser; * * * and that Mr. Arterberry would have to be willing to dismiss this case if Mr. Simpson told him to do it". Mrs. Werner then stated that it would be necessary for her to go over and see Mrs. Bovell and Mr. Bovshover; that she being a woman could talk to Mrs. Bovell better than a man could and that she was going to propose that they go over that evening to the Bovshover home and have dinner.

McNeil testified that when appellant returned to the room shortly thereafter, Mr. Werner said "he would offer them (Mrs. Bovell and Mr. Bovshover) the home and the furniture and the two bungalows and $10,000.00 * * *. That Mr. Bergman was in New York, and that it would be necessary to get Mr. Bergman on the telephone if we got down to an understanding".

On the following day, Thursday, August 26, 1937, appellant and Mrs. Werner returned to the McNeil home. Mr. McNeil testified as to what occurred upon that occasion in substance as follows: that Mrs. Werner told him they had had dinner at the Bovshover home the night before, and that Mrs. Bovell was there, and that apparently matters were progressing satisfactorily, and that they were going to be able to effect a settlement with Mrs. Bovell; that appellant told him (McNeil) that he wanted him to put up the $10,000 "right now" as he "could not do business on jawbone", which statement provoked an angry discussion between them. It appears that an arrangement was made secretly between Mrs. Werner and McNeil that she was to see McNeil alone some time the following day, and that Mr. Werner was not to know of this arrangement. McNeil further testified that Mrs. Werner informed him that "she had already talked to Mr. Simpson, and he wanted $2,500.00, and that he had definitely agreed to have the case dismissed in the District Attorney's office".

On the following afternoon, Friday, August 27, 1937, Mrs. Werner called upon McNeil, at which time, McNeil stated, Mrs. Werner told him that she and appellant expected to come out that night to get the $10,000, but that she wished him to tell appellant that it would not be available until the following morning; that,

nevertheless, McNeil was to "slip" her the $10,000 in an envelope that evening, secretly, in the event Mr. Werner should happen to leave the room. According to McNeil, the reason given by Mrs. Werner for this surreptitious arrangement was that if she had the money in her possession "she would see that it was not used unless the District Attorney's office was paid off and taken care of". McNeil also testified that Mrs. Werner "said she had to see Mr. Simpson the next morning" (Saturday morning, August 27th), "and give him the $2,500.00".

On the evening of that same day, Friday, August 27, 1937, (the date mentioned in the indictment), appellant and Mrs. Werner returned to McNeil's home. A short time after they entered the house appellant left the room for a few minutes, and in his absence Mrs. Werner asked McNeil to give her the money, which he did, and Mrs. Werner pinned the envelope in her blouse. The envelope contained two $1 bills and eight pieces of white paper cut the size of one dollar bills, with a little pencil mark in the corner of each slip. It was not McNeil's money but money which had been handed to him by the investigator in the district attorney's office. After appellant returned to the room, and upon Mrs. Werner's suggestion, they left the McNeil home. As Mr. and Mrs. Werner walked out into the yard they were arrested by deputies from the district attorney's office.

Mr. William E. Simpson, the chief deputy district attorney, denied knowing the defendant Mrs. Werner, or that he had ever maintained an office in Pasadena.

It is contended on appeal, quoting from appellant's brief, that "The People's whole argument thus rests upon the conniving of McNeil", and that "The People's whole case, therefore, against Erwin P. Werner, hinges upon this one shred of testimony from an undependable and base a character as ever testified in a court room".

[1, 2] Based upon the authority of People v. Pantages, 212 Cal. 237, 297 P. 890, and Dahly v. United States, 8 Cir., 50 F. 2d 37, it is argued that McNeil's testimony is inherently improbable and therefore insufficient to support the verdict. The trial was somewhat protracted, as indicated by a reporter's transcript of 1580 pages, and it would serve no useful purpose to enter upon a detailed discussion of the evidence as revealed by the record, which tends to, and does in fact, defeat appellant's contention in this regard. Conceding that he is the knave sought to be pictured by appellant, McNeil's testimony nevertheless is not without substantial corroboration. It should be emphasized that the jury, in the first instance, is vested with exclusive power to pass judgment upon the credibility of the witnesses. It is evident, from a review of the evidence adduced at the trial, that the jury was accorded ample opportunity to give intelligent consideration to McNeil's testimony and to give to such testimony the value to which, in the judgment of the jury, it was entitled. The Pantages case, supra, and the Dahly case, supra, announce and affirm a well-known doctrine and serve as examples thereof, but whether the doctrine applies depends upon the facts and circumstances of each individual case. In the circumstances here presented, no reason appears for disturbing the verdict of the jury on the grounds that McNeil's testimony is inherently improbable and that, as a matter of law, therefore, the judgment lacks evidentiary support.

It is also contended that the evidence is insufficient to prove any attempted grand theft, because, as argued by appellant: First, there can be no attempted grand theft by one who seeks to recover moneys owed to him by a debtor; Second, there can be no attempted grand theft by invitation of the alleged victim; Third, there can be no attempted grand theft where the alleged attempt to steal is not to be formed until a future time; and, Fourth, where two dollars are taken by one of two codefendants, the offense, if any, is petty theft.

[3, 4] In connection with the first item above-mentioned, it is argued that in the civil action filed by appellant against McNeil to recover the sum of $7,500 claimed by him as attorney's fees, McNeil defaulted and that therefore the relation of creditor and debtor between Werner and McNeil was effectively established. The contention is without merit. In a criminal action the offense is against the state and not against the individual, and therefore any action McNeil may have taken in connection with a civil controversy is not binding upon the state and is beside the issue. In that connection it should be noted that the rejection of evidence offered by the defendant and appellant, tend-

ing to prove the value of Werner's services, was proper.

The second contention above-mentioned, namely, that the alleged theft was at the invitation of McNeil, lacks support in the record, as does, also, the contention above-described as item three.

[5, 6] The argument of appellant, denominated as item four, is likewise without merit. The defendants were charged with *attempted* grand theft. If it can be shown that the amount *attempted* to be stolen meets the statutory definition of grand theft, proof is sufficient and the amount, if any, actually stolen is immaterial. Indeed, the crime of attempted grand theft may be complete in the absence of proof of an actual theft of anything of any value. To hold to the contrary would eliminate such offenses as the attempted theft of an automobile, horse, mare, et cetera, which under the law may be the objects of attempted grand theft. Sec. 487, Pen.Code.

[7] It is argued also that the evidence reveals a "case of entrapment", and, further, that there can be no conviction of attempted grand theft where all the evidence, "if it proved anything, proved solicitation to bribe". It is a reasonable assumption that the same argument was presented to the jury and to the court at the trial and with no more success there than the record reveals it to be entitled to on appeal.

[8] It is further contended, quoting from appellant's brief, that "The Court nowhere gave the statutory definition of theft, and its degrees". In that regard the court instructed the jury as follows: "As applicable to the case on trial Attempt to Commit Grand Theft is defined as the Attempt to Commit theft of money or property of a value in excess of Two Hundred Dollars ($200.00)." The instruction was sufficient. Other complaints about instructions given and refused are equally unmeritorious.

The hearing on the motion for a new trial and the ruling thereon were in accordance with law. There are no prejudicial errors in the record.

For the foregoing reasons the order denying the motion for a new trial is affirmed.

We concur: YORK, P. J.; WHITE, J.

38 Cal.App.2d 523

In re MAUTNER'S ESTATE.

Civ. 12503.

District Court of Appeal, Second District, Division 2, California.

April 19, 1940.

1. Executors and administrators ⇐82

Where will directed executrix to dispose of any part of testatrix' estate to enable executrix to divide estate among testatrix' heirs and provided that it was testatrix' wish that if, in dividing estate among named persons, any difference arose as to value thereof or as to when and how any part should be disposed of, the will of the majority should prevail, provisions of will were ambiguous, and hence it was proper for executrix to seek instructions from court.

2. Wills ⇐82

Where will directed executrix to dispose of any part of testatrix' estate to enable executrix to divide estate among testatrix' heirs, and provisions of will concerning sale of testatrix' property were ambiguous, instructions directing executrix to exercise a reasonably diligent effort to sell all salable assets of estate for purpose of placing estate in condition for final distribution and that sales of assets should be conducted by executrix in accordance with provisions of statute and should be subject to approval and confirmation by probate court were proper. Probate Code, § 755.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of Mathilde G. Mautner, deceased, wherein Doris Fischer, executrix, petitioned the probate court for instructions relative to the sale and distribution of deceased's estate. From an order of the superior court sitting in probate, Ida Wells, opposed by Doris Fischer, executrix, and the Federation of Jewish Welfare Organizations of Los Angeles, Cal., appealed to the Supreme Court which transferred the case to the District Court of Appeal for decision pursuant to provisions of the Constitution, article 6, section 4c.

Affirmed.

Leland E. Zeman, of Los Angeles, for appellant Ida Wells.

Melvin E. MacKinnon, of Los Angeles (Philip B. Kehr, of Los Angeles, of counsel), for respondent Mrs. Doris Fischer, executrix.

McCOMB, Justice.

This appeal transferred from the Supreme Court to this court for decision pursuant to the provisions of article VI, section 4c of the Constitution of the State of California is from an order of the superior court sitting in probate, construing a provision in the will of decedent and instructing the executrix relative to the correct interpretation thereof.

The essential facts are:

The will of decedent contained among others the following provisions:

"Second: That my personal property consisting of clothing, household furniture and effects of every kind of which I may die possessed, shall be sold and the money derived therefrom shall be included in and become a part of my estate. Whatever other real and personal property, consisting of houses, lots, notes, mortgages, stocks, bonds and money in the bank, if any there be, shall be and shall constitute a part of my estate, and I hereby direct that my executor shall dispose of and convert any part of my estate, to enable him to divide the estate among my heirs, as I direct."

"Seventh: It is my wish that in the matter of dividing of my estate among the within named persons, that if any difference shall arise as to the value thereof, or as to when and how any part thereof, shall be sold or disposed of for the purpose of dividing the same, that the will of the majority shall prevail."

Respondent executrix petitioned the probate court for instructions relative to the sale and distribution of the estate of decedent. The court in response thereto made the following orders:

"7. That the executrix exercise reasonably diligent effort to sell any and all salable assets and property of this estate for the purpose of placing said estate in condition for final distribution."

"8. That any and all sales of assets or property of the estate shall be conducted by the executrix in accordance with the provisions of Section 755 of the Probate Code of the State of California and such sale or other disposition of said property or assets shall be subject to approval and confirmation by this Court."

These are the questions to be determined:

First: Were the provisions of the will set forth above free from ambiguity?

Second: Did the Probate Court place the proper constructions upon the provisions of the will here questioned?

[1] The first question must be answered in the negative. A reading of the second and seventh paragraphs of decedent's will, which are the only material provisions so far as the question before this court is concerned, leaves unanswered these queries:

(1) Who are the within named persons?

(2) To what majority is the testatrix referring?

(3) If the majority fail to agree, should the executrix endeavor to dispose of decedent's property?

The answers to the foregoing questions are left doubtful by the provisions of the will and therefore it was proper for the executrix to seek instructions from the probate court. (In re Pearsons' Estate, 98 Cal. 603, 610, 33 P. 451; 23 Cor.Jur. [1921] 1174, § 393; 21 Am.Jur. [1939] 492, § 214.)

[2] The second question must be answered in the affirmative. As heretofore stated, the provisions of the will relative to the sale of decedent's property were ambiguous. We believe the instructions given by the court provide a reasonable plan under which the executrix may proceed with the sale and distribution of the estate entirely in accordance with the wishes of decedent.

For the foregoing reasons the orders appealed from are and each is affirmed.

I concur: MOORE, P. J.

38 Cal.App.2d 521

In re MAUTNER'S ESTATE.

Civ. 12503.

District Court of Appeal, Second District, Division 2, California.

April 19, 1940.

Hearing Denied June 17, 1940.

1. Appeal and error ⊜907(3)

Where appeal is on the judgment roll alone, findings will be conclusively presumed to be supported by evidence, and the findings are to receive, if possible, such construction as will uphold trial court's order, and the findings must be liberally construed and any ambiguity or inconsistency resolved in favor of sustaining the order.

2. Appeal and error ⊜907(3)

On appeal on the judgment roll alone, every presumption is resolved in favor of regularity of proceedings in trial court, and trial court's order will not be reversed except for fatal error appearing on face of judgment roll.

3. Executors and administrators ⊜314(12)

Where appeal from probate court's order holding that respondent was entitled to part of deceased's estate as a distributee was on judgment roll alone, District Court of Appeal was bound to assume that probate court received evidence contrary to statements in a document filed by appellant respecting distributees, and that such evidence would support probate court's findings.

4. Executors and administrators ⊜314(12)

Where appeal from probate court's order was on the judgment roll alone, the probate court's finding that decedent left surviving no spouse, brother, sister, nephew, niece, descendant, or ancester was conclusively presumed to be supported by evidence.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of Mathilde G. Mautner, deceased, by Doris Fischer, executrix. From an order of the probate court holding that the Federation of Jewish Welfare Organizations of Los Angeles, Cal., was entitled to receive a part of deceased's estate, Carrie Levi, opposed by Doris Fischer, executrix, and the Federation of Jewish Welfare Organizations of Los Angeles, Cal., appealed on the judgment roll to the Supreme Court which transferred the case to the District Court of Appeal for decision pursuant to the Constitution, article 6, section 4c.

Affirmed.

N. J. Nyman, of West Hollywood, for appellant Carrie Levi.

Loeb & Loeb, of Los Angeles (Walter S. Hilborn and Herman F. Selvin, both of Los Angeles, of counsel), for respondent Federation of Jewish Welfare Organizations of Los Angeles, Cal.

McCOMB, Justice.

This appeal transferred from the Supreme Court to this court for decision pursuant to article VI, section 4c, of the Constitution of the state of California, is on the judgment roll alone from an order of the probate court holding that respondent, a charitable organization, is entitled to receive a part of the estate of decedent as a distributee.

This is the sole question to be determined: *Was there substantial evidence to sustain the trial court's finding "that the decedent left her surviving no spouse, brother, sister, nephew, niece, descendant, or ancestor"?*

[1, 2] This question must be answered in the affirmative. The law is established in California that, where the appeal is on the judgment roll alone, the findings will be *conclusively* presumed to be supported by the evidence. (Estate of Woods, 23 Cal.App.2d 187, 191, 72 P.2d 258.) In the case just cited Mr. Justice Wood, speaking for this court at page 191 of 23 Cal.App. 2d, 72 P.2d at page 260, thus accurately states the rule: "Since the appeal is on the judgment roll alone, the findings are conclusively presumed to be supported by the evidence; they are to receive, if possible, such a construction as will uphold rather than defeat the order of the court; they must be liberally construed and any ambiguity or inconsistency must be resolved in favor of sustaining the order. On such an appeal every presumption and intendment is resolved in favor of the regularity of the proceedings in the trial court. The order of the court will not be reversed except for some fatal error appearing on the face of the judgment roll."

[3] Even if we assume for the purpose of argument that the document filed by appellant Carrie Levi entitled "statement of Carrie Levi as a qualifying distributee"

is a pleading, we must, since the appeal is on the judgment roll alone, assume that the trial court received evidence contrary to the statements in such document, which evidence would support the trial court's findings. Berri v. Rogero, 168 Cal. 736, 741, 145 P. 95.

[4] Therefore, applying the foregoing rules to the facts of the instant case, since the appeal is on the judgment roll alone, the finding above set forth is conclusively presumed to be supported by evidence, and since no error appears on the face of the judgment roll, the judgment must be affirmed.

The order appealed from is affirmed.

I concur: MOORE, P. J.



38 Cal.App.2d 529

In re DE RUFF'S GUARDIANSHIP.
DE RUFF v. ROBINSON.

Civ. 12612.

District Court of Appeal, Second District, Division 2, California.

April 19, 1940.

Rehearing Denied May 10, 1940.

Parent and child ⇐2(4)

In proceeding to obtain custody of minor child, court erred, in the absence of a finding that father was an unfit person to have custody of his minor child, in awarding custody of child to maternal grandmother. Probate Code, § 1407.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Proceeding in the matter of the guardianship of the person of Robert Lee De Ruff, a minor, wherein Bertha C. Robinson brought an action against Paul De Ruff for custody of the minor. From an order awarding the custody of the minor to the petitioner, defendant appeals.

Reversed.

W. Frank Shelley, of Los Angeles, for appellant.

Moody & Whitney, of Glendale (H. Rawlins Overton, of Glendale, of counsel), for respondent.

McCOMB, Justice.

This is an appeal from an order awarding the custody of defendant's minor son, nine years of age, to the child's maternal grandmother.

The essential facts are these:

Defendant and his wife are divorced. The present action was instituted by the maternal grandmother of the minor child of defendant and his divorced wife, seeking the custody of said child, whom after a hearing the trial court awarded to plaintiff. The trial court failed to make a finding that defendant, the father of the child, was an unfit person to have the custody of his minor son.

This is the sole question to be determined:

Was it error, in the absence of a finding that defendant was an unfit person to have the custody of his minor child, to award said child to the custody of his maternal grandmother?

This question must be answered in the affirmative. Section 1407 of the Probate Code reads as follows:

"Order of right to guardianship. Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows:

"(1) To a parent;

"(2) To one who was indicated by the wishes of a deceased parent;

"(3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;

"(4) To a relative."

This section of the Probate Code is based, so far as material in the present case, upon the first sentence in section 1751 of the Code of Civil Procedure as it existed prior to 1931, the date of the adoption of the Probate Code.

In construing section 1407 of the Probate Code so far as it carries into effect the provisions of the first sentence of section 1751 of the Code of Civil Procedure as it existed before 1931, our Supreme Court in Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, held that in a proceeding to obtain the custody of a minor child by one other than the child's natural parent, when a parent also sought the custody of the

child, it was a prerequisite to an order awarding the custody to the person other than the parent that the trial court make a finding that such parent was an unfit person to have the custody of his minor child.

Therefore, since in the present case the trial court did not make a finding that defendant, the natural parent of the child, was an unfit person to have his custody, the order awarding the custody of said minor to plaintiff, the maternal grandmother, is reversed.

I concur: MOORE, P. J.



38 Cal.App.2d 395

KLOKE v. PONGRATZ.

Civ. 12326.

District Court of Appeal, Second District, Division 2, California.

April 11, 1940.

Rehearing Denied May 6, 1940.

Hearing Denied June 6, 1940.

1. Evidence ⇐414

Where plaintiff, seeking to hold defendant liable for services rendered in assisting to procure an oil lease of Indian lands on ground defendant was partner in unincorporated organization which employed him, relied on date of special power of attorney authorizing one of members to bid on lease on behalf of all signers, which was signed by defendant to show defendant was a partner within six weeks after plaintiff's employment, defendant could show that special power of attorney was not actually executed on the date that it bore. Civ.Code, § 2411.

2. Partnership ⇐55

That defendant testified in his deposition that he was member of unincorporated organization, which had employed plaintiff to assist in procuring oil lease of Indian lands, within six weeks after plaintiff's employment, did not of itself establish truth of such fact, where defendant later gave corrected testimony. Civ.Code, § 2411.

3. Mines and minerals ⇐101

That oil lease of Indian lands, which plaintiff had been employed by unincorporated organization to assist in procuring, was operated by corporation under management of defendant, was not proof that defendant was member of unincorporated organization, so as to be liable as partner for services rendered by plaintiff.

4. Partnership ⇐17

Whether the legal relationship of copartners existed in absence of articles must necessarily depend to a large extent upon alleged copartners' legal intent as deduced from all their transactions, conduct, and declarations.

5. Partnership ⇐52

A contract of copartnership being similar to any other type of contract must be proved in the same manner by substantial evidentiary facts.

6. Partnership ⇐55

One who alleges a partnership cannot prove it merely by evidence of an agreement wherein the parties call themselves partners, since use of term "partner" in popular sense, or as a matter of business convenience, will not necessarily import an intention that a legal partnership should result.

See Words and Phrases, Permanent Edition, for all other definitions of "Partner".

7. Partnership ⇐55

The prima facie showing of the existence of a copartnership must first be made before a person may be charged as a partner by his own declaration.

8. Mines and minerals ⇐101

Evidence that defendant advanced money to unincorporated organization which had secured oil lease of Indian lands, and had posted bond required under lease with Department of Interior, pursuant to written agreement in which organization agreed to assign an undivided two-thirds of entire working interest in lease, was insufficient to show that defendant was "partner" in organization, so as to be liable for services rendered by plaintiff in assisting to procure lease, under agreement with organization.

9. Partnership ⇐50

Where a stranger to group alleged to be partners asserts a "partnership by estoppel", he will not be confined to same character of proof that would be required of a member, and in establishing his case, he may satisfy the trial court that the acts, acquiescences and utterances of a party were

such as to warrant his conclusion of a copartnership and that he was justified in his reliance upon such conclusion. Civ.Code, § 2410.

10. Mines and minerals ⇐101

Defendant could not be held liable for services rendered by plaintiff in assisting to procure oil lease of Indian lands under agreement with unincorporated organization, on ground that defendant was "estopped" to deny his membership in organization, where plaintiff had entered into performance of contract before having communicated with defendant, and there was no act or acquiescence of defendant subsequent to plaintiff's communication with defendant that led plaintiff to continue his efforts to effect execution of lease. Civ.Code, § 2410.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

11. Mines and minerals ⇐101

Where contract by which plaintiff was employed by unincorporated organization to assist in procuring oil lease of Indian lands called for payment of $5,000 upon execution of lease, proof that plaintiff made no demand upon defendant for payment until some seven months after lease had been executed was significant as showing plaintiff's conduct was inconsistent with his asserted belief that defendant was a copartner of organization. Civ.Code, § 2410.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by F. G. Kloke against Gus Pongratz and others, as members of an alleged copartnership, doing business under the firm name of "California Independent Oil Organization, Unincorporated," to recover moneys for services rendered in assisting to procure a lease. From a judgment for plaintiff, the named defendant appeals.

Reversed.

F. W. Nahls and Stuart McHaffie, by Stuart McHaffie, both of Los Angeles, for appellant.

Henry K. Elder, of Los Angeles (Joseph K. Coady, of Los Angeles, of counsel), for respondent.

MOORE, Presiding Justice.

This action was brought to recover moneys for services rendered in assisting to procure a lease. It resulted in a judgment by the court in the sum of $13,477.26 against defendant Pongratz who alone prosecutes this appeal.

The grounds of appeal are: (1) the insufficiency of the evidence to support the findings; (2) the limitation upon plaintiff's right of recovery in that any judgment obtained by him would essentially be collectible only out of partnership assets inasmuch as defendant entered into the transaction more than six weeks after plaintiff's employment, Civ.Code, sec. 2411; and (3) lack of proof of ratification or adoption of the contract by Pongratz.

Pongratz was sued as a member of an alleged copartnership, consisting of Main, Coniglio, Hintze and defendant, doing business under the firm name of "California Independent Oil Organization, Unincorporated". The basis of the action was a writing by said Main, dated the 17th day of June, 1933, in the form of a letter addressed to the plaintiff. The instrument is signed "California Independent Oil Organization, Unincorporated, by S. L. Main". It is an offer to pay plaintiff $10,000 cash in two equal payments and to grant him an over-riding royalty of four and one-sixth per cent of the proceeds on all hydrocarbon substances produced and saved from a certain 560-acre tract of tribal lands of the Crow Indians in the Soap creek oil fields, Big Horn county, Montana, in the event that the plaintiff should be successful in procuring for said organization a lease of the land.

At the time of the execution of said agreement, the only persons known to the plaintiff to be connected with the said oil organization were Babcock, Main and Hintze. He had never met any of the other parties hereinafter mentioned. He conversed in the Crow dialect and was on friendly terms with a number of the Crow tribe. By reason of his tact in dealing with the red man, plaintiff had undertaken on behalf of other parties prior to 1933 to procure a lease of said tribal lands.

In the spring of 1933, plaintiff had three conferences with the defendants Main, Babcock, and Hintze, at which plaintiff stated that if the lease held by the Argo Oil Company on said lands could be canceled, he could render them an effective service in procuring a lease of said lands. He advised them to use "California Independent Oil Organization" as the name of the prospective lessee, by reason of the aversion of

said Indians to the major oil companies and of their preference for independent concerns. During the period covered by the ensuing conferences, it was developed that said Argo lease could be canceled and that bids for a new lease would be received on July 28, 1933, at the Crow Indian reservation. At the suggestion of Babcock and the defendant Main, it was determined that the plaintiff should go to Montana. But prior to his departure, at the suggestion of one Weston, plaintiff's employment was memorialized by said letter of June 17th. Otherwise, there is no evidence that any of the members of the so-called organization authorized the execution of said writing. In truth, there is no proof of the existence of any such organization at that time. On the 14th day of July, 1933, plaintiff accepted the terms offered by said Main by affixing his signature at the foot of said letter. On the 20th day of July, he arrived in Hardin, Montana, accompanied by said Main and Weston, his expenses for this trip, as well as of all others, having been advanced by said Main.

On the 28th day of July, 1933, a bid was submitted by said "California Independent Oil Organization" for an oil lease on said 560 acres. Accompanying the bid was a list of some fifteen names of persons who were represented to be members of such organization, not including Pongratz. The Indian agent accepted the bid and a deposit by Main subject to the payment of a bonus of $504 and the posting of a $15,000 bond. Following the filing of said bid, plaintiff visited among the Indians for the purpose of securing favorable action thereon.

On the 15th day of August said bid was approved by vote of the Indians. A draft in the sum of $504 drawn by the Indian agent on said Weston, in payment of said bonus, was dishonored and it was impossible to raise said money for the members of said organization. In his effort to procure said funds, defendant Main made the acquaintance of defendant Pongratz on the 30th day of August, 1933, and on the following day, acting on behalf of himself and "associates", the said Main executed a writing with Pongratz to the effect that, in consideration of the promise of Pongratz to furnish an acceptable surety bond and to pay said sum of $504 and the further sum of $300, the organization would assign to said Pongratz and his associates "an undivided two-thirds of the entire working interest in and to said tribal lease". As a part of said agreement, a corporation should be organized and two-thirds of its capital stock would be issued to Pongratz and one-third to Main and associates. Thereafter Pongratz accompanied by the said Hintze, Main and Coniglio, journeyed to Hardin, Montana, where they arrived on the 6th day of September, when plaintiff for the first time made the acquaintance of Pongratz.

There they were confronted with a new problem. After disclosing to the attorney for the Indians the changes made in their plans by the recent contract with defendant Pongratz, said attorney advised them that in order for them to hold the advantage made by the original bid of the said organization, it would be necessary to submit a new power of attorney bearing the signature of Pongratz. Acting upon said advice of said attorney, on the 6th day of September, 1933, a new instrument was drawn whereby said Main was authorized to bid on behalf of the parties executing the instrument. Said instrument bore the date of July 20, 1933, although it was prepared and acknowledged by Pongratz, Hintze and Coniglio on September 6th. Said instrument recited that Pongratz, Hintze, Coniglio and Main were copartners. Following the delivery of said last-mentioned writing to the Indian agent, Pongratz paid the moneys promised by him in his said contract and posted a $7,000 cash bond which was satisfactory to the department of the interior.

In order to expedite the granting of said lease by the department of the interior, plaintiff, upon the urgent importunities of said Main, accompanied the latter to the District of Columbia, where they arrived on December 25th. Immediately following his arrival in the capital, plaintiff began and continued his work of negotiating with the officials of the department of the interior and of the bureau of Indian affairs and with some legislators with a view of effectuating an immediate grant of said lease. That was soon accomplished. At Main's final act of executing the lease on the 24th day of February, 1934, in Washington, plaintiff for the first time saw said "special power of attorney" of September 6th, which recited that Pongratz, Hintze, Coniglio and Main were copartners. Pongratz knew that plaintiff was with Main in Washington. Upon the execution of the lease, Pongratz promptly organized his "California Independent Oil Organization,

Inc." and proceeded with operations upon the lease.

Is there substantial evidence tending to support the finding that Pongratz was a copartner with said Main, Hintze and Coniglio? Although the reporter's transcript contains some 850 pages, the following is the only evidence indicating the existence of such copartnership:

(A) The "special power of attorney" executed on September 6th in Montana included the name of Gus Pongratz;

(B) The testimony of Pongratz in his deposition that he became a member of the partnership on July 20, 1933;

(C) The contract of Main and Pongratz on August 31, 1933, and the operation of the lease by the California Independent Oil Organization, Inc., at all times after said February 24th under the management of Pongratz;

(D) (1) The testimony of plaintiff as to the statements of Pongratz to plaintiff at Hardin, Montana, on the occasion of the presentation to Pongratz of a telegram received by plaintiff from the office of Indian affairs complaining of the return of the deposit draft. When Pongratz handed the telegram to Hintze, he said: "He is my attorney and takes care of these matters"; to this Hintze responded: "We will go down and take care of this right away"; and (2) addressing Kloke, said: "Mr. Kloke, all the dealings you have with the California Independent Oil Organization and Mr. Main are OK with us; we will take care of it"; also (3) the introduction of Pongratz to plaintiff by Main as a "new member" of the organization.

(E) The posting by Pongratz of the $7,000 cash bond with the government to secure the lease.

(F) The presence of Hintze at the first meeting between plaintiff and Main in Babcock's office in the spring of 1933.

In view of plaintiff's contention that Pongratz' conduct estops him from denying the existence of said partnership, we shall first determine whether there was in truth a partnership inter se. From a consideration of all of the itemized evidence, singly and collectively, we must conclude that there is no proof of the existence of such partnership.

[1] The fact that said "special power of attorney" bore the date of July 20th does not defeat the fact that it was actually executed on September 6th. The drafting of a new instrument on September 6th to include the name of defendant Pongratz and giving it the date of July 20th was done as a practical expedient to effectuate the substitution of the new power for that which had been used in making the original bid for the lease on July 28th. The act of thus devising another power with Pongratz' name appearing as one of the original bidders for the lease is not an issue here. Plaintiff now seeks to profit by it.

[2] The fact that Pongratz testified in his deposition that on the 20th day of July, 1935, he was a member of the California Independent Oil Association, Unincorporated, does not itself establish the truth of that item of his proof. He later gave corrected testimony which is supported by the indisputable proof that when Pongratz arrived in Montana on September 6th, he received his introduction to plaintiff as a "new member" of the organization. Moreover, the agreement between plaintiff and defendant Main who pretended to represent the organization, became effective July 14, 1933, more than six weeks prior to the time when Main first met Pongratz and seven weeks before plaintiff had ever seen Pongratz.

[3] The fact that the lease was operated by the California Independent Oil Organization, Inc., from the date of the lease on February 24, 1934, till the cessation of operations in April, 1936, under the management of Pongratz, is not proof of such partnership at any time prior to said September 6th, or of Pongratz' membership in any copartnership. When Pongratz was approached by Main August 31, 1933, for the purpose of gaining financial aid to promote the obtaining of a lease, Pongratz definitely avoided a partnership by his written agreement. There is nothing in said instrument from which a partnership may be inferred. It contains no express intention that Pongratz would share the conduct of the business with Main and his associates. No common liability was contemplated. No provision was made for the sharing of profits or losses. It was nothing more than an agreement on the part of Main and his associates to convey to Pongratz a two-thirds working interest in the Indian lease in consideration of the payment by Pongratz of the sums named in the agreement and of the posting of a satisfactory bond with the department of the interior. There is no evidence of any

words spoken or acts done by Pongratz at the time of his agreement with Main or at any subsequent conference from which a fair deduction could be drawn that any partnership of Main was to include Pongratz. The agreement was unequivocal and free of all implications that the interests of the two groups were to merge into a copartnership. It is but a fair inference that the phrase "Main and Associates" was used for the purpose of distinguishing the members of the California Independent Oil Organization, Unincorporated, as it then existed, from Pongratz and his associates or from any company he might incorporate. It will be recalled that at no meeting with Main prior to September 6, 1933, did plaintiff make any effort to ascertain the identity of the individuals comprising said organization. Promptly upon the execution of a lease by the department of the interior, Pongratz commenced the organization of his said corporation to which was given the name "California Independent Oil Organization, Inc.". He thereafter caused two-thirds of its capital stock to be issued to himself and one-third to said Main. It was this corporation that took over the operation of the lease and thereafter continued to develop said lease until April, 1936, when the operations ceased.

[4-8] Whether the legal relationship of copartners existed in the absence of articles must necessarily depend to a large extent upon their legal intent as deduced from all of the "transactions, conduct, and declarations of the alleged partners". Swanson v. Siem, 124 Cal.App. 519, 12 P. 2d 1053, 1055. A contract of copartnership being similar to any other type of contract must be proved in the same manner by substantial evidentiary facts. Blinn v. Ritchie, 101 Cal.App. 691, 282 P. 390. The only evidence which could be construed as an expression of the relation of copartnership is that found in the said "special power of attorney" and the said admission of Pongratz that he became a member of the organization on July 20, 1933. Both of these are conclusions of law which, taken alone, are insufficient to support a finding of an express partnership agreement. One who alleges a partnership cannot prove it merely by evidence of an agreement wherein the parties call themselves partners. The use of the term "partner" in the popular sense, or as a matter of business convenience, will not necessarily import or imply an intention that a legal partnership should result. 47 Cor.Jur. 653–4. The prima facie showing of the existence of a copartnership must first be made before a person may be charged as a partner by his own declaration. Swanson v. Siem, supra. Excluding said declaration and admission of Pongratz, there is no evidence in the record from which his membership in said copartnership could be rationally inferred.

After thus demonstrating a complete absence of any proof of a partnership inter se, we turn now to a consideration of plaintiff's proposition that Pongratz is estopped to deny his membership in the copartnership. It is asserted that, by reason of his signing the "special power of attorney" (item A), of his silence in the presence of the plaintiff at the time of the incidents mentioned (item D), and of his silence while knowing of plaintiff's efforts at Washington, he has rendered himself liable as a partner under section 2410 of the Civil Code, which reads as follows: "(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made."

[9] When a partnership by estoppel is claimed, authorities are of little value, except in announcing general principles for each case must be determined upon its own facts. When, as here, a third party —a stranger to the group alleged to be partners—asserts the partnership, he will not be confined to the same character of proof that would be required of a member. In establishing his case, he may satisfy the trial court that the acts, acquiescences and utterances of a party were such as to warrant his conclusion of a copartnership and that he was justified in his reliance upon such conclusion. Associated Piping & Engineering Co., Ltd., v. Jones, 17 Cal.App.2d 107, 61 P.2d 536.

[10] Plaintiff having never seen or communicated with Pongratz prior to September 6, 1933, he cannot base his plea of estoppel upon any of his conduct prior thereto. There is no act or acquiescence of Pongratz, on or subsequent to said date, that led plaintiff to continue his efforts to effect the execution of the lease. The only evidence affording any rational basis for the claim that Pongratz represented himself to be a partner in said organization is that set forth in said items A and D. To the significance of item A we have heretofore adverted. The fact that the matters contained under item D were the testimony of plaintiff and were contradicted by Pongratz, Hintze, Main and Coniglio is of ominous significance in view of the crippled condition of the proof advanced to establish an estoppel. This testimony of plaintiff is not of such reliable character as would warrant the finding of a copartnership on the ground of estoppel and is insufficient to hold Pongratz liable as a partner, particularly in view of the failure otherwise to prove that any partnership included him. He could not have relied upon the contents of the "special power of attorney" for he never saw it until after the department of the interior had finally authorized the lease on said February 24. As to said imputed declaration of Hintze, conceding its verity, it could be considered no more than the exuberant swagger of a promoter beaming on himself after achieving the materialization of his dream. There is no proof that he had any authority to make promises for Pongratz to pay money. His statements merely indicate that his "organization" was delighted with their conquest of a man who could finance the Indian lease.

[11] Moreover, there is no evidence that plaintiff gave any credit upon the faith of such alleged representations. At the beginning of his services, plaintiff dealt only with the defendant Main. He knew no other member of the organization; made no attempt to ascertain any. At no time did plaintiff have any business dealings with Pongratz but dealt solely with Main and his original associates. There is no evidence that would justify the inference that plaintiff placed reliance upon anything more than his contract with Main. Unless he extended his credit or rendered a valuable service in reliance upon the unmistakable representations of Pongratz, he urges in vain his plea of estoppel. Finally, plaintiff's conduct was inconsistent with his asserted belief that Pongratz was a copartner; for, although the contract called for the payment of $5,000 upon the execution of the lease, plaintiff made no demand upon Pongratz for payment until some seven months after the lease had been executed. This is of peculiar significance in view of the fact that in September, 1933, plaintiff made a statement to the effect that Pongratz was the only one connected with the deal who had a good financial standing.

Since there is no substantial evidence to support the finding of Pongratz' membership in Main's organization either by express agreement or by estoppel, we cannot allow the judgment to stand. In view of the decision indicated, it will be unnecessary to consider the other points raised by the appellant.

The judgment is reversed.

I concur: WOOD, J.

McCOMB, J., deemed himself disqualified and took no part in the consideration or decision of this case.



38 Cal.App.2d 431

PEOPLE v. VON BENSON.

Cr. 3278.

District Court of Appeal, Second District, Division 1, California.

April 15, 1940.

Rehearing Denied April 24, 1940.

Hearing Denied May 13, 1940.

1. Criminal law ⇐1144(13)

Following a verdict or decision of guilty, reviewing court must set forth the testimony most favorable to the prosecution.

2. Infants ⇐20

Evidence *held* to authorize conviction of lewd acts with minor. Pen.Code, § 288.

3. Criminal law ⇐1159(2)

An appellate court may not reverse judgment for insufficiency of evidence when there is in the record evidence of sufficient substantiality which, if believed by the trier of fact, would warrant conviction.

4. Criminal law ⇐742(1)

Though defendant's own story and that of witnesses presented in his behalf exculpates him, it is for the trier of fact to say whether defendant's story and those of his witnesses should be believed.

5. Criminal law ⇐507(7)

In prosecution for committing lewd acts with minor, corroboration of complaining witness is not necessary, since such witness is not liable to prosecution for the identical offense. Pen.Code, § 288.

6. Criminal law ⇐959

Where, on hearing on application for probation before judge who did not try the case, defendant argued that there could not be conviction on several counts for a single act, and prosecution was willing to dismiss one count, but at court's suggestion defendant made motion for new trial which was granted as to one count and denied as to the other, as basis for dismissing one count, defendant was not denied his rights of hearing and argument on motion for new trial.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler and Frank G. Swain, Judges.

Richard C. K. Von Benson was convicted of violation of section 288 of the Penal Code, and he appeals.

Affirmed.

Opinion in 99 P.2d 295 superseded.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

This cause is now before this court for the second time. Upon the former hearing we reversed the order denying defendant's motion for a new trial and remanded the cause for further proceedings in accordance with the views expressed in our decision. 99 P.2d 295. No application was made to us for a rehearing, but within the prescribed time respondent filed with the Supreme Court a petition for hearing therein. Such petition was granted, and thereafter the Supreme Court entered its order transferring the cause to this court for hearing and determination.

At the former hearing in this court we were advised by the briefs of both appellant and the attorney-general that the procedural situation set forth in our opinion occurred in the trial court upon hearing of a motion for a new trial. Later, it was asserted by the attorney-general in his petition for hearing in the Supreme Court that the factual situation in question occurred in connection with the hearing on defendant's application for probation, and not in connection with his motion for a new trial. Examination by us of the record shows the last-named claim to be well founded, as we shall more particularly point out when we consider the grounds urged by appellant for a reversal of the order denying his motion for a new trial.

An information filed by the district attorney of Los Angeles county charged the defendant in counts 1 and 3 with a violation of section 288a of the Penal Code, while count 2 alleged the commission by him of certain acts denounced by section 288 of the Penal Code. Trial by the court sitting without a jury resulted in conviction of the defendant on counts 1 and 2 and his acquittal of the offense charged in count 3. A motion for a new trial was granted as to count 1, which was subsequently dismissed, and a like motion was denied as to count 2, whereupon the court pronounced judgment against the defendant on count 2, from which judgment he prosecutes this appeal.

It is urged that the evidence in this case is insufficient to support the verdict, in that the testimony of the two young men who testified in connection with the offenses charged in count 2 is unsubstantial, vague, indefinite, uncertain and contradictory.

[1] Setting forth the testimony most favorable to the prosecution, as we are required to do following a guilty verdict or decision, we find in the record testimony that one of the complainants, a boy 13 years old at the time of the trial, was acquainted with appellant; that the former was engaged in the occupation of shining shoes; that he first saw appellant on or about February 23, 1939, near the vicinity of Eighty-second and San Pedro streets, in the city of Los Angeles. That on that date his cousin, another young man, 16 years of age, was with him in the late afternoon. Both of them were engaged in shining shoes. This witness further testified that his cousin first talked to appellant and then came back and talked to the witness; that shortly thereafter the witness and his cousin went with appellant into an alley, the latter proceeding up the alley a short distance

with appellant, while the witness remained behind, finally returning to where the witness was waiting for them. On their return to where the witness was, he went with appellant up the alley between a house and a garage; that upon arriving at this location appellant committed upon and with the person of the witness an offense denounced by sections 288 and 288a of the Penal Code. It is unnecessary to here recite the sordid details. The testimony given by the cousin of the witness was substantially the same as that of the latter, except that the former testified to the acts committed upon him by appellant; and while he testified that he saw the first witness and appellant between the house and the garage, he could not see what they were doing.

[2-4] The mere fact that this evidence was contradicted by other testimony in the case is not ground for a reversal. No principle is more firmly grounded in our law than that which precludes an appellate court from reversing a judgment for insufficiency of the evidence when there is in the record evidence of sufficient substantiality which, if believed by the trier of fact, would warrant a conviction. For a comprehensive discussion of the limitations surrounding an appellate tribunal on questions of this kind see People v. Haydon, 18 Cal.App. 543, 123 P. 1102, 1114. While it is true that appellant himself testified and denied the accusatory evidence of the prosecution's witnesses, it is a well-established principle of law in this state that although the defendant's own story and that of witnesses, if any, presented in his behalf exculpates him, it is for the jury, or as in the instant case where a jury was waived for the judge, to say whether the defendant's story and those of his witnesses should be believed. People v. Rongo, 169 Cal. 71, 145 P. 1017; People v. Sears, 119 Cal. 267, 51 P. 325; People v. Billings, 34 Cal.App. 549, 168 P. 396; People v. Stephens, 29 Cal.App. 616, 157 P. 570, 572. In the instant case the decision of the trial judge indicates that he did not believe the appellant's story in denial of what was said by the People's witness. Even though we were to concede that a mere reading of the record in the case might leave one in some doubt on the question of the defendant's guilt, there is certainly enough in the evidence to sustain the conclusion of the trial judge, who saw and heard the various witnesses, and who was in a much better position to determine the truth than a court that does not possess such an advantage.

[5] With reference to the claim that the testimony of the complainant was without corroboration, it need only be said that corroboration is not required in a prosecution for a violation of section 288 of the Penal Code, for the reason that the complaining witness is not liable to prosecution for the identical offense which is set forth in that section. People v. Troutman, 187 Cal. 313, 201 P. 928; People v. Chaddock, 2 Cal.App.2d 643, 38 P.2d 473; People v. Spillard, 15 Cal.App.2d 649, 59 P.2d 887.

[6] We come now to a consideration of appellant's claim that "the court erred in denying defendant the right to have the same judge pass on the motion for a new trial as heard the evidence in the case, and in having a substituted judge pass on the motion without complete knowledge of all the facts, testimony and demeanor of the witnesses". Appellant's contention in this regard is devoid of merit. Recourse by us to the record shows that on August 15, 1939, the cause was argued and submitted to Judge Dockweiler, who had tried the case, and defendant was found guilty of the offenses charged in counts 1 and 2 and not guilty of the offense charged in count 3 of the information. At that time defendant waived time for sentence and orally applied for probation. The matter of passing on such application for probation and the pronouncing of judgment and sentence was set for August 24, on which latter date a continuance was taken to August 31. Up to this time no motion for a new trial had been made. Accordingly, on August 31, the matter was called for hearing on the application for probation and for the pronouncing of judgment and sentence. Upon this occasion Judge Swain was presiding. When the matter was called the following proceedings took place:

"Mr. Gleason (Defendant's Counsel): This matter was heard before Judge Dockweiler without a jury, and being familiar with the facts I am wondering if it would not be advisable that he pass on the matter.

"The Court: Judge Dockweiler asked me to handle this. I asked him to handle all matters that were heard before him and thought he was going to do so, but something came up which made it impossible for him to be here and he made a special request that I handle all matters on his

calendar this morning, including those where trials were had before him.

"Mr. Gleason: I was not making that request in criticism. Perhaps it would be admissible that your Honor become familiar with the facts as developed in the trial.

"The Court: I have read the probation officer's report.

"Mr. Gleason: Yes, but that is not sufficient. I would be willing that this matter be placed at the foot of the calendar, so that I may have more time to present this matter to your Honor.

"The Court: I would be glad to hear what you have to say. I don't want an extended speech, and I don't want you to cover what is already in the report, but anything unusual, I will be glad to hear it.

"Mr. Gleason: The report is what the boys told the probation officer when he was there, but I am referring to the evidence in the case. I don't believe the report goes into that.

"The Court: No doubt some of the same evidence was introduced at the trial. I am willing to hear what you have to say.

"Mr. Gleason: There were only two witnesses on behalf of the People.

"The Court: Don't argue that the defendant is not guilty because that is a settled matter. Judge Dockweiler found the defendant guilty."

At this point defendant's counsel presented an argument with reference to the insufficiency of the evidence to support the conviction, concluding that argument with the following statement: "Since the court dismissed count three which involved the other boy, the White boy, the court dismissed that count because there was not any corroboration, and the other two counts involved, I believe, another boy, and there is only one offense committed, and certainly there could not be a conviction on both counts if there was only one offense committed."

We then find in the record the following:

"The Court: What does the District Attorney say about that point?

"Mr. Blalock (Deputy District Attorney): I did not try the case.

"The Court: He may be convicted of 288 and 288a for the same act—yes, for the same act.

"Mr. Blalock: I think the matter could be taken care of by your Honor in the matter of sentence.

"The Court: Of course, there may be some additional evidence that shows he may be guilty of both of them.

"Mr. Blalock: Yes, but I think any doubt could be resolved in the defendant's favor in the sentence.

"The Court: I would be willing to dismiss count one and sentence on count two.

"Mr. Blalock: No objection, your Honor.

"Mr. Gleason: There is no objection on our part.

"The Court: I am not sure there is any error, but it is possible there is. It is conceivable that there could be a violation of both sections and therefore make the conviction perfectly proper on both counts, but I have no disposition to sentence on the two counts when it is essentially the one act. I think possibly, for the purpose of the record if you make a motion for a new trial it will give me authority.

"Mr. Blalock: I move to dismiss count one.

"The Court: In the interest of justice, and on motion of the District Attorney, count one is dismissed."

Defendant's counsel then made a plea to the court to grant probation on condition the defendant leave the state of California. It should be noted that up to this time no motion for a new trial had been interposed. At this juncture the following proceedings took place:

"Mr. Blalock: If your Honor please, upon reconsidering, I don't believe that I had authority to move to dismiss.

"The Court: Let's back up and do it right. If you want to, you can make a motion for a new trial.

"Mr. Gleason: At this time the defendant makes a motion for a new trial on all the grounds prescribed in the statute.

"The Court: The motion for a new trial is granted as to count one and denied as to count two.

"Mr. Blalock: Now, I move to dismiss count one.

"The Court: The motion is granted. The application for probation is denied."

From a reading of the foregoing it is at once apparent that at no time was appel-

lant's counsel presenting an argument in favor of the granting of a motion for a new trial, because during all of his argument no motion for a new trial had been made until after counsel had suggested to the court that the offenses of which defendant had been found guilty embraced but one act, and might not, therefore, be the subject of a conviction for the commission of two crimes. Thereupon the court suggested that a motion for a new trial be made on behalf of the defendant. The motion was then made and the same was granted as to count 1 and denied as to count 2. Never at any time after the motion for a new trial was made did appellant's counsel request permission to argue the same, nor did the court refuse to permit argument thereon. Obviously no substantial right of appellant was violated, nor was he at any time foreclosed from presenting any argument in support of his motion for a new trial. The motion was not predicated upon insufficiency of the evidence except in so far as appellant contended that the evidence was insufficient to sustain the convictions on both counts, and with that claim of appellant the court agreed and granted the motion as to one of the challenged counts.

Appellant's contention that he was denied his legal right to show cause why judgment should not be pronounced against him cannot be sustained. Appellant's only contention at the time he was arraigned for judgment and consideration of his application for probation—and this contention was made prior to the making of a motion for a new trial—was that the evidence was insufficient to sustain a conviction on both counts 1 and 2 for the reasons hereinbefore set forth. As heretofore pointed out, in this contention appellant was sustained. Thereafter the court asked appellant, "Is there any legal cause to show why sentence should not be pronounced at this time?" to which appellant's counsel answered, "No legal cause, your Honor."

The condition of the record in this case, as narrated above, makes it unnecessary to discuss or decide the right of a defendant in a criminal case to have the judge who presided at the trial hear and determine the motion for a new trial.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

PEOPLE v. McCULLOUGH.

Cr. 3300.

District Court of Appeal, Second District, Division 1, California.

April 11, 1940.

Hearing Denied May 9, 1940.

1. Criminal law ⇐31

In prosecution for violation of statute relating to crimes against children and for rape, wherein accused relied on defense of alibi, accused had the right to be advised of the exact occasion upon which he was charged with committing offense so as to be afforded the opportunity to present evidence in support of contention that he was not present with the prosecutrix at the time and place claimed. Pen.Code, § 288.

2. Criminal law ⇐572

Where inconsistencies in prosecutrix' testimony were not explained and it was not disputed that child was told what to say by her mother and evidence in support of accused's defense of alibi was uncontroverted, evidence was insufficient to sustain conviction of rape and violation of statute relating to crimes against children. Pen.Code, § 288.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Leonard McCullough was convicted of violation of section 288 of the Penal Code and of rape, and he appeals.

Reversed and remanded.

Hearing denied; CARTER, J., dissenting.

Gladys Towles Root, Eugene V. McPherson, and Martin S. Ryan, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged in counts I and II of an indictment filed by the district attorney with violations of section 288 of the Penal Code on or about June 17, 1939, and in count III thereof with the crime of rape committed on or about July 1, 1939. Count I was dismissed upon motion of the district attorney and the information amended by changing the numbers of the remaining counts to I and II instead of II and III.

This is an appeal from the judgment of conviction rendered pursuant to the jury's verdict finding appellant guilty as charged in both counts of the information as amended, as well as an appeal from the order by which his motion for a new trial was denied.

A reversal is urged primarily upon the ground of the insufficiency of the evidence to support the verdict, and a review of the record sustains such contention.

The testimony of the prosecutrix (a seven-year-old girl), which was elicited from her in answer to interrogatories both leading and suggestive to a marked degree, reveals that she lived at a certain address in Inglewood; that appellant lived on the same street two or three houses removed; that she had visited appellant's home on a number of occasions prior to the time when the acts complained of were committed. She testified upon direct examination that the alleged act of rape occurred on the bed in a bedroom of appellant's home quite a long time before the 4th of July, and that two or three days prior thereto, the alleged act in violation of section 288 of the Penal Code took place in appellant's garage. However, from the testimony of prosecutrix on cross-examination, it appeared that the alleged act of rape took place on Saturday night, July 1, 1939. Prosecutrix was impeached by statements which she made at the preliminary hearing as to the manner in which the act of rape was accomplished. She further testified that she made no outcry at the time, nor complaint thereafter, but immediately afterward she went home and played "Chinese Puzzles" with her cousin, played out of doors with neighborhood boys and girls and later that same evening went back to appellant's home accompanied by her brother, when she talked to Mrs. McCullough but did not see appellant.

In support of Count I of the information, as amended, alleging a violation of section 288 of the Penal Code, the prosecutrix stated that that act occurred on the previous afternoon, Friday, June 30th, in the back yard of appellant's home, whereupon she was impeached by statements made by her at the preliminary hearing to the effect that the only time appellant touched her was on the Saturday when the alleged rape was supposed to have been committed.

In answer to the question on cross-examination, "Did your mother tell you what to say up here today?" she replied "Yes"; and when asked by the trial judge, "* * * where did you learn what the words 'private parts' mean? Where did you learn that?" she answered, "I learned that from my mother."

A young girl aged sixteen years who was a witness for the prosecution, accounted for the whereabouts of the prosecutrix on the night of July 1st except for a period of from fifteen to twenty minutes thereof.

The testimony of the prosecutrix, as above outlined, reveals that the child was very uncertain as to the time and place when the acts complained of occurred, and was also uncertain as to the manner in which the crime of rape was accomplished, such uncertainty giving credence to her statement that her mother told her what to say upon the witness stand. In no essential particulars was her testimony directly corroborated. Her mother testified as to the age of said prosecutrix and identified certain articles of clothing which the child was wearing at the time the offense of rape took place, but no evidence of any kind was presented with respect to the physical or mental condition of the child subsequent to the commission of the alleged offenses.

Appellant emphatically denied the accusatory statements made by the little girl and evidence offered in his behalf which tended to establish an alibi stands uncontroverted in the record. In this connection appellant testified that he had dinner with his family at 6:30 o'clock on the evening of July 1st; that the only time he saw the prosecutrix on that day was between a quarter before eight and eight o'clock in the evening, when she was playing with a crowd of children on the corner in close proximity to his home; that around eight o'clock he got in his car and drove to Hermosa Beach to see a friend of his, Byron Sheets, about going fishing the next day; that he returned home about ten o'clock and retired. During the day, he stated, his son, his daughter-in-law and his wife were in and about the premises at all times. This evidence as to appellant's whereabouts was corroborated by Mr. and Mrs. Sheets, by appellant's wife, his son, his daughter-in-law, his daughter and her husband.

In addition, several witnesses testified that appellant was a man of good repute in the community in which he lived.

[1] In cases of this character about the only defense open to the accused is that of an alibi. Therefore, unless the prosecutrix is firmly held to fixing the time and place of the alleged occurrence, the defendant is deprived of the opportunity to present evidence in support of his contention that he was not present with the child at the time and place claimed. The uncertainty of the testimony of the prosecutrix in the instant case as to the date and time when the offenses allegedly occurred, furnishes a striking example of how a defendant may be deprived of the right to present an alibi. That the prosecutrix may have been a child of immature years and consequently unable to remember dates and time furnishes no valid reason for denying the accused the right to be advised of the exact occasion upon which he is charged with committing the offense. Such exactness might not be necessary if the story told by the prosecutrix found corroboration in other facts or circumstances, but such is not the case here.

Considering that no explanation of the uncertainties or inconsistencies which appear in the child's testimony has been made or attempted, in conjunction with the undisputed fact that the child was told what to say by her mother, as well as the fact that the evidence in support of appellant's defense of alibi stands uncontroverted, it becomes readily apparent that the question of appellant's guilt or innocence was neither carefully nor dispassionately weighed by the jury.

"As frequently has been said regarding cases of the instant character, 'No charge can be more easily made, and none more difficult to disprove.' As a matter of practical observation to many judges who have presided over trials of this nature, it is plainly recognized that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of 'guilty'; and that—instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt—in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt. * * * In at least a majority of such prosecutions, over the emphatic and categorical denial by the defendant of the incident or incidents testified to by the prosecutrix, the accused is found 'guilty' on evidence that, because of the nature of the asserted offense, rarely is possible of corroboration; and it is not at all improbable that at the instigation of either over-suspicious or misinformed mothers, who may entertain malice or personal prejudice toward the accused, miscarriages of justice often result,—with the consequence that innocent men are or have been humiliated, ruined in character and good reputation, and caused to suffer ignominiously for the alleged commission by them of offenses of which they were or are not guilty." People v. Adams, Cal.Sup., 93 P.2d 146, 152.

[2] For the reasons stated, the judgment appealed from is reversed and the cause remanded for a new trial.

We concur: DORAN, J.; WHITE, J.



38 Cal.App.2d 463

In re SOMERVILLE'S ESTATE.
ASHLEY et al. v. SOMERVILLE.
Civ. 12437-S.

District Court of Appeal, Second District, Division 1, California.
April 15, 1940.

1. Wills ⇐634(9)

Under will devising homestead and cash sum to wife for life, with power to dispose of such parts thereof as wife should deem necessary for her personal comfort and happiness, remainder to testator's children, was a "vested remainder", and estate of son who predeceased wife was entitled to son's share, notwithstanding provision, construed in view

of general testamentary scheme as referring only to bequest of residuary estate in trust for sons, that if son should die "before the time stated herein at which he is to receive the principal portion given him by this will", then "the provision herein made for him" should be void.

The word "principal" is generally understood and regarded as synonymous with the "corpus" of a trust.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal", "Corpus", and "Vested Remainder".

2. Wills ⇐634(9)

Although person named as taker of a future estate may have died without coming into enjoyment or possession, the law permits conclusion that his ownership was absolute and that the estate or interest was descendible, devisable, and alienable, and ownership is deemed to have been vested although possession or enjoyment was contingent upon survival of the designated devisee or legatee.

3. Wills ⇐440

In determining testator's intention, court must stand by words of the will and no intention should be attributed to testator which cannot reasonably be drawn from language of the document itself. Probate Code, § 106.

4. Wills ⇐457

Technical words in a will should be taken in a technical sense unless contrary intention is disclosed by the context or it appears that testator was not acquainted with such technical sense. Probate Code, § 106.

5. Wills ⇐439

A will should be examined with view to discovering decedent's testamentary scheme or general intention, and apparent meaning of particular words, phrases, and provisions should be subordinated to such scheme. Probate Code, § 106.

6. Wills ⇐462

In construing wills, court is not authorized to supply needed words or expressions in order to arrive at testator's intention.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Proceeding in the matter of the estate of George Washington Somerville, also known as George Somerville, George W. Somerville, Geo. W. Somerville, and G. W. Somerville, deceased wherein George S. Somerville, individually and as administrator of the estate of Saxe Somerville, deceased, filed petition for distribution under the will, contested by Carol Somerville Ashley and others. From an adverse order, contestants appeal.

Affirmed.

David P. Hatch, of Los Angeles, for appellants.

James A. Houlahan, of Beverly Hills, for respondent.

WHITE, Justice.

This appeal presents a question of construction of the last will and testament of George W. Somerville. The testator died on July 9, 1937, leaving as his survivors his widow, Cora I. Somerville, two daughters, Carol Somerville Ashley and Madge Somerville Nippolt, formerly known as Madge Somerville Ruenitz, and two sons, Saxe Somerville and Wayne W. Somerville. Decedent's will was admitted to probate, and the widow and daughter Carol Ashley were appointed and regularly qualified as executrices thereof. The provisions of the will which require consideration by us read as follows:

"First: I give, devise and bequeath unto my beloved wife, Cora I. Somerville, free from all incumbrance, the family homestead, situated at No. 2414 Eighth Avenue, Los Angeles, California, together with all the contents thereof; also the sum of Fifty Thousand Dollars ($50,000.00) to have and to hold the said house and contents and said Fifty Thousand Dollars ($50,000.00) during the term of her natural life, and at her death all of said property, or the residue thereof, shall descend to and become the property of my four children hereinafter mentioned, share and share alike. All of said property shall also become the property of said children, share and share alike, in case my said wife does not survive me; it is my last will and desire that my said wife shall not only have the use and income from all of said property during her natural life, but that she may dispose of such parts thereof as she deems necessary for her personal comfort and happiness.

"Second: All the balance and residue of my property, of whatsoever kind of nature, or wheresoever situated, I give, devise

and bequeath unto Madge Somerville-Ruentiz, Carol Somerville-Ashley, Saxe Somerville, and Wayne W. Somerville, to be divided equally between them, share and share alike; provided, however, that the said share of my said son Saxe Somerville, shall be held in trust by my executrixes hereinafter named until he is fifty-two (52) years of age, and the share of my said son, Wayne W. Somerville, shall likewise be held in trust by said executrixes until he is forty-seven (47) years of age, the income from the share of each of said sons, however, shall be paid to him annually; and provided, further, that the whole or any part of the share of Saxe Somerville may be paid to him before he becomes fifty-two (52) years of age, and to my son Wayne W. Somerville before he becomes forty-seven (47) years of age, in case any two of my said executrixes hereinafter named, in their opinion, deem it necessary or for the best interests of said son or sons.

"Third: In case either of my said sons should died before the time stated herein at which he is to receive the principal portion given him by this will, then and in that event it is my will that the provision herein made for him shall be and become null and void, and his said portion so willed to him shall inure to and become the property of and be divided among my said surviving children, share and share alike."

All of the devisees and legatees mentioned survived the decedent and are still living, except the son Saxe Somerville, who died May 27, 1938, during the administration of his father's estate and before such son had arrived at the age of 52 years. Surviving him as his only heirs at law are his two daughters, Alice Somerville Glotzbach and Inez Somerville Klein, and a son, George S. Somerville, the latter of whom is acting as administrator of the estate of his father, Saxe Somerville, which is now in course of administration.

On December 7, 1938, the executrices filed their final account, report and petition for distribution, praying among other things that a decree be made for distribution of the estate to the persons entitled thereto, in accordance with the terms and conditions of the will, as modified by an agreement which is not here pertinent.

Prior to the hearing on the account and petition for distribution, George S. Somerville, as the administrator of the estate of his father, and individually, filed a petition praying, in substance, that the court distribute to him as such administrator the share of the estate his father would have taken under the terms of the will if the latter had survived to receive it. Appropriate objections to the last-named petition were filed by the remaining heirs of George W. Somerville, such heirs claiming that pursuant to the terms and conditions of the will and the agreement mentioned, and by reason of the death of Saxe Somerville, such heirs were entitled to one-third of the remainder of the estate remaining when the death of Cora I. Somerville should occur, which property, pursuant to the terms of the will, she would receive for life; and the surviving heirs of George W. Somerville further contended that they were entitled to one-third of the balance and residue of the property of the estate which is mentioned in the second paragraph of the will. The issues thus presented were determined solely on the pleadings, papers, records and files, and no oral or other evidence was offered or received.

Respondent concedes that the estate of his father is not entitled to any of the balance and residue of the estate mentioned in the second paragraph of the will, and admits that because of the death of Saxe Somerville prior to his attaining the age of 52 years the property mentioned in the second paragraph vests in the surviving daughters and son. Appellants contend that by reason of the death of the testator's son Saxe Somerville prior to the death of his mother and prior to his attaining the age of 52 years, the estate in its entirety vests in the last-mentioned surviving children.

On the hearing of the petition for distribution the trial court construed the third clause of the will to relate only to the second clause and not to the first paragraph of the testamentary document, and therefore decided that with regard to the residue of the property remaining at the death of Cora I. Somerville which she received upon distribution for life, the surviving daughters and son are entitled upon distribution to one-fourth thereof, and that Saxe Somerville was, in his lifetime, entitled to one-fourth thereof; that title thereto vested in the deceased son Saxe Somerville, is now vested in his heirs subject to administration, and that the administrator of his estate is entitled to have

distribution thereof. From the last-named portion of the decree, Carol Somerville Ashley, Madge Somerville Nippolt and Wayne W. Somerville prosecute this appeal.

[1] In the present controversy, centering as it does upon the interpretation to be given the third clause of the will, appellants contend that under the provisions of the will Saxe Somerville was devised and bequeathed a conditional estate only in the residue of the property remaining at the death of the widow of deceased, which was distributed to her for life with a limited power of disposal, and that he having died before the life tenant, the property upon his death vested absolutely in his surviving sisters and brother share and share alike; that the decree adjudging that the interest of the deceased son of the testator was vested and upon his death passed to his heirs subject to administration, is not supported by the findings of the trial court, because such findings are in conflict with and contrary to the testator's intentions as expressed in the language of his will. Unless the language of the will negatives the fact that the estate of the remaindermen under the provisions of the first clause was a vested one, we have no hesitancy in saying that the finding of the court that such estate was vested is correct.

[2] As is said in 26 California Jurisprudence, page 1013: "Although the person who is named as the taker of a future estate may have died without having come into enjoyment or possession of the property, the law permits of a conclusion that his ownership was absolute, and that the estate or interest was descendible, devisable and alienable. Ownership is deemed to have been 'vested', although possession or enjoyment was contingent upon the survival of the designated devisee or legatee. Thus, where property is expressed to be given to X for life, and at the death of X to A, A's estate or interest in remainder is held to be vested, with the result that A's heirs,—A having died before X,—are entitled to claim the property at the termination of the life estate."

[3–5] We turn now to a consideration of the testamentary document to ascertain from the language thereof whether or not not the testator intended that the interests of the remaindermen should not be a vested one unless they survived the life tenant. It is true, as asserted by appellants, that in determining the intention of the testator we must stand by the words of the will, and no intention should be attributed to the testator which cannot reasonably be drawn from the language of the document itself. Section 106 of the Probate Code directs us in the interpretation of wills to view the testamentary words thereof in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can, from the testamentary language, be ascertained. Technical words in a will, it is true, will be taken in a technical sense unless a contrary intention is disclosed by the context, or it appears that the testator was not acquainted with such technical sense. For our further guidance there is also a rule that the will is to be examined with a view to discovering the decedent's testamentary scheme or general intention; and to this scheme, plan, or dominant purpose the apparent meaning of particular words, phrases and provisions is to be subordinated. Estate of Puett, 1 Cal.2d 131, 133, 33 P.2d 825.

[6] Applying the foregoing rules to the testamentary instrument before us, we are satisfied that the decedent's testamentary scheme and general intention was to give a life estate to his wife in the property mentioned in the first paragraph of the will, with a remainder in the four children; that he then turned his attention to the residue of his estate, which he bequeathed to his four children, with the proviso, however, that as to his two sons the same should be held in trust until each of said sons attained a given age. From a reading of the language in the will, we are impressed with the fact that the testator then directed his attention to the disposition to be made of such trust property in the event either of his said sons died prior to attaining the prescribed age. The testator then added the third clause to his will wherein he provided that "In case either of my said sons should die before the time stated herein at which he is to receive the principal portion given him by this will, then and in that event it is my will that the provision herein made for him shall be and become null and void, and his said portion so willed to him shall inure to and become the property of and be divided among my said surviving chil-

dren, share and share alike." It seems to us that when consideration is given to the fact that prior to reaching the stated age each son was nevertheless to receive the income from the trust property mentioned in the second clause, while neither was to receive anything from the life estate created by the first clause until the death of the life tenant, it is obvious that when he referred in the singular to "the principal portion given him by this will", he referred to the corpus of the property mentioned in the second clause and out of which "corpus" or "principal" the sons were receiving their respective shares of the income. In the construction of wills we are not authorized to supply needed words or expressions in order to arrive at the maker's intention. In the instant case the testator referred to but one "principal portion", and we cannot add thereto, nor surmise what his intention was, other than as expressed in the language he used. It is at once apparent from a reading of the will that the testator did not desire that either son should reach any particular age before receiving his remainder interest of the life estate created in the widow. It was further provided that when the widow died each son was to receive his remainder share regardless of his age or of the happening of any contingency other than the demise of the widow; while as to the property mentioned in the second clause the testator provided that the same should be held in trust until the sons attained a given age, but gave to them at all times during the pendency of the trust the income receivable from the "principal" or corpus of such trust. Manifestly no reason existed for the testator to make the third clause apply to the provisions of the first, but as to the property mentioned in the second clause his language in the third would indicate his desire that the sons enjoy the income, but in case of the death of either his share of the "principal" or corpus of the property out of which he had been receiving the income should become vested in the surviving child. Had the testator desired otherwise he could easily have said so by direct reference to the remainder estate just as he made explicit reference to the "principal", which is generally understood and regarded as synonymous with the "corpus" of a trust.

The order appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

38 Cal.App.2d 392

PEOPLE v. MARTONE.

Cr. 3297.

District Court of Appeal, Second District, Division 2, California.

April 11, 1940.

1. Criminal law ⇐568, 738

The intention with which an act is committed is ordinarily a question for jury and may be properly inferred from surrounding circumstances.

2. Burglary ⇐41(10)

Evidence that at 2:16 a. m. an officer saw defendant leaning against glass door of store with defendant's arm extended through broken glass, that upon officer's approach defendant stepped away from door and placed hand in pocket, that defendant had a wrench in hand when withdrawn from pocket, and that lock on door had been scratched by a hard substance, warranted conviction of "attempted burglary of the second degree".

See Words and Phrases, Permanent Edition, for all other definitions of "Attempted Burglary of the Second Degree".

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Alfred Martone was convicted of attempted burglary of the second degree under an information charging attempted burglary with a prior conviction for violation of the Penal Code, § 107, and a prior conviction of burglary, and he appeals.

Affirmed.

Gladys Towles Root and Eugene McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the respondent.

MOORE, Presiding Justice.

Defendant was accused by information of the crime of attempted burglary together with a prior conviction for violation of section 107 of the Penal Code, which makes it a felony to attempt to escape a prison, and a prior conviction of the crime of burglary. He admitted his prior convictions but denied that he was attempting to commit a burglary at the time of the apprehen-

sion in the instant case, and having been convicted of attempted burglary of the second degree, he appeals from the judgment after conviction by the court. The only ground for his appeal is the insufficiency of the evidence to sustain the judgment.

On the morning of July 15, 1939, at 2:16 o'clock a. m., a police officer of the city of Los Angeles saw defendant leaning against the glass door with his right arm through the glass which had been broken. The pane appeared to be about two feet square. The building to which said door constituted the entrance, stood at the corner of North Broadway and Workman streets, in the city of Los Angeles. The door opened on Workman street. Upon the approach of the officer, defendant stepped away from the door and inserted his right hand into his pocket. On the withdrawal of his hand from his pocket, it was found to hold a crescent wrench. An examination of the locks on the door disclosed that a lock on the inside had been scratched by some hard substance and that the clasp against the wall had scratches on it. Moreover, a further examination of the premises, after darkness had passed, indicated that the hook which held the lock on the back door of the store on Workman street was bent and the window was smashed. His identity as the intruder, the fact that he had his arm through the broken glass of the door; that he held in his hand an instrument capable of breaking locks and of opening doors, leaves little to be said on behalf of the innocence of defendant. The trial judge sitting as a jury was warranted in finding that he had attempted a burglary.

[1, 2] Where a person climbed over a second-story balcony and approached the door leading therefrom into a bed room and fled upon arousing the occupants, he was guilty of attempting to commit a burglary, although he never touched the door. The evidence indicated an overt act, and from the attendant circumstances, the intention to commit the crime of burglary was reasonably inferred without the aid of any extrajudicial admissions. People v. Gilbert, 86 Cal.App. 8, 260 P. 558. Where a person was observed in front of a bedroom window of an inhabited dwelling with his hands upraised toward the window, where coats and purses were on the bed inside and the defendant was found standing in a space less than four feet wide between the hedge and the house, such acts "would have naturally resulted in the crime of burglary had the defendant not been scared away". People v. Davis, 24 Cal. App.2d 408, 75 P.2d 80. The intention with which an act is committed is ordinarily a question of fact for the jury and may be properly inferred from the surrounding circumstances. People v. Carter, 73 Cal. App. 495, 238 P. 1059. The presence of this defendant at the front door of the premises with his right arm projecting to the inside, at an hour when the world is asleep, without any sort of explanation of his presence there or of his possession of the wrench with which he had worked upon the lock of the door on the inside was sufficient to warrant the trial court in finding that he was possessed of an intent to burglarize the store. It has been held that the possession of burglary tools is appropriate evidence after proof of a burglary. People v. Parkinson, 138 Cal.App. 599, 33 P.2d 18.

The contention is made by defendant that in order to convict him of burglarious intent, it was necessary to presume such intent. With this we cannot agree. The circumstances surrounding him at the time of his apprehension furnish sufficient evidence, which, if believed by the trial judge, would warrant the inference of intent to commit a burglary. People v. Mize, 80 Cal. 41, 22 P. 80; People v. Perini, 94 Cal. 573, 29 P. 1027. Certainly, breaking a door of a building belonging to a stranger at 2 o'clock in the morning could not have been done with a view of protecting the property or for any other lawful purpose. The fact that merchandise was on the inside and that it was of such character as is daily consumed by human beings is additional proof that a housebreaker at such an hour in the morning would have intended to take possession of certain contents of said store.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

TAYLOR v. SAPRITCH et al.

Civ. 6336.

District Court of Appeal, Third District, California.

April 16, 1940.

Hearing Denied June 14, 1940.

1. Contracts ⇐303(4)

Performance of a contract by one party is excused where prevented or rendered impossible by other party, since a party to a contract cannot take advantage of his own act or omission to escape liability. Civ.Code, § 1511.

2. Contracts ⇐303(4)

Where mortgagee paid off mortgagors' indebtedness to another which was prior lien on property, and, under escrow agreement, was to receive a new deed of trust which was to be a first lien on the property, mortgagors' retention of canceled note and deed of trust representing prior lien and refusal to deliver them to escrowee prevented, and so excused, mortgagee's performance of escrow agreement, which mortgagee therefore was justified in canceling. Civ.Code, § 1511.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Dikran Taylor against Krekor H. Sapritch and others, for specific performance of covenants contained in a deed of trust, wherein defendants filed a cross-complaint for damages arising out of plaintiff's alleged violation of an escrow agreement. From judgment for defendants, plaintiff appeals.

Reversed.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

E. A. Sarkisian and Winterer & Ritchie, all of Los Angeles, for appellant.

Astor Elmassian and C. G. Weisbrod, both of Los Angeles, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

Appellant commenced this action for the purpose of compelling respondents to specifically perform the covenants contained in a deed of trust executed by them in his favor. Respondents filed a cross-complaint for damages arising out of the alleged violation of an escrow agreement by appellant. The trial court found against appellant upon his complaint, and in favor of respondents upon their cross-complaint. Judgment was entered in favor of respondents, Krekor H. Sapritch and Takoohie K. Sapritch in the sum of $1,500, and in favor of respondent Armenia Ruth Sapritch in the sum of $1,000. The appeal is from the judgment.

On January 28, 1932, respondents executed a $1,000 note to appellant, which note was secured by a deed of trust on two lots owned by respondents—lot 7 owned by Mr. and Mrs. Sapritch, and lot 6 owned by Armenia Ruth Sapritch, their daughter. On April 12, 1934, a further advance of $500 was made by appellant, secured by this deed of trust. This trust deed constituted a first lien on lot 6, and a second lien on lot 7, upon which a prior deed of trust, secured by a note in the sum of $4,150, was held by the Security First National Bank of Los Angeles. Appellant and Sapritch met at the Security First National Bank on January 28, 1935. At this time appellant advanced Sapritch $4,392.46, which amount was paid over to the Security First National Bank in full payment and satisfaction of its said indebtedness. The deed of trust was marked "Paid", as of January 31, 1935, and a letter written on February 1, 1935, to the Los Angeles Trust and Safe Deposit Company, the trustee, stated that the note and deed of trust were being sent to said trustee for cancellation. At the time that the $4,392.46 was paid over to the bank, Mr. Sapritch executed a writing authorizing the *bank* to forward the note, trust deed, and request for reconveyance to the appellant, Mr. Taylor. *Through inadvertence, these papers were mailed to respondent Sapritch, who received them on February 5, 1935. This note, canceled deed of trust, and other papers were held by the respondent until the bringing of this action.* They were admitted in evidence during the trial.

Escrow instructions were executed and signed by appellant and respondents on February 1, 1935. Appellant agreed to put into the escrow a request for full reconveyance of the trust deed of record for $1,500, executed by the respondents, and also any additional funds required to complete the escrow. The written instructions indicate that additional funds were needed to pay taxes for 1934–35, and penalties. Appellant also agreed to pay any delinquent street bond or assessments, and to pay light assessments for light bill for year 1934. The amount of these items was

never ascertained. Respondents executed and delivered into escrow a promissory note in favor of appellant in the sum of $6,225, secured by a deed of trust on lots 6 and 7, belonging to them, which deed of trust was to be a first lien on the land. Respondents also executed and delivered into escrow an assignment to appellant, of all rents accruing from the respective property. On February 19th further escrow instructions were signed by appellant and delivered to the same bank. They provided as follows: "I will hand you Full Reconveyance of Trust Deed of record, for $4150.00 executed by Krekor H. Sapritch et al in favor of the Security First National Bank of Los Angeles, and said Trust Deed paid for in full by me. You are also authorized and instructed to file for record this Full Reconveyance through this escrow."

Appellant did not pay any moneys into the escrow subsequent to February 1, 1935, with the one exception of a $25 payment, which was for title and escrow charges. During February, appellant made quite a number of visits to the Sapritch home, and the evidence shows without dispute that he made numerous requests for the note, deed of trust, etc., that had been mailed to respondent Sapritch by the bank. Sapritch never produced these papers for Taylor, and they have remained in Sapritch's possession ever since. *The record shows that Taylor, his attorney, and two representatives from the bank informed Sapritch that they wanted the papers in order to complete the escrow.* Mr. Sapritch testified that Taylor wanted the papers only for the purpose of quieting title pursuant to foreclosure proceedings. However, on February 13, 1935, Sarkisian, attorney for Taylor, wrote to the respondents upon the instance of Taylor, stating in effect that Taylor was disappointed that respondents had refused to sign an agreement canceling the escrow. The letter also stated that unless the required agreement was received by the following Saturday, that Taylor would take legal action in the matter. No further action was taken by appellant or respondents in furtherance of carrying out the escrow agreement, and appellant canceled the escrow on March 5, 1935, by letter of instruction to the Security First National Bank. On July 13, 1935, appellant, under his original deed of trust, sold the real property, upon default in the payment of the $1,500 indebtedness, and became the purchaser at the trustees' sale. Up to that time he had advanced the following sums to respondents: $4,392.46 paid on account of respondents' indebtedness on the first trust deed to the bank; and $1,500 on the original trust deed.

The trial court found that respondents had performed all the terms on their part to be performed, as provided in the escrow agreement. It also found that appellant had breached said agreement, in that he failed to pay taxes and assessments on the real property, and title, escrow, and other necessary charges to close the escrow.

[1, 2] Appellant contends that respondents cannot recover on account of a breach of the escrow for the reason that the latter prevented performance upon his part. We are in accord with this view. The understanding was that appellant would advance sufficient funds to pay off the trust deed to the bank, which was a prior lien on the property in respect to his own deed of trust. He was to receive a new trust deed which was to be a first lien upon the property. Respondents wrote the bank directing that the canceled note and deed of trust and request for reconveyance relating to the indebtedness to the bank, be sent to appellant. By mistake, they were sent to respondents, who at all times refused to deposit them in escrow. Without them, it was impossible to close the escrow, as the agreement provided that the new trust deed to appellant be a first lien on the property. Thus, it very definitely appears that respondents prevented appellant from performing his obligation, and in fact halted all further proceedings under the escrow. "As indicated above, by force of the provisions of section 1511 of the Civil Code, prevention by one party will excuse want of performance or delay on the part of the other." 6 Cal.Jur., p. 436, sec. 261. "A party to a contract cannot take advantage of his own act or omission, to escape liability thereon. * * * Under this rule performance of a contract is excused when it is prevented by the acts of the opposite party, or is rendered impossible by him." Ray Thomas Inc. v. Cowan, 99 Cal.App. 140, 277 P. 1086, 1088. The retention by respondents of the documents mentioned, and their refusal to deliver them to the escrowee, excused appellant from performance with the terms of the escrow, and it follows that the finding that appellant breached the contract is not sustained by the evidence, and that appellant was fully justified in canceling the escrow agreement.

Numerous additional points are raised by appellant, but we do not deem it necessary to discuss them.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



38 Cal.App.2d 470

RITZMAN v. CITY OF LOS ANGELES et al.

Civ. 2517.

District Court of Appeal, Fourth District, California.

April 15, 1940.

Hearing Denied June 14, 1940.

1. Municipal corporations ⇐270, 276, 323(3)

The straightening of channel of natural storm drain running through city park was consistent with use of the land for "park purposes", and was a matter within discretion of board of park commissioners, who under city charter were given full control over parks, and could not be enjoined, notwithstanding allegation that no damage to parks from floods had occurred since construction of dam, since it is common knowledge that dams sometimes break, or fill up and become less efficient in controlling floods, and that extraordinary storms sometimes occur.

See Words and Phrases, Permanent Edition, for all other definitions of "Park Purposes".

2. Municipal corporations ⇐270, 276, 323(3)

The straightening of channel of natural storm drain in city park was largely within discretion of park commissioners, who had full control over parks under city charter, and complaint to be sufficient, in suit to enjoin the straightening, should fairly have negatived presumption of the regularity of the official action of the park commissioners in directing that channel be straightened.

3. Dedication ⇐64

Generally, where a private individual conveys land to a city for a definite public purpose, it cannot be diverted to a different purpose, at least so long as the conditions of the grant are in force, in view of the fact that in such a case the title remains in the original owner subject to the specified public use, but a different rule applies where the city has acquired title in fee.

4. Municipal corporations ⇐721(1)

City which had acquired fee-simple title to land by condemnation for park, and which assessed the cost of the land so taken against adjacent lands, could thereafter permit a state highway to be built through park, where city charter provided that board of park commissioners might authorize the opening, establishment, and maintenance of streets or "other public ways" in or through parks, since the phrase "other public ways" includes a highway. St.1909, p. 1066; Code Civ.Proc. § 1239.

See Words and Phrases, Permanent Edition, for all other definitions of "Other Public Ways".

5. Municipal corporations ⇐517

One assessed for improvements through the formation of an assessment district has no title or right in the improvements superior to that of the public in general, since, though improvements are presumed to benefit, particularly, land within assessment district, they are for the benefit of the entire community.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Mary Ritzman against the City of Los Angeles and others, to restrain the defendants from building a highway through a park of the city of Los Angeles and from deepening and widening the channel of a natural storm drain in the park. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Jerrell Babb, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Leon Thomas David, Asst. City Atty., both of Los Angeles, for respondents City of Los Angeles and its officers.

C. C. Carleton and C. R. Montgomery, both of Sacramento, for respondents Highway Commission and its officers.

BARNARD, Presiding Justice.

This is an action to restrain the defendants from building a highway through that portion of the Arroyo Seco which lies

within the limits of the city of Los Angeles and from deepening and widening the Arroyo Seco channel. An objection to the introduction of evidence was sustained on the ground that the complaint did not state a cause of action. The plaintiff, having declined to amend, has appealed from the judgment.

The complaint alleges that the Arroyo Seco is a natural storm drain meandering from the mountains north of Pasadena through a narrow basin to its terminal at the Los Angeles river; that the narrow basin through which it flows is a natural park and playground heavily wooded with native shrubs and trees; that formerly flood waters came through the Arroyo Seco at times causing damage to its natural beauty; that the Devil's Gate dam was built about 1918 for the purpose of flood control, which purpose has been accomplished and since then the Arroyo Seco is a meandering channel about 20 feet wide and three feet deep; and that, in keeping with plans made by the cities of Pasadena, South Pasadena and Los Angeles, the city of Los Angeles condemned park areas so as to give the city a continuous park in the Arroyo Seco, running from the south boundary of South Pasadena to the Los Angeles river, a distance of about four and a half miles and having an average width of about 300 feet.

It is then alleged that in these condemnation proceedings brought under the Park and Playground Act of 1909, St. 1909, p. 1066, two assessment districts were formed, the cost of the land taken being assessed against the adjacent lands in the assessment districts; that the plaintiff owns land within one of these districts which was thus assessed; that about 70 per cent of the land taken was on the floor of the arroyo and 30 per cent was on the adjoining barren hills; that the city of Los Angeles has improved a portion of the land taken, this development consisting, in addition to local roadways, of tennis courts, bowling greens, playground apparatus, and places for numerous games, camp grounds and picnic grounds; that the principal users of these parks are people residing westerly thereof; and that said lands were acquired in trust for park purposes.

It is further alleged that the defendants jointly have surveyed, designed and commenced to build a "high speed highway" to be a state highway running through the westerly portion of these park lands for the entire distance of four and one-half miles, connecting at its southerly end with a street in down-town Los Angeles and at its northerly end with a street in South Pasadena; that this highway is designed to be 80 feet wide, having lanes separated by a four-foot parking strip, and that it will be 12 feet below the surface of the adjacent ground, being made convenient for high speed traffic; that it is to be continuous for its entire distance without any adequate inlets or outlets and with no "practical" access from side streets within the assessment district; and that the highway is intended to connect down-town Los Angeles with the city of Pasadena and the horse-racing tracks at Santa Anita and for fast moving traffic. It is also alleged that the defendants are planning to change the Arroyo Seco channel by deepening it and by changing its course from a zigzag one to one approximately in the center of the park lands, and that this change is unnecessary since the erection of the Devil's Gate dam, which has so far been adequate to control the flood waters. It is then alleged that these proposed improvements will destroy the usefulness of the park lands for park and playground purposes, and that the proposed use is inconsistent with the purpose to which the lands have been dedicated.

The question presented is whether the complaint alleges facts showing that this is such a diversion of the land from park purposes as may not legally be made by respondent city and its boards.

Section 172 of the charter of the city of Los Angeles authorizes the department of parks to manage and control the parks owned or operated by the city, to establish parks and to acquire by purchase, condemnation or gift any and all property necessary or convenient for such purposes. Section 176 provides that the board of park commissioners "shall have full control over all park sites and no such sites shall be devoted to any other purpose, in whole or in part, without permission from said Board". Section 178 reads in part: "All lands belonging to the city which have heretofore or which hereafter may be set apart or dedicated for the use of the public as a public park, shall forever remain to the use of the public inviolate; provided, however, that the Board of Park Commissioners * * * may authorize the opening, establishment and mainte-

nance of streets or other public ways in or through such parks."

[1,2] It cannot be seriously questioned that the contemplated straightening of the channel running through the Arroyo Seco, as alleged, is entirely consistent with the use of the land for park purposes and is a matter within the discretion of the board of park commissioners. It is alleged that floods in the past have caused damage to these park lands and while it is alleged that no damage has occurred since the construction of the Devil's Gate dam it is a matter of common knowledge that dams sometimes break, that they sometimes fill up and become less efficient in controlling floods, and that extraordinary storms sometimes occur. See Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 55 P.2d 847. This entire matter is so largely within the discretion of the park commissioners that the complaint "should reasonably be required fairly to negative the presumption of the regularity of official action declared by the Code". Los Angeles Athletic Club v. Long Beach, 128 Cal.App. 427, 17 P.2d 1061, 1064.

Assuming that the building of a highway through this long narrow park would constitute a diversion of a portion of these lands to purposes inconsistent with their use as a park, the question is presented as to whether such diversion is within the power of the city and its boards. The city was authorized to take title in fee to these lands in the condemnation proceedings [Sec. 1239 of the Code of Civil Procedure]. Crockett L. & C. Co. v. American T. B. Co., 211 Cal. 361, 295 P. 328. The complaint does not allege that the city did not take title to these lands in fee and, on the other hand, it is affirmatively alleged that the city "holds the title to said park lands as trustee for the benefit of its inhabitants". For the present purposes it sufficiently appears that the city holds title to these lands in fee.

[3] Generally speaking, where a private party conveys land to a city for a definite public purpose it cannot be diverted to another and different purpose, at least so long as the conditions of the grant are in force. Harter v. City of San Jose, 141 Cal. 659, 75 P. 344. The main reason for this rule is that in such a case the title remains in the original owner subject to the specified public use. Harter v. City of San Jose, supra. That a different rule applies where the city has acquired title in fee was pointed out in Slavich v. Hamilton, 201 Cal. 299, 257 P. 60, 61, where the court said: "The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, that is, whether dedicated by the donor, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted."

The distinction with respect to the manner in which land is acquired for park purposes, that is, whether acquired in fee or by private donation, has not always been kept clear in the decisions in this state. In Hall v. Fairchild, etc., Co., 66 Cal.App. 615, 227 P. 649, the court said that where land is once dedicated for a particular purpose it is beyond the authority of a city or of the legislature to withdraw it therefrom. However, no attempt was there made to distinguish between the two methods of acquiring property for park uses or to analyze the reasons for the rules under the respective methods of acquisition. In Spires v. Los Angeles, 150 Cal. 64, 87 P. 1026, 11 Ann.Cas. 465, where the land in question had been acquired in fee, it was stated in effect that lands dedicated to park purposes could not be used for a purpose inconsistent therewith, although it was held that the building there in question was appropriate for park purposes. Again no attempt was made to discuss the reasons for the rule. In Mulvey v. Wangenheim, 23 Cal.App. 268, 137 P. 1106, these matters were not distinguished, although a holding that a part of park lands could not be used for street purposes was based upon the ground that land granted for a specific purpose could not be used for another purpose. A part of the land there in question had been donated for park purposes. The case of Olmstead v. San Diego, 124 Cal.App. 14, 12 P.2d 22, has no bearing here. While the lands were owned in fee the charter had given the park board exclusive control thereof and the park board had refused to consent to a use of a portion of the land for road purposes.

[4] The case of Spinks v. City of Los Angeles, 220 Cal. 366, 31 P.2d 193, 194, involved the right or power of the city to extend a street through Westlake park, the land having been owned in fee by the

city and dedicated as a public park. The court referred to section 178 of the city charter and, after pointing out the distinction between cases where land has been donated for park purposes and cases where land owned in fee has been dedicated to such uses, said: "Acting under authority of its charter, and through the action of its legislative body, the city is only dedicating its own property to a different public use than that to which it has been heretofore subjected." Upholding the right of a municipality to thus meet changing conditions, and the right of the city to use a portion of these park lands for such street purposes, a judgment restraining the construction of a street across the park was reversed. The rule thus applied is not only supported by principle and authority, but finds additional support in the fact that the Los Angeles city charter not only provides that such lands shall not be devoted to other purposes without permission of the park commissioners, but also provides that this board may authorize the opening and maintenance of streets or other public ways both in and through such parks. The phrase "other public ways" would include a highway. City of Long Beach v. Payne, 3 Cal.2d 184, 44 P.2d 305.

[5] The only material difference between the facts involved in the case of Spinks v. City of Los Angeles, supra, and those involved in the instant case is that here the land in question, although owned in fee, was acquired through condemnation proceedings with the cost of the land raised by assessments upon the property within certain assessment districts. The fact that the land was dedicated to a certain purpose in connection with the condemnation proceedings results in no different situation, so far as our present problem is concerned, than exists where land is otherwise by ordinance or legislative act dedicated to a certain use, which was the situation involved in the case of Spinks v. City of Los Angeles, supra. One assessed for improvements through the formation of an assessment district has no title or right in the improvements superior to that of the public in general. While such improvements are presumed to benefit, particularly, land within the assessment district they are for the benefit of the entire community. We know of no rules giving such an assessment payer a vested right in the improvements, providing that the improvements shall perpetually remain in the same form, or providing that they may not later be changed or even abandoned, in the public interest.

In the case of Reichelderfer v. Quinn, 287 U.S. 315, 53 S.Ct. 177, 179, 77 L.Ed. 331, 83 A.L.R. 1429, which was cited with approval in Spinks v. City of Los Angeles supra, park lands acquired in fee under an act of congress, through condemnation proceedings and an assessment against the property in an assessment district, were by a later act of congress directed to be used in part for another purpose. It was held in that case that since the government had acquired the fee to those lands it did not, by dedicating the lands to a park use, purport to deprive itself of the power to change that use and devote the land to another purpose. In this connection the court said: "For, if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise." And further: "The case of a park is not unique. * * * It has often been decided that, when lands are acquired by a governmental body in fee and dedicated by statute to park purposes, it is within the legislative power to change the use [citing cases]. The abutting owner cannot complain; the damage suffered by him 'though greater in degree than that of the rest of the public, is the same in kind'." With respect to the claim there made that one assessed for the cost of land to be used for park purposes was entitled to have that use continued the court said: "The fact that lands, including those now owned by respondents, were assessed for benefits * * * leads to no different conclusion. * * * All that the statute says is that the lands acquired shall be perpetually dedicated as a park * * * and that benefits shall be assessed." It was then held that the benefits intended, which were to be assessed, were those existing in the absence of any guaranty that the park would be continued for any particular length of time; that the possibility that the government might later exercise is power to change the use of the land was a proper subject for consideration in valuing the benefits conferred; and that such assessments are an exercise of the taxing power which in no way differs from the assessment of benefits arising from other types of public improvement.

In our opinion, the principles enunciated in the two cases last cited, taken in connection with the sections of the Los Angeles city charter to which we have referred, are controlling here.

The respondent Highway Commission and highway officials ask for a clarification of the rule broadly stated in the case of Spinks v. City of Los Angeles, supra, to the effect that where land is donated by private individuals to a city for park purposes "the city cannot legally divert the use of such property to purposes inconsistent with the terms of the grant". It is argued that the reason for that general rule is that title in such a case is reserved in the grantor and the only right possessed by the city is the right to use the land for the specified purpose; that the limitation upon the city's right to change the use of such land is based upon lack of title in the city rather than upon lack of power; and that no legal reason exists why that part of the title reserved to or remaining in the grantor may not be acquired by condemnation proceedings just as any other right or title may be thus acquired. While there would seem to be considerable merit in this argument such an issue is not involved on this appeal and anything we might say in that connection would serve no useful purpose.

The judgment appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



38 Cal.App.2d 482

PEOPLE v. ESPINOLA.

Cr. 453.

District Court of Appeal, Fourth District, California.

April 16, 1940.

1. Criminal law ⇐935(1)

An order granting new trial in grand theft prosecution could not be attacked on ground that trial court made order because of alleged misconceptions of law and not because of any insufficiency in evidence, where trial court's references to propositions of law were made in connection with court's weighing of evidence and by way of pointing out certain inconsistencies therein, and after referring to such matters court stated that in its opinion verdict was unfair upon all the facts and circumstances, and order granting new trial was made "on the ground of the insufficiency of the evidence."

2. Criminal law ⇐1158(1)

An order granting new trial in criminal prosecution may not be disturbed where record discloses a conflict in evidence.

3. Criminal law ⇐1156(1)

An order granting a new trial in criminal prosecution may not be disturbed in absence of clear showing of abuse of wide discretion vested in trial judge.

4. Criminal law ⇐959

On motion for new trial, trial judge could disbelieve state's evidence or conclude that accused's explanatory evidence raised reasonable doubt as to accused's guilt, since such matters were confined to judge's discretion in granting new trial.

5. Criminal law ⇐935(1)

In grand theft prosecution against union business agent, wherein state's evidence was sufficient to support conviction, but wherein evidence given by accused by way of explanation to effect that he had used money involved for benefit of the union in carrying out his duties, if believed, would call for acquittal, granting new trial because of insufficiency of evidence to establish guilt beyond reasonable doubt was not abuse of discretion.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Manuel Espinola was convicted of grand theft, and from an order granting his motion for new trial, the People appeal.

Affirmed.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and James B. Abbey, Dist. Atty., and Seymour Wurfel, Deputy Dist. Atty., both of San Diego, for appellant.

Edward L. Davin, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with grand theft in each of five counts of an indict-

ment returned by the grand jury of San Diego county. Two counts of the indictment were dismissed during the trial, and the jury brought in a verdict of not guilty with respect to two other counts and a verdict of guilty of the charge contained in the fifth count. The defendant moved for a new trial upon various grounds, including the insufficiency of the evidence, and the motion was granted on that ground. From the order granting a new trial, the People have appealed.

The appellant contends that the order appealed from should be reversed because an abuse of discretion appears in that the trial court, in fact, granted a new trial because of its erroneous conception of the law and not because of any insufficiency in the evidence. The appellant relies upon the case of People v. Rothrock, 8 Cal.2d 21, 63 P.2d 807, and People v. Skoff, 131 Cal.App. 235, 21 P.2d 118, in support of its contentions. In the first of these cases, the court entered an order purporting to set aside a conviction after stating his reason therefor, which was that no legal plea had been entered. On appeal, it was held that a plea had been properly entered and that the order was erroneous, the court stating that the order was similar in effect to the granting of a new trial on the court's own motion, which could not be done. It fully appears in that case that the sufficiency or insufficiency of the evidence had nothing to do with the making of the order. In the second of the cited cases, a motion for a new trial was made on various grounds which did not include that of the insufficiency of the evidence. A new trial was granted on the sole ground that a certain matter of evidence had been erroneously admitted, although later stricken, and "because the evidence in the absence thereof was not sufficient to warrant a conviction". After stating that the trial court was without authority to grant a new trial on the ground of the insufficiency of the evidence since it had not been applied for upon that ground, and that a new trial had been granted not on the ground of lack of evidence but because of error in the admission of evidence, the appellate court reversed the order on the ground that there had been no error in the admission of the evidence in question and that, aside therefrom, there was sufficient evidence to support a conviction.

[1] In seeking to bring the instant case within the rules applied in the two cases above referred to, the appellant refers to certain remarks made by the trial court in passing upon the motion for a new trial and just before the order was made. In those remarks, the court stated that the proceeding against the respondent was initiated by a grand jury indictment and not by a complaint brought by the membership or officers of the union, the funds of which the respondent was charged with taking; that any person or association may ratify the acts of its agent and, in so far as the evidence disclosed, what the respondent did had not been disapproved of by the union; that probably the verdict was a compromise on the part of the jury; and that the evidence was weaker with respect to a count on which he was found not guilty than it was concerning the count on which he was found guilty. It is argued that by referring to these four matters the court indicated that it had an erroneous conception of the law in connection therewith, and that it made the order complained of because of such misconceptions of law and not because of any insufficiency in the evidence.

The contention made cannot be sustained. While it appears that the court referred to the four matters above set forth, it also appears that these references were made in connection with the court's weighing of the evidence and by way of pointing out certain inconsistencies therein. In the course of his remarks and after referring to these matters the court said: "I am of the opinion the verdict is unfair upon all of the facts and circumstances of the trial," and, after another remark upon the constitutional rights of the respondent, the order was made granting a new trial "on the ground of the insufficiency of the evidence". It may be here observed that while there was sufficient evidence to support a conviction upon the count here in question there was also evidence, given by the respondent by way of explanation, to the effect that he had used the money in question for the benefit of the union and in carrying out his duties as its business agent, which evidence, if believed, would call for an acquittal as to this count.

[2-4] It is well settled that an order granting a new trial in such a case may not be disturbed where the record dis-

closes a conflict in the evidence (People v. Ostrander, 23 Cal.App. 241, 137 P. 619) and, further, that such an order may not be disturbed in the absence of a clear showing of an abuse of the wide discretion vested in the trial judge. People v. Mattmueller, 25 Cal.App.2d 418, 77 P.2d 504, 506. We may say here as we said in the case last cited: "For all that appears the trial judge may have disbelieved the testimony offered by appellant's witnesses or he may have concluded that the explanation given by respondent and his witnesses raised a reasonable doubt of respondent's guilt. These were matters which were confided to his discretion, and it may not be declared from the record here presented that he abused such discretion."

[5] It sufficiently appears that the order appealed from was made because of the trial court's conclusion that the evidence was not sufficient to establish the guilt of the respondent beyond a reasonable doubt, and not because of any erroneous views of law entertained by the trial judge. Moreover, no abuse of discretion appears.

The order is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



38 Cal.App.2d 412

PEOPLE v. PHILLIPS (two cases).

Cr. 530.

District Court of Appeal, Fourth District, California.

April 11, 1940.

Criminal law ⇐1182

Where no briefs were filed and no appearance was made for defendant by the date upon which case was placed on calendar for argument, convictions must be affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Lloyd Phillips was convicted of burglary under two separate informations, and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

The defendant Lloyd Phillips was charged in two separate informations with the offense of burglary on two different occasions. The defendant has appealed from the judgment of conviction in each case. The clerk's and reporter's transcripts in these consolidated actions were filed in the office of the clerk of this court on February 13, 1940, and on February 27, 1940, respectively, and the case was placed on the calendar for argument on April 9, 1940. No briefs have been filed and no appearance has been made for him. The People moved to affirm the judgment under the provisions of section 1253 of the Penal Code. It is quite apparent that the motion must be granted in each case. People v. Whelan, 13 Cal.App.2d 274, 56 P.2d 960.

Judgments affirmed.

We concur: BARNARD, P.J.; MARKS, J.



38 Cal.App.2d 531

MAYER v. MOLINAR.

Civ. 12543.

District Court of Appeal, Second District, Division 2, California.

April 19, 1940.

Bills and notes ⇐518(1)

In action on notes, defendant's testimony that notes were given as part of tentative agreement to purchase business, but that purchase was never completed except under new agreement under which new note was given, authorized finding that there was no consideration for the notes.

Appeal from Supreme Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by S. Mayer against Joseph Molinar on promissory notes. From a judgment for defendant, plaintiff appeals.

Affirmed.

I. Charles Rubin, of Los Angeles, for appellant.

Carroll W. Harlan and Birger Tinglof, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover upon two promissory notes, plaintiff appeals.

Viewing the evidence most favorable to defendant (respondent), the essential facts are:

May 11, 1936, defendant executed two notes in favor of Sam Pozen, plaintiff's assignor, in the sum of $2,332.16 and $1,000 respectively. The two notes sued upon were part of a contemporaneous tentative agreement for the purchase of the Gardner Drug Store. Concurrent with the execution of these notes an agreement between the parties was executed reading in part as follows:

"The purchase price of the business as hereinbefore itemized is to be arrived at in the following manner:

"All fixtures and equipment, including stocks of merchandise, are to be invoiced at the fixed price of $7,000.00.

"Terms of payment are to be as follows: Party of the first part (Pozen, the Seller) agrees to accept from the party of the second part (Molinar, the Buyer), his note, in the amount of $5,000.00, this note being secured by a chattel mortgage on the store fixtures and payable at the rate of $100.00 per month or more on the deferred payments, with interest at the rate of seven per cent per annum,—the first of these installments becoming due and payable thirty days after possession of the business has been taken by the party of the second part. McKesson & Robbins, Inc., agree to transfer an existing note indebtedness of $1,200.00 due them from the party of the first part (Pozen) to the party of the second part (Molinar); this note indebtedness of $1,200.00 is payable at the rate of $75.00 per month or more, with interest on the deferred payments at the rate of seven per cent,—the payment of the note to be guaranteed by the party of the first part."

After the execution of said notes and agreement defendant purchased the Gardner Drug Store from Mr. Pozen in July, 1937, for the consideration of a $5,000 note and an agreement upon defendant's part to assume certain unpaid obligations of the drug store. Approximately two years after this latter transaction, suit was instituted on the first-mentioned notes. Defendant set up as a defense, among others, lack of consideration for the notes. The trial court found as follows: "That neither of said notes was delivered to plaintiff's assignor and that neither of said notes was executed nor delivered to plaintiff's assignor for a valuable or any consideration."

This is the sole question necessary for us to determine: *Was there substantial evidence to sustain the trial court's finding that there was no consideration for either of the notes upon which this action was predicated?*

This question must be answered in the affirmative.

Defendant testified that he gave the notes which are the basis of the present suit to plaintiff's assignor as part of a tentative agreement to purchase a business known as the Gardner Drug Store. He further testified that the transaction was never completed and that in July, 1937, he subsequently purchased the business under a new agreement by giving a note in the sum of $5,000 secured by a mortgage and assuming certain additional indebtedness. This evidence fully supports the trial court's findings of fact set forth above.

The judgment is affirmed.

I concur: MOORE, P. J.

38 Cal.App.2d 518

In re BURRE'S ESTATE.
KORNBAU et al. v. KARRAS.
Civ. 12436.

District Court of Appeal, Second District, Division 1, California.

April 19, 1940.

Rehearing Denied May 2, 1940.

Hearing Denied June 17, 1940.

1. Trial ⇐165

Generally on motion for nonsuit in civil cases, every inference favorable to plaintiff's case deducible from the evidence and every favorable presumption resulting fairly from the evidence must be taken in favor of the plaintiff's case.

2. Wills ⇐326

The rule that on motion for nonsuit every inference favorable to plaintiff's case deducible from evidence and every favorable presumption resulting fairly from the evidence must be taken in favor of plaintiff's case applies to will contests.

3. Wills ⇐326

If evidence is fairly susceptible of two constructions of will or if several inferences may reasonably be made from the evidence as a whole, the view most favorable to contestant must be taken on motion for nonsuit.

4. Wills ⇐326

All evidence in favor of will contestant must as against motion for nonsuit be taken as true and contradictory evidence if any must be disregarded and this having been done, if there is any substantial evidence to prove the facts necessary to make out contestant's case, motion for nonsuit must be denied.

5. Wills ⇐324(3)

Whether a will under which testator devised his estate to his sister to the exclusion of testator's children was executed as the result of undue influence of sister who allegedly sustained confidential relations with the testator was for jury.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Proceeding in the matter of the estate of Henry Burre, also known as Henry William Burre, sometimes known as H. Burre, deceased, wherein Lucy Kornbau and another contested the will of the deceased and the contest was opposed by Bertha E. Karras, proponent. From an order granting motions for nonsuit, the contestants appeal.

Order reversed and cause remanded for new trial.

J. Robert Arkush, of Los Angeles, for appellants.

Oscar S. Elvrum, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order granting a motion for a nonsuit. Appellants herein, Lucy Kornbau and Georgia Burre, contested the probate of the will executed by their father, Henry Burre, who died on February 7, 1938.

The will, dated March 5, 1931, nominated the decedent's sister, Bertha E. Karras, respondent herein, as executor, and devised and bequeathed all of the property of which he was possessed to her.

The facts as shown by the uncontradicted evidence are as follows: The decedent, Henry Burre, and his family formerly lived in the state of Missouri. In 1924 Mrs. Burre died and the home was broken up. The children were adults at the time; there were five daughters, all married except one, and two sons. Mr. Burre subsequently made a trip to his old home in Indiana to attend the funeral of his father. He there met his sister, Bertha E. Karras, and they joined in a plan to move to California, where they lived together with the respondent keeping house for the decedent, until 1930, when Mrs. Karras married. Thereafter Mr. Burre resided alone on a ranch in Lancaster about six miles from his sister's home, although he took most of his meals with her.

Mrs. Karras held certain property in joint tenancy with the decedent with regard to which she testified as follows:

"Q. Isn't it a fact, Mrs. Karras, that you held certain property in joint tenancy with him? A. Yes, sir.

"Q. When did he acquire that property in joint tenancy? A. Well, as we went on I had money when we came to California, and as he did not have anything to make a living, so I took my $500.00, the $600.00 I had after my husband passed away, and the property that was sold at Vincennes that belonged to our father, that was part of the inheritance that he received

also, and put into affairs to make our living together."

Mrs. Karras testified that she helped her brother, who was a carpenter by trade, in many ways; for example, she testified, "I helped him dig cesspools there at the place, I helped put up a windmill. I helped him with sanding floors at different times, and I helped him get along before he received this money from his son."

In 1931, Mr. Burre received word that his son, Edward, who had been "missing" for about fourteen years, was dying in a hospital in Palo Alto, California. Mr. Burre and Mrs. Karras made a trip to the hospital to see him. At this time they met one George L. Lang, who was an attorney for the Legionnaires. The son died shortly thereafter, and apparently left his estate to his father. Mr. Burre again went to San Francisco to straighten out the son's affairs, and Mrs. Karras again accompanied him. Mr. Lang was consulted in regard to the probate of the son's estate, and it was he who advised Mr. Burre to make his will. The will herein involved was drawn by Mr. Lang and executed in his office; it remained in the possession of the decedent or his attorney from that time until the decedent's death in 1938.

Mrs. Karras testified that she was not present when the conversation took place in Mr. Lang's office, wherein the decedent made known his intentions as to the provisions of the will.

In connection with the evidence relied upon by appellants, it is argued that the will drawn by the decedent was an unnatural will in that the contest is on behalf of his children and there was no evidence tending to show any discord or unnatural feeling between him and his children; that there was a presumption of undue influence in that the principal beneficiary sustained confidential relations with the deceased; that the principal beneficiary assisted in the drafting of the will, as evidenced by the fact that there were mistakes in the names of the decedent's children "just as Mrs. Karras was in the habit of making them and as the decedent never made and which Lang, the attorney, being a stranger to the family, would not know unless told"; and, finally, that the burden of proof was on the beneficiary to show no coercion or undue influence, and that there was no evidence to support this burden.

[1-4] From a review of the record it must be conceded that, although slight, there was some evidence to justify the foregoing argument, and sufficiently substantial to defeat the motion for a nonsuit. "It is, of course, the general and well-understood rule that ordinarily upon a motion for a nonsuit, in civil cases generally, every inference favorable to plaintiff's case deducible from the evidence and every favorable presumption resulting fairly from the evidence must be taken in favor of plaintiff's case. This rule applies with equal force to cases of contests of wills. Of course, if the evidence is fairly susceptible of two constructions, or if several inferences may reasonably be made from the evidence as a whole, it goes without saying that the view most favorable to the contestant must be taken. And, further, all of the evidence in favor of the contestant must, as against a motion for a nonsuit, be taken as true, and contradictory evidence, if any, must be disregarded. This having been done, if there is any substantial evidence tending to prove the fact necessary to make out the contestant's case, the motion for a nonsuit must be denied and the case given to the jury." Estate of Newhall, 190 Cal. 709, 719, 214 P. 231, 235, 28 A.L.R. 778. See, also, Estate of Arnold, 147 Cal. 583, 82 P. 252; Estate of Maescher, 78 Cal.App. 189, 248 P. 537; Estate of Gallo, 61 Cal.App. 163, 214 P. 496.

[5] Even though it might appear that the trial would have resulted in a judgment for respondent under and by virtue of the evidence adduced, it does not follow that the motion for a nonsuit should have been granted. To the contrary, in the light of the record and under the authorities, the motion for a nonsuit should have been denied.

For the foregoing reasons, the order granting the motion for nonsuit is reversed, and the cause remanded for a new trial.

We concur: YORK, P. J.; WHITE, J.

38 Cal.App.2d 449

In re GARVEY'S ESTATE.
SMITH v. FREDERICK.

Civ. 12435–S.

District Court of Appeal, Second District, Division 1, California.

April 15, 1940.

1. Wills ⇐1

A testator may dispose of his property as he wills, and he is not called upon to consult or satisfy the wishes or views of juries or courts, and whether will is just or unjust is a matter of opinion on which jury cannot overturn testator's disposition. Probate Code, § 20.

2. Wills ⇐55(6)

Evidence *held* not to authorize finding of lack of testamentary capacity, notwithstanding evidence of overindulgence in alcoholic liquor. Probate Code, § 20.

3. Wills ⇐52(1)

Testamentary capacity is always presumed to exist until the contrary is established. Probate Code, § 20.

4. Wills ⇐55(1)

In will contest, contestant always has burden of showing affirmatively and by preponderance of evidence that testator, at time of executing the will, actually was of unsound mind and that such unsoundness of mind actually affected or controlled his testamentary capacity. Probate Code, § 20.

5. Wills ⇐50

"Testamentary capacity" exists when testator understands the nature and situation of his property, recalls and understands his relations to the persons who have claims upon his bounty, and whose interests are affected by the provisions of the instrument. Probate Code, § 20.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Capacity".

6. Wills ⇐82

A will giving all property to nurse, to exclusion of testator's wife and daughter, was not so unnatural and unjust as to furnish grounds for contest, where wife and daughter had co-operated in instituting proceedings for separate maintenance and for adjudication of testator's incompetency, and testator had made property settlement with wife.

7. Wills ⇐82

A testator who has testamentary capacity may make what might be regarded by others as an unreasonable or even an unjust will.

8. Wills ⇐55(1)

The fact that will was a "deathbed will" is not of particular consequence unless evidence warranted conclusion that, at time of execution, testator's condition of mind and body excluded existence of testamentary capacity. Probate Code, § 20.

9. Wills ⇐166(2)

In will contest, evidence *held* to authorize finding against charges of fraud and undue influence by testator's nurse who was sole devisee.

10. Appeal and error ⇐1011(1)

An appellate court may not disturb findings when the evidence, though controverted, contains substantial testimony which, if believed, is sufficient to sustain the findings.

11. Wills ⇐163(2)

A presumption of undue influence in execution of will does not arise from existence of confidential relationship between testator and beneficiary, in absence of evidence of participation by beneficiary. Probate Code, § 20.

Appeal from Superior Court, Los Angeles County; Louis C. Drapeau, Judge.

Proceeding in the matter of the estate of W. E. Garvey, also known as Wallace Edward Garvey, deceased, wherein Eddie Garvey Smith appealed from an order admitting to probate a will proposed by Mildred Pauline Frederick.

Affirmed.

Frank J. Kashare, of Los Angeles, for appellant.

Julius V. Patrosso and William A. Sherwin, both of Los Angeles, for respondent.

WHITE, Justice.

From an order admitting to probate the last will and testament of Wallace Edward Garvey following a hearing upon the petition of respondent for probate thereof and a contest filed thereto by the appellant, Eddie Garvey Smith, adult daughter of decedent, this appeal is prosecuted. The grounds of contest were: "(1) Incompetency; (2) intoxication to the extent that decedent was incapable of exercising his will

and was without testamentary capacity; (3) undue influence; (4) fraud; and (5) that said will was not executed in the manner and form prescribed by law". The court heard the proceeding sitting without a jury, and at the close of contestant's case granted a nonsuit as to the first, second and fifth grounds, and denied a nonsuit as to the third and fourth grounds of contest. Upon the conclusion of the trial the court made detailed findings of fact in favor of respondent upon the last named grounds and ordered the will admitted to probate.

The will was executed December 22, 1937, and decedent died two days thereafter. At the time of his death decedent was approximately 55 years of age and had resided in Los Angeles County for some two years prior to his death. His previous residence, extending over a period of years, was in the city of Salem, New Jersey, where he had been successively a schoolteacher, principal of the high school, and an employee of the Salem Glass Company, with which latter concern he had been connected as secretary, factory superintendent, and in the sales department. His family consisted of his wife, Lavinia Garvey, and the contestant, with whom he resided prior to coming to California. During his years of residence in Salem decedent was regarded as an able business man, "hard-working, sensitive, and given somewhat to moody periods". During these times he was considered as only an occasional user of intoxicants. Through his own efforts he amassed a modest competency, and at the time of his death his estate had a net value of approximately $50,000 in personal property, consisting principally of securities.

The record discloses that decedent was quite active in business until the early part of May, 1935, when he became ill and was hospitalized and operated upon for a cancer of the rectum, which operation is known to medical science as a colostomy and involves a complete removal of the rectum. The effect of this operation was to destroy the normal functions of the body in the elimination of waste matter, and the patient is therefore without power to control the movement of his bowels. Following this operation decedent returned to his home in Salem, and on October 10, 1935, the respondent, a registered nurse, was employed to attend decedent in her professional capacity. She remained in attendance upon him until the following April, during which time decedent's wife was absent for a considerable time on a trip and appellant was also away from home for a period. Determining upon a trip to California in the hope of benefitting his health, decedent, with the knowledge and consent of his wife and daughter, came to Los Angeles in company with the respondent acting in her professional capacity as a nurse. Locating in Long Beach, decedent with his nurse and a housekeeper resided together. In July of the following year decedent and respondent returned East, respondent going to Philadelphia and decedent to his home in Salem. Subsequently respondent was re-engaged to act as nurse for decedent, in which capacity she acted for about a week or ten days. During the following month, in response to a telegram from decedent, she again re-entered professional employment and accompanied him to California, where she remained in attendance upon him until his death. On each of the occasions when decedent returned east he lived at home with his wife, and according to her testimony and that of appellant, the relations between him and his family were friendly. While decedent's wife did not come to California until a few days prior to his death, the appellant visited her father on three different occasions from October, 1936, to December, 1937.

During his residence in California decedent became actively interested in the business of producing, processing and marketing sulphur and sulphur products, and at the time of his death was president and secretary, respectively, of two different corporations engaged in this business. He was also interested in racing, and was the owner of several horses which were racing at California race tracks.

Coming now to the last month of decedent's life, it appears that on November 30, 1937, decedent received a telegram signed "Mrs. Smith", requesting him to call her at a Los Angeles hotel. Upon making the call appellant discovered that the sender of the telegram was the appellant, his daughter, who had recently been married. Decedent invited appellant and her husband to come to his apartment in Long Beach, where they remained for several days. On the day preceding their departure decedent took his daughter, her husband, the respondent and some other friends to the Santa Anita race track, stating that he desired to show them his horses which were stabled there. On that evening, while all the last-named parties were having dinner, a telegram was delivered to appellant which

appellant stated to those present was "from the girls at the office". It appears, however, that the telegram was from decedent's wife, and on the following morning appellant and her husband left the apartment, advising that they would return during the day. They did not return, however, but instead telephoned the next day, Monday, and on Tuesday, that they were detained in Los Angeles. On Thursday decedent received a telephone call from his attorney, who stated that the latter had noted in the morning issue of one of the legal papers that decedent's wife had instituted a proceeding to have decedent declared incompetent, and had also filed an action against decedent for separate maintenance. Up to this time decedent apparently had no information that his wife was in California. He thereupon left his apartment and went to the home of friends in a neighboring city. It further appears that during decedent's residence in California and while his wife was residing in the family home in Salem, he had provided for her use the income from certain securities which aggregated approximately $1,500 quarterly. These dividends were deposited in a joint account of decedent and his wife in a bank in Salem. Just prior to the last-mentioned arrival of his wife in California decedent had drawn a check upon this joint account which was returned unpaid. Upon making inquiry as to the cause of such nonpayment, he was informed that the check had been dishonored because his wife had closed the account by withdrawing therefrom the entire amount thereof in the sum of $2,400. Following the institution of the divorce and incompetency proceedings decedent directed his counsel to effect a settlement with his wife, as a result of which a property agreement was determined upon which was executed by decedent on the 21st day of December, 1937, three days prior to his demise, and which agreement his wife had executed the preceding day. By the terms of this agreement decedent transferred and conveyed to his wife the real property consisting of the home in Salem, certain stock, and agreed to pay her $23,000 in cash from the sale of remaining securities. He also assigned to his wife life insurance policies in the sum of $14,000. This agreement contained a provision also that the same should operate as a complete property settlement and release of each of the parties by the other, and each waived his respective right to inherit or administer upon the estate of the other. On the day following, decedent executed his will, the first paragraph of which provided: "I make no provision for my wife Lavina Garvey as I have signed a property settlement with her. I make no provision for my daughter Mrs. F. H. Smith because I have provided an education for her and because she is married and will be amply provided for by her husband and by her mother"; and the second paragraph of which was as follows: "I leave all my property real personal or mixed including stocks and horses to Mildred Pauline Frederick and appoint her as administratrix hereof without bond."

It is unnecessary to give any consideration to the fifth ground of contest, in connection with which the court granted a nonsuit, for the reason that no complaint is directed against the action of the trial court therein.

[1] We shall first consider the grounds of contest as to which nonsuits were granted, having in mind in connection therewith the familiar rules announced in Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, governing the power of the court to grant a nonsuit. It should, however, be borne in mind when reviewing a judgment of nonsuit in a matter such as the one before us, that every person of sound mind over the age of 18 years may dispose of his separate property by will. Prob.Code, sec. 20. As was said in Estate of Nolan, 25 Cal. App.2d 738, 78 P.2d 456, 457: "* * * the property of the testator is his to dispose of as he wills, and he is not called upon to consult or satisfy the wishes or views of juries or courts. (Estate of Spencer, 96 Cal. 448, 452, 31 P. 453; Estate of Perkins, 195 Cal. 699, 709, 235 P. 45); and 'Whether in the minds of others a will is just or unjust is a matter of opinion, and to permit a jury to determine the question without that substantial evidence which the law requires would be to permit a jury to make the disposition irrespective of the desires of a testator.' Estate of Donovan, 114 Cal.App. 228, 233, 299 P. 816, 819."

Grounds of contest numbered 1 and 2 may be considered together, as they embrace allegations of general incompetency and incompetency allegedly produced by continuous and excessive use of intoxicants. In this regard there was no testimony by any witness, expert or otherwise, that the decedent was insane, incompetent, or suffered from any hallucinations or delusions at any time prior to or upon the occasion when he executed his will. There was evi-

dence that following his operation decedent drank considerably and was under the influence of liquor a great deal of the time; that he "looked terrible"; neglected his business, and that when he returned home to Salem, New Jersey, in December, 1936, he was "just drinking all the time"; that he would start drinking in the morning when he arose, and during the latter months of his life would continue drinking throughout the day; that he was "getting to the point where it was more hard for him to control his emotions, more and more things upset him and littler things"; that he would become angry and give way to emotional outbursts; that he would on occasions consume as much as four pints of whiskey a day. There was also testimony that he was slovenly in his appearance and habits; neglectful of his person, and would wear soiled clothing; his mental condition was thus described by appellant when testifying as a witness: "His mind was not nearly as quick; he couldn't make decisions; he seemed to avoid issues, and he just wasn't as smart a man as he had been before".

[2-4] The foregoing furnishes an epitome of the testimony in the light most favorable to the contestant. Giving to it all the weight to which it is entitled, we cannot conclude that the contestant produced sufficient evidence to defeat the motion for a nonsuit as to the grounds of contest now under consideration. Testamentary capacity is always presumed to exist until the contrary is established. The burden is always upon the contestant to show affirmatively and by a preponderance of the evidence that the testator, *at the time of executing the will,* was of unsound mind and that such unsoundness of mind actually affected or controlled his testamentary capacity. The question is not what the testator's mental state *may* have been at the time of the testamentary act, but *what it actually was.* Both of the attesting witnesses testified that at the time of the execution of the will decedent was competent, acting freely, and that his physical condition appeared to be substantially the same as it had been during the period of their acquaintance with him. Decedent's physician testified that on the day the will was executed decedent was rational and intelligent, and that the cold from which he was suffering was on that day "proceeding downward to a bronchitis and possibly pneumonia". When a clear case of testamentary capacity of decedent at the very time of the execution of the will is made by the evidence of the proponent, the question presented is, did the contestant introduce evidence so inconsistent with and contradictory of that adduced by the proponent that it would have been sufficient to support a verdict or decision for contestant under the "conflicting evidence" doctrine if the jury had seen fit to bring in such a verdict or the court, sitting without a jury, should arrive at such a decision? In the case at bar the evidence was insufficient as a matter of law to sustain a finding for contestant on the issue of incompetency. In Estate of Carithers, 156 Cal. 422, 105 P. 127, 129, wherein the testimony with reference to overindulgence in alcoholic stimulants was more pronounced than in the case before us, and where the cause of death, which occurred two months after the execution of the will, was ascribed to "acute alcoholism", the Supreme Court, in pronouncing the evidence insufficient to sustain the judgment in favor of contestant, said: "* * * We do not think that the contestants produced sufficient evidence of *facts* to justify the jury's verdict. It is true that gross habits of indulgence in strong drink were disclosed; but there was nothing which tended to break the force of the positive testimony of the attorney and the attesting witnesses that Carithers was possessed of testamentary capacity when he signed the will. The testimony of the physicians was largely speculative and was founded entirely upon knowledge gained subsequent to August 18, 1906, while the other witnesses depended upon facts which were just as consistent with the theory of temporary drunkenness as of permanent mental derangement. Such evidence is not adequate for the overthrowing of the provisions of a will. In re Wilson, 117 Cal. [262], 276, 49 P. [172], 176, [711], lays down the rule for cases of this kind very clearly as follows: 'While evidence of the condition of the testator's mind both before and after the date of the testamentary act is admissible, yet it is important only as it bears upon that condition at the very time of the execution of the will. It unfortunately is often the case that exceedingly bright and strong-minded people are addicted to the excessive use of alcoholic drinks, and are frequently intoxicated; and to hold that the wills of such persons, although shown to have been executed when they were in full possession of testamentary capacity, can be upset by a jury upon

mere proof of such drinking habit, would be to carry the rule of "conflicting evidence" beyond all reasonable bounds.'"

Again in Estate of Smethurst, 15 Cal. App.2d 322, 59 P.2d 830, 834 (hearing denied by Supreme Court), we find the following:

"* * * The habitual use of intoxicating liquor to excess may result in permanent insanity, but, to constitute insanity, more than dipsomania must be shown; it must be a condition of fixed mental unsoundness; nor can insanity be presumed from proof of habitual drunkenness, however excessive or long continued. Estate of Mahoney, 6 Coffey Prob.Dec. 1.

"The fact that the testator may have been under the influence of intoxicating liquor at the time he made his will does not invalidate the instrument unless he at that time had no independent comprehension of what he was doing (Estate of Little, 46 Cal.App. 776, 189 P. 818); and contestants here submitted no evidence in that particular.

"The intoxication of the testator, assuming it to have been established on the day of the execution of the will, must have been of such a degree as to have deprived him of judgment while executing it. It must affirmatively appear that the mind of the testator was totally destroyed, and that he was so far under the influence of liquor at the instant of its execution that he was incapable of comprehending the nature of his act, the extent of his property, and those who had a claim upon his bounty. Estate of Mahoney, supra."

See, also, Estate of Casarotti, 184 Cal. 73, 192 P. 1085; Estate of Campbell, 46 Cal. App. 612, 189 P. 812.

[5] Testamentary capacity exists when the testator understands the nature and situation of his property; recalls and understands his relation to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. That the decedent possessed such understanding is fortified by the fact in evidence that on the day preceding the execution of his will he had executed a formal document in the nature of a property settlement with his wife, which instrument set forth in detail property owned by him and clearly indicated the particular character of so much of his property as was to be transferred to his wife pursuant to the terms of the settlement. That he had both his wife and daughter in mind when he executed his will is evidenced by the fact that in the same he referred to both of them and set forth his reasons for not therein making provision for them. The answer to the opinion of the psychiatrist who testified that from the autopsy performed by him upon the body of the decedent as well as from a comparison of the signatures of decedent on documents other than the will, the signature upon the latter was an "alcoholic signature", is contained in the opinion of the court in Estate of Little, 46 Cal.App. 776, 791, 189 P. 818. The evidence of overindulgence in alcoholic liquor as reflected in the record before us falls far short of the quantum required to establish the fact that decedent had become so weakened in his physical and mental powers that he was incapable of the testamentary act. Estate of Fisher, 202 Cal. 205, 259 P. 755; Estate of Putnam, 1 Cal.2d 162, 165, 34 P.2d 148. Neither does the evidence in the instant case of repulsive or filthy personal habits, ill temper and a disagreeable disposition constitute insanity or unsoundness of mind. Estate of Collins, 174 Cal. 663, 164 P. 1110; Estate of McGuirk, 50 Cal. App. 352, 195 P. 279. Applying the principles of law herein enunciated to the state of the evidence as here presented, the conclusion is inescapable that the contestant failed to sustain the burden of establishing the fact that at the time of the execution of the will on December 22, 1937, the testator was so mentally incapacitated that he did not possess testamentary capacity. Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Wright, 7 Cal.App.2d 348, 60 P. 2d 434; Estate of Grant, 8 Cal.App.2d 232, 47 P.2d 508.

[6, 7] Appellant next asserts that the will was unnatural and unjust, in that it disinherited appellant, who was the daughter of decedent. In this claim appellant cannot be upheld. The evidence indicates that while decedent was providing for his family and enjoying friendly and harmonious relations with his wife and daughter, shortly before he executed the will here in question his wife and daughter, acting in concert, without any intimation to decedent of their contemplated action, caused to be instituted proceedings for separate maintenance for the former and to have decedent adjudged incompetent and his wife and daughter appointed as his guardians. This, it might be noted, occurred at a time when the decedent was actively engaged in business in the community in which he resid-

ed. Following the institution of the aforesaid proceedings a property settlement was negotiated between decedent and his wife, under the terms of which she received approximately one half of their property. Irrespective of the motives which actuated his wife and daughter, and regardless of who was at fault, the fact remains, as disclosed by the evidence, that decedent was not on friendly terms with his family at the time he executed his will, but was deeply resentful of their conduct toward him. If decedent had testamentary capacity, and the evidence herein is insufficient to establish the contrary, then in disposing of his own property he had a right to make what by others might be regarded as an unreasonable or even an unjust will. Estate of McDevitt, 95 Cal. 17, 33, 30 P. 101; Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897.

[8] Appellant next directs our attention to the fact that the will was executed shortly before the death of the decedent. The fact that the testamentary document was what is commonly designated as a "deathbed will" is not of particular consequence unless the evidence warrants the conclusion that at the time of its execution the testator's condition of mind and body was such as to exclude the existence of testamentary capacity. There is no such showing here. While it is true decedent died two days after the execution of his will, nevertheless the evidence of the subscribing witnesses and of the attending physician was to the effect that the condition of decedent at the time was approximately the same as it had been during previous months. As heretofore noted, decedent had on the day previous to the signing of his will executed before a notary public the property settlement with his wife. Further, the cause of death was pneumonia which resulted from a cold previously contracted. There is no evidence of a wasting, lengthy, or painful disability which ravaged either the mental or physical faculties of the testator.

We come now to a consideration of the question of undue influence and fraud, as alleged in the grounds of contest numbered 3 and 4. A nonsuit having been denied as to these issues, the court at the conclusion of the trial made findings that there was no undue influence or fraud exercised by proponent upon decedent in connection with the execution of the will. Appellant contends the evidence was not sufficient to support such findings. In connection with the charges of fraud and undue influence, contestants' pleading alleges in general that decedent became acquainted with proponent approximately two years before the decedent's death; that proponent was a nurse and prior to her employment in that capacity by decedent the relations of the latter with his wife and daughter had been of an affectionate and friendly nature; but when proponent learned that decedent was possessed of property she spirited him away from his family and so poisoned and prejudiced his mind against his wife and daughter that the friendly and affectionate feelings and relations theretofore existing between decedent and his wife and daughter changed, and that decedent formed a dislike, disfavor and aversion for his family; that proponent refused to allow decedent's wife and daughter to see him until the morning of his death; that when decedent became extremely ill on December 22d and "was in a dying condition", the proponent did not remove decedent to a hospital or notify his family of the seriousness of his condition until after, at the instance of proponent and without the request of decedent, "she had written out the document which has here been proposed as the last will and testament"; and if decedent affixed his signature thereto it was done "at the fraudulent importunity of said Mildred Pauline Frederick, and while the decedent's own volition was overpowered by said Mildred Pauline Frederick; that immediately thereafter Mildred Pauline Frederick took said proposed will with her and retained the same in her custody until it was filed for probate herein; that the said Mildred Pauline Frederick did not notify the family of said decedent, and allow the said family to remove the said decedent to a hospital and medical attention and care until he was so far gone that there was no hope of recovery".

[9, 10] We are not directed by appellant to any testimony contained in the record to substantiate the charges of fraud and undue influence, but are asked to infer from a consideration of the entire case that the will in question was the result of respondent's overpowering influence upon and fraudulent representations to the decedent. It cannot be gainsaid in the case at bar but that the evidence in connection with the charges of fraud and undue influence was, to say the least, in conflict; and no rule of law is more firmly established than

the one which precludes an appellate court from disturbing findings when the evidence, although the same may be controverted, contains substantial testimony which if believed, is sufficient to sustain the findings in question. There appears in the record testimony of decedent's attorney and one of the attesting witnesses that no one other than counsel and the decedent were present at the time when the matter of the will was discussed, and that decedent dictated its provisions; that at the time the will was executed there were present only the attesting witnesses and the decedent. It was also testified by decedent's counsel that at no time had he discussed the matter of the will with respondent nor she with him until after decedent's death. One of the subscribing witnesses, who had served as housekeeper for decedent, testified that during the entire time she was employed in such capacity, extending over a period of a year and a half, she never heard decedent and respondent discuss the matter of a will. Testimony was given by respondent that at no time did decedent discuss his business affairs with her or solicit her advice thereon; that she had never seen the will until it was exhibited to her by decedent's counsel following the death of the former. There is also evidence in the record that respondent endeavored to discourage decedent from using intoxicating liquor and at one time succeeded to the extent that for approximately two months decedent abstained from the use of alcohol. Business associates of decedent testified that at frequent conferences held with him respondent took no part therein, and that while occasionally she would be in the room she never entered into the conversation or made any suggestions. However contradictory of the foregoing other evidence might be, it was nevertheless within the power of the trial court to resolve that conflict in favor of respondent if the trial court believed, as evidently it did from the findings, the witnesses who testified as aforesaid.

[11] Appellant urges that because of the confidential relationship existing between the testator and the beneficiary there arose a presumption of undue influence, but this is not a correct statement of the law. In the absence of evidence of participation by the beneficiary, the presumption does not arise. As was said by this court in Estate of Burns, 26 Cal.App.2d 741, 749, 80 P.2d 77, 81 (hearing denied by Supreme Court): "There is a well-established exception to this rule, upon which the contestants rely here, to the effect that where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud. As suggested in Estate of Higgins, 156 Cal. 257, 261, 104 P. 6, 8, a 'presumption of undue influence' arises from proof of the existence of a confidential relation between the testator and such a beneficiary, 'coupled with activity on the part of the latter in the preparation of the will'. However, the confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will. See, in this connection, Estate of Ricks, 160 Cal. 450, 117 P. 532; Estate of Lavinburg, 161 Cal. 536, 543, 119 P. 915; Estate of Higgins, supra; Estate of McDevitt, 95 Cal. 17, 33, 30 P. 101; Coghill v. Kennedy, 119 Ala. 641, 24 So. 459."

To the same effect see Estate of Frank, 1 Cal.2d 34, 36, 32 P.2d 607; Estate of Jacobs, 24 Cal.App.2d 649, 651, 76 P.2d 128; 26 Cal.Jur., p. 650, § 21.

While it may be inferred from the evidence that respondent beneficiary had opportunity to exercise undue influence upon, or make fraudulent representations to the decedent, nevertheless, opportunity standing by itself is insufficient to warrant a finding of undue influence or give rise to a presumption thereof, in the absence of proof of some activity on the part of the beneficiary in the preparation of the will. Appellant's claim that respondent spirited decedent away from his family during the last days of his life is thoroughly contradicted by testimony of the witness Mr. A. C. Palmer, a business associate of decedent, at whose home the latter stayed for a period of approximately two weeks immediately preceding the execution of the will. This witness testified that decedent telephoned him, stating that he was in some trouble or difficulty, and asked the witness to come to see him. When in response to the call the witness went to decedent's apartment, the latter told him that he had been advised by his attorney that his wife had instituted some legal proceedings, and that he wanted to come to the witness' home until he had time to think the matter over and to talk with his attorney before being served with papers. This witness further

testified that it was in response to decedent's request that he took him to his home, where decedent remained until December 21. This witness also testified that decedent was a man of determined views and insisted upon having his way when giving orders to respondent; and the witness corroborated respondent's claim that she had endeavored to discourage decedent from the use of liquor, and at times would dilute decedent's liquor without the latter's knowledge.

For the foregoing reasons it follows that the judgment from which the appeal herein is taken should be, and it is, affirmed.

We concur: YORK, P. J.; DORAN, J.



PACIFIC MUT. LIFE INS. CO. v. CLEVERDON et al.*
Civ. 11345.

District Court of Appeal, First District, Division 2, California.

April 16, 1940.

Hearing Granted June 14, 1940.

1. Interpleader ⇐29

In action to determine rights to proceeds of life policy taken out by school teacher before her marriage, evidence *held* not to authorize award of a part to insured's husband rather than to named beneficiary on theory that premiums paid after marriage were paid out of community property, in view of evidence that premiums were paid from separate property, comprising insured's earnings after marriage.

2. Husband and wife ⇐266

In California, husband may relinquish to wife the right to her earnings during marriage without any consideration other than their mutual consent, which may be shown by evidence of acts or conduct of the husband indicating that he did not regard the earnings as community property.

3. Husband and wife ⇐249

If premiums on wife's life policy taken out before marriage were paid out of community property, but with husband's knowledge and consent, husband was not subsequently entitled to share in proceeds of life policy to exclusion of named beneficiary. Civ.Code, § 172.

4. Appeal and error ⇐1176(1)

Where admitted facts in interpleader action showed that named beneficiary was entitled to all the proceeds of life policy, reversal of judgment allowing insured's husband to share in proceeds was accompanied with directions to enter judgment for beneficiary.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Pacific Mutual Life Insurance Company against Susannah G. Cleverdon, W. A. Street, and others, in interpleader to determine conflicting claims to proceeds of "life income bond." From a judgment apportioning the proceeds, defendant Susannah G. Cleverdon appeals.

Reversed with directions.

Robert L. Faucett, Winterer & Ritchie, and E. Winterer, all of Los Angeles, for appellant.

Wayne R. Millington, of San Francisco, and Leo V. Youngworth and J. Harold Decker, both of Los Angeles, for respondent.

SPENCE, Justice.

This action in interpleader was brought to determine the conflicting claims of defendant Susannah G. Cleverdon and W. A. Street to the proceeds of a "Life Income Bond" issued by plaintiff. In its judgment, the trial court apportioned the proceeds between said defendants. Defendant Susannah G. Cleverdon appeals from said judgment. Defendants Susannah G. Cleverdon will be hereinafter referred to as appellant and defendant W. A. Street will be hereinafter referred to as respondent.

Said "Life Income Bond" was issued in 1926 to Helen Frances Cleverdon, as insured, with appellant named as the beneficiary therein. At that time, the insured was unmarried but in 1930 she married respondent. The insured died in 1936.

The insured was a school teacher and she continued in her employment after her marriage and up to the time of her death. Respondent was a dentist. Prior to and after the marriage, the insured maintained a separate bank account in her own name and all of her earnings were deposited in

* Subsequent opinion 108 P.2d 405.

that account. All of the premiums paid to plaintiff were paid by the insured out of that account. Respondent also maintained a separate bank account into which most of his earnings were deposited. Respondent testified that he did not deposit all of his earnings in his bank account, stating, "Well, not always, money that I would take in in cash, I would take home and use as expenditures at home" and "Sometimes I deposited some of the money that I earned in her account, sometimes." He further testified, however, that at various times he borrowed money from his wife which he repaid or intended to repay. However, the exact amount of the borrowings and of the repayments does not appear in the record. He testified that he had not repaid all that he had borrowed and it is entirely probable that the deposits in his wife's account were made on account of such repayments. In any event respondent testified that the premiums on the insurance policy in question were paid by his wife out of her earnings.

Throughout the testimony, respondent referred to the wife's bank account as "her account" and to the money therein as "her money". While he testified that there was no express agreement concerning said money, the only conclusion which can reasonably be drawn from the testimony is that he relinquished all control over said money and treated it as the separate property of his wife. Other witnesses testified to various statements made by respondent to the effect that "her salary was her own". While respondent testified, "No, I never made any statement to that effect, that I gave her anything that was hers," this testimony in itself implies that respondent deemed said earnings to be the separate property of his wife.

Appellant alleged in her answer that the claim of respondent was without any right whatsoever; that respondent had not any right, title or interest in the proceeds of the policy; that the policy was the separate property of the insured; that all premiums were paid out of the separate property of the insured; and that appellant, as the named beneficiary, was entitled to all of the proceeds thereof. Respondent merely alleged that all premiums paid subsequent to the marriage were paid out of community funds and he sought judgment for a proportionate share of the proceeds of the policy. The trial court found that all premiums paid subsequent to the marriage were paid out of community funds and it entered judgment awarding to respondent a proportionate share of the proceeds of the policy.

Appellant contends that the trial court erred in awarding any portion of the proceeds of the policy to respondent. We are of the opinion that this contention must be sustained.

[1, 2] In support of said contention appellant first claims that the evidence was insufficient to support the finding that the premiums, paid after marriage, were paid out of community property. This claim appears to be well founded. The settled rule is stated in 3 California Jurisprudence Supplement at page 643, section 129, as follows: "While the rule is otherwise in some of the community property states, in California the husband may relinquish to the wife the right to her earnings during marriage without any consideration other than their mutual consent, and her earnings thereupon become her separate estate. Such relinquishment and mutual consent may be shown by evidence of the acts or conduct of the husband, indicating that he did not regard the earnings as community property." See Wren v. Wren, 100 Cal. 276, 34 P. 775, 38 Am.St.Rep. 287; Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272; Diefendorff v. Hopkins, 95 Cal. 343, 28 P. 265, 30 P. 549; Gray v. Perlis, 76 Cal.App. 511, 245 P. 221; Smith v. Smith, 47 Cal. App. 650, 191 P. 60; Larson v. Larson, 15 Cal.App. 531, 115 P. 340. When respondent's testimony is reviewed in the light of these authorities, we see no escape from the conclusion that the earnings of the insured, out of which the premiums were paid, were her separate property as all of the acts and conduct of respondent clearly indicated that he did not regard his wife's earnings as community property and that he had relinquished to his wife the right thereto.

[3] But appellant makes the further claim that even if the premiums, paid after marriage, were paid out of community property, said premiums were paid with the knowledge and consent of respondent and he was therefore not entitled to share in the proceeds of the policy. We believe that this claim is equally well founded. It is conceded by respondent that the premiums on this policy were paid by his wife with his knowledge and consent. We believe this fact precludes respondent from successfully asserting a claim to any of the proceeds of the policy as against the beneficiary named therein.

The parties have discussed at some length the authorities in this state dealing with the general subject of the right of a surviving wife as against a named beneficiary to a portion of the proceeds of an insurance policy issued upon the life of the husband where the premiums have been paid by the husband with community funds. The reason underlying the rules established by said authorities is summed up in Travelers' Insurance Co. v. Fancher, 219 Cal. 351, at page 353, 26 P.2d 482, 483, as follows: "As shown by a number of later cases, among them being Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034, and Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431, the doctrine of the New York Life Ins. Co. Case, supra [New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61], is based on the following legal propositions: First, where premiums of an insurance policy issued on the life of the husband after coverture are paid entirely from community funds, the policy becomes a community asset. Second, the designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy, which, if not revoked by the insured prior to his death, vests in the beneficiary at the time of his death. Third, the husband may not make a gift of the entire community property without the written consent of the wife; but if he attempts so to do, in contravention of the wife's rights (as in the case of a life insurance policy, by naming a third party as beneficiary) the entire gift is not a nullity; it is subject only to the wife's right to have it revoked as to the half to which she would be entitled upon his death; and as to the remaining half, the gift is valid and immune from attack by the surviving wife or by those who under the law of succession would inherit the husband's share in case he made no disposition thereof up to the time of his death. Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, and Dargie v. Patterson, 176 Cal. 714, 169 P. 360."

We find none of the above-mentioned authorities in point. It will be noted that each of said cases involved a policy which was issued upon the life of the husband and the premiums for which were paid by the husband out of community funds. The reason for the rules established in such cases is that the husband, who had the right to manage and control the community funds subject to certain limitations, Civ. Code of Calif., sec. 172, had acted in contravention of the wife's rights. But the reason for the rule ceases in cases, such as the present one, where the acts of the wife were done with the knowledge and consent of the husband and nothing was done in contravention of any of his rights. We therefore conclude that respondent may not now complain and that he is not entitled to share in the proceeds of the policy.

[4] In view of the conclusions which we have reached, we deem it unnecessary to discuss certain additional claims made by appellant. We further believe that the admitted facts make this an appropriate case in which to reverse the judgment with directions.

The judgment is reversed with directions to the trial court to enter its judgment awarding the entire proceeds of the policy to defendant Susannah G. Cleverdon.

We concur: NOURSE, P. J.; STURTEVANT, J.



38 Cal.App.2d 421

PEOPLE v. SHAFFER et al.

Cr. 3280.

District Court of Appeal, Second District, Division 1, California.

April 12, 1940.

Rehearing Denied April 24, 1940.

Hearing Denied May 9, 1940.

1. False pretenses ⇐49(1)

Evidence that defendants planned and put into execution a fraudulent scheme by means of which they induced the complaining witness to part with a substantial sum of money in return for a practically worthless oil lease, supported conviction of defendants for grand theft by false pretense.

2. Criminal law ⇐423(1)

Where it was conclusively shown that two defendants, in prosecution for grand theft, were co-conspirators, allowing conversation of defendants to be admitted in evidence was not error.

3. Criminal law ⇐452(1)

In prosecution for grand theft by false pretenses, arising out of sale of New Mexico

oil lease, permitting person who had sold lease to one of defendants and who was an expert on New Mexico oil leases, to testify as to value of the lease, was not error.

4. Criminal law ⇐369(15)

In prosecution against two defendants for grand theft by false pretenses, arising out of sale of New Mexico oil lease, testimony of witness, who had sold the lease to one of defendants, as to transactions by which he had previously sold three oil leases to other defendant, was properly admitted for purpose of identifying the parties, the business that they were engaged in, and the fact that business had been conducted between parties previous to the instant transaction.

5. False pretenses ⇐41

In prosecution against two defendants for grand theft by false pretenses, arising out of sale of New Mexico oil lease, evidence of telephone call received by complaining witness to effect that person who was purportedly negotiating to purchase the lease from her, but who was really one of defendants under an assumed name, was killed in an automobile accident, was admissible as part of defendants' plan to defraud.

6. Criminal law ⇐437

In prosecution for grand theft by false pretenses, arising out of sale of New Mexico oil lease, testimony of deputy real estate commissioner with reference to map of county in New Mexico where land included in lease was located and the map were properly admitted, where it was shown that map was prepared by the Department of Interior, and that witness had personally covered the territory and had visited every well in the county. Code Civ.Proc. § 1936.

7. Criminal law ⇐369(15)

In prosecution against two defendants for grand theft by false pretenses, arising out of sale of New Mexico oil lease, evidence as to two other leases which complaining witness purchased from one of defendants, and which was not made basis of prosecution, and the check which complaining witness gave therefor, was admissible to show a definite tie between defendants at time in question.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

George W. Shaffer and James M. Jacobson were jointly charged with grand theft, and defendant Shaffer was also charged with a prior conviction, and defendant Shaffer appeals from judgments of conviction, and defendant Jacobson (as to whom no judgment was pronounced, his application for probation having been granted) appeals from order by which his motion for new trial was denied.

Affirmed.

Wm. J. F. Brown, of Los Angeles, for appellant Shaffer.

Donald MacKay, of Los Angeles, for appellant Jacobson.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jesse Frampton and Logan Lindley, Deputy Dist. Attys., all of Los Angeles, for respondent.

YORK, Presiding Justice.

By an indictment returned by the grand jury, appellants were charged jointly in two counts with the crime of grand theft. Appellant Shaffer was also charged with two prior convictions, one of which was admitted by him and the other was stricken from the record upon motion of the district attorney. Upon trial by the court sitting without a jury, appellants were found guilty as charged in both counts of the indictment. Appellant Shaffer appeals from the judgments of conviction rendered against him, and appellant Jacobson (as to whom no judgment was pronounced, his application for probation having been granted) appeals from the order by which his motion for a new trial was denied.

A review of the record reveals briefly that in 1938 the appellant Shaffer became acquainted with one Ralph Gallinger, a wholesale dealer in New Mexico state oil leases, from whom said appellant bought three forty-acre leases for $6.50 each. These leases are issued by the state of New Mexico on forty-acre parcels of land "for the purpose of exploiting for oil", for which a charge is made ranging from $2 for wild-cat land to $4,000 for land "adjacent to production", plus a yearly rental of 5 cents per acre, all of which is paid directly to the state of New Mexico. It appears that the state of New Mexico has set up this leasing arrangement in order to get money to support its institutions and "is not interested whether there is oil there or not." Gallinger maintained an organization in New Mexico which contacted the state land office and attended to the details there in connection with obtaining

the leases which he in turn sold by assignment to other persons.

In January, 1939, appellant Shaffer introduced appellant Jacobson and a man named Caples to said Gallinger, who immediately thereafter sold three leases to appellant Jacobson, i. e., an 80-acre lease for $25, a 240-acre lease for $39, and a 158.78-acre lease for $21, with assignments in blank. It was agreed that these leases should be sold and the proceeds divided equally between appellants and Caples. In this venture appellant Jacobson invested $85, the purchase price of the three leases, and appellant Shaffer and Caples contributed their experience in the oil business.

Mrs. Russell, the complaining witness, and her husband were an elderly couple residing in Glendale, having retired from the millinery business in which they had formerly engaged. They owned a number of leases on so-called wild-cat oil land in Chaves county, New Mexico, and had paid $500 each for two of these leases. They possessed maps of Chaves and Lincoln counties, New Mexico, and received reports from the state of New Mexico as to current activities in that particular territory.

Some time in January, 1939, appellant Shaffer called at the Russell home and introduced himself as a Mr. Walbridge, stating that he was interested in oil and in oil land; that he was a vice-president of the Texa Homa Oil Company with offices in Albuquerque, New Mexico, and that he was buying oil leases. He told the Russells that he had just arrived from Albuquerque by plane and had taken a taxicab from Burbank to their home.

About a week later, appellant Jacobson called on the Russells and told them that he had some leases of land in Chaves and Lincoln counties, New Mexico, and that he wanted to sell two of them, to-wit: a 240-acre lease and another for 158.78 acres, at a price of $10 per acre. Mrs. Russell brought out her maps and after some discussion bought the two leases, paying appellant Jacobson therefor a total consideration of $3,980. After deducting his initial investment of $85 therefrom, appellant Jacobson divided the remainder between himself, appellant Shaffer and Caples. According to her testimony, Mrs. Russell was told by appellant Jacobson that the "geologists had been to work in that field and they had every assurance that there was oil to be made; major oil companies had been working there with these geologists * * * there was lots of money to be had if I would buy the leases. He was willing to sell at a very low price. He also said he had 80 acres that he was reserving that he didn't care to sell at that time." It appears that Mrs. Russell had two or three conversations with appellant Jacobson with respect to this 80-acre lease which he considered more desirable than the two leases he had already sold to her, but that he did not know to whom he could sell it. He did not have the description of this lease with him, but he subsequently telephoned it to her, and Mrs. Russell wrote it down on a piece of paper which was introduced in evidence as plaintiff's exhibit 13. Finally, he offered the 80-acre lease to Mrs. Russell at $30 per acre.

Shortly after Mrs. Russell re-received the description of the lease from appellant Jacobson, the appellant Shaffer, alias Walbridge, again drove up to the Russell home in a taxicab, saying that he had come from Albuquerque by plane and that he wanted to buy a certain lease but did not know where he could find out who owned it. Mrs. Russell then told him about the 80-acre lease and read to him the description which appellant Jacobson had given her over the telephone. Thereupon, appellant Shaffer, alias Walbridge, said it was just what he wanted "because the major oil companies were near and they were going to drill very soon and that he could make good money out of this * * * he was buying it for the Texa Homa Oil Company. * * * He was out buying for the Texa Homa Oil Company and he wanted to get some good leases there, big money in it, and if he could get this particular lease it was just what he wanted, and he said he was taking another plane for San Francisco to see further customers there." With reference to this 80-acre lease, Mrs. Russell testified on cross-examination as follows: "Mr. Walbridge (Shaffer) offered me $60 per acre if he could get this particular lease, a $5,000 bonus when they produced oil and a 1/8 royalty for the lease"; that he promised to buy it from her as soon as she could get the lease back from New Mexico. "He put the figures down on a piece of paper what he would pay for it." She further testified that she had no real knowledge of it except what appellant Jacobson had given her "the description of the

lease." When asked, "And when you purchased this 80 acres you purchased it because you believed it was a good buy?", she replied, "I purchased it because Mr. Walbridge (Shaffer) said he would buy it from me at double the price I would pay."

On February 21, 1939, Mrs. Russell purchased the 80-acre lease from appellant Jacobson and gave him two checks totaling the full amount of the purchase price at $30 per acre. One check for $1,877.50 was paid and the money derived therefrom was divided between appellants and the said Caples. Payment was stopped on the other check for $362.50 which was post-dated, and when appellant Jacobson contacted Mrs. Russell with regard thereto, she told him she stopped payment on the check because her account was short. That was the last time Mrs. Russell saw appellant Jacobson during the transaction in question. He told her he was going to Colorado, but before leaving he gave appellant Shaffer permission to collect the $362.50 check, and the next day the latter called upon Mrs. Russell and told her the title to the lease was not clear, that there was an attachment against it and that he could not buy it from her until the $362.50 was paid. In company with appellant Shaffer, Mrs. Russell went to her bank and withdrew from her savings account sufficient money with which to pay appellant Shaffer the amount of the check. The lease was then forwarded to the Land Office in New Mexico where it was recorded and subsequently returned to Mrs. Russell. Appellant Shaffer, alias Walbridge, never bought the lease from Mrs. Russell and it was admitted by appellant Jacobson that he authorized appellant Shaffer to collect the $362.50. About a week after this check transaction took place, someone called Mrs. Russell on the telephone and told her Mr. Walbridge had been killed instantly. She did not see him again until after the indictment was returned when he called at her home in Glendale. Mrs. Russell testified that neither man mentioned the name of the other during the entire transaction, commenting "Apparently they didn't know each other."

Appellant Jacobson testified that when the first two leases were sold to Mrs. Russell the sum of $400 was paid to a man by the name of Hendricks or Henriquez, who had furnished the name of the Russells as a prospective purchaser. Also, that during the transactions with the Russells he saw appellant Shaffer every two or three days, but to his knowledge appellant Shaffer did not contact the Russells at all, although Shaffer had told him that he would help him sell the leases. However, appellant Jacobson admitted that he had told appellant Shaffer that Mrs. Russell "was interested in buying the 80 acres, and that I was going to sell it to her"; that she had a "deal with the Standard Oil Company to sell her holdings, and we had agreed that if she could use it she would pay me $30 an acre, and I was to call her and give her the description." Appellant Jacobson also admitted upon cross-examination that he told Mrs. Russell that this 80-acre lease was within a few miles of oil production. This statement was definitely shown to be false.

Mrs. Russell's testimony was corroborated by her husband, Leroy E. Russell, who was with her at all times during the instant transactions.

A deputy real estate commissoner for the state of California, who was a graduate engineer of the University of Arizona, testified that his office had a sectionalized geographical map of Chaves county, New Mexico, which had been prepared under the direction of the Department of the Interior of the United States government; that this map showed, among other things, the oil fields, and all the drilling and abandoned wells in the said area to approximately June 1, 1939; that he had actually been on the ground in Chaves county and had spent ten days there in June, 1939; that no major oil company had ever drilled in Chaves county and that the rental prices of land surrounding the 80-acre parcel was 5¢ an acre per year, or $2 for 40 acres; that there was at that time no oil production to the west of the described property; that approximately 15 to 18 miles due west of the west side line of Township 14, there were three dry and abandoned holes; to the north there was a new well, the High Tower, which was listed as a producer, but that when said witness was on the property thirty days prior to the time he testified, said well was not producing; that there was a well in Township 13, drilled to 3,750 feet, which was dry and abandoned, and still further east, 32 to 35 miles, the Kauf-Brown well had been drilled to 5,127 feet but that also had been abandoned, the bottom of the

hole being filled with salt water; that Lincoln county adjoins Chaves county on the west, and that there was no oil production and no prospects therefor in Lincoln county.

Appellant Shaffer neither testified nor produced any evidence in his own defense.

The charge of grand theft contained in the first count of the indictment is based upon the check for $1,877.50, and the second count is based upon the sum of $362.50, which amounts were paid by Mrs. Russell to appellants in payment for the 80-acre lease hereinbefore referred to.

Appellants urge on this appeal that the evidence is insufficient to sustain the convictions of guilt, and that the court erred in its rulings with respect to the admission of evidence. It is claimed that the evidence fails to meet the requirements necessary to constitute any one of the offenses which are included in the crime of grand theft, i. e., embezzlement, larceny by trick and device and false pretenses, and in support of this theory, appellants have listed in their briefs approximately twenty-five representations which were made by them to Mrs. Russell, and then proceed to attack each representation in an effort to show that it was either a mere future promise, an expression of opinion, or, although admittedly false, was not relied upon.

[1] The evidence adduced at the trial herein shows conclusively that appellants planned and put into execution a fraudulent scheme by means of which they induced the complaining witness to part with a substantial sum of money in return for a practically worthless oil lease. These two men worked together in an effort to sell the leases at a profit, but during the negotiations which they carried on with Mrs. Russell, neither one mentioned the other, although they saw each other frequently during this period. While it is undoubtedly true that the complaining witness did not rely upon any particular statement made to her by appellants, a consideration of the transaction as a whole, together with the circumstances surrounding the same, reveals that these two men by false statements and nicely timed visits worked upon the credulity of Mrs. Russell until she became imbued with the idea that she was acquiring a lease which she could sell to appellant Shaffer at great profit to herself. Had she known that appellants were working together, the plan could never have been accomplished. Appellant Shaffer led her to believe that he was an officer of a responsible oil company actively engaged in drilling operations in Chaves county, New Mexico, and that he was negotiating for the purchase of leases for such company; also that such transactions were of sufficient importance to warrant the company in sending an executive from Albuquerque to Los Angeles and San Francisco by plane.

The false representation made by appellant Shaffer to the effect that he was negotiating for leases for the Texa Homa Oil Company, a purely fictitious entity, was in itself sufficient to sustain the judgments of conviction. People v. Fisher, 116 Cal. App. 243, 2 P.2d 564. Moreover, after appellants discussed the possibility of selling the 80-acre lease to the complaining witness at a price of $30 per acre, and after appellant Jacobson had telephoned the description of said lease to her, appellant Shaffer appeared at her home and falsely stated that he did not know who owned the said lease. Taken as a whole, the transaction here involved reveals that appellants conspiring together with intent to defraud, deceived Mrs. Russell by presenting to her a picture which was purely fictitious and fraudulent, and as a climax offered to buy the lease from her at double the price they were asking her for it.

The evidence in its entirety is not conflicting, and the court properly drew the inferences of guilt therefrom.

[2] Each appellant urges that the trial court erred in allowing the conversation of the other to be admitted in evidence. As has heretofore been shown, appellants were co-conspirators and by their joint efforts succeeded in selling all three leases to Mrs. Russell. At the start, appellant Shaffer agreed to help appellant Jacobson sell the leases for which he had paid Gallinger the sum of $85. Furthermore, Shaffer gave to Jacobson the name of the Russells and told him to contact them and attempt to sell the leases to them, and after the sale of the first two leases, Jacobson agreed to pay Hendricks $400 out of the profits realized for merely supplying the name of the Russells to Shaffer. It will be recalled that Shaffer first called upon the Russells and told them he was negotiating for oil leases for his company; that immediately after Jacobson approached them and attempted to sell the first two leases, and after that sale was

completed, Shaffer next visited the Russells after Jacobson had telephoned to Mrs. Russell the description of the 80-acre lease, and when Jacobson was unsuccessful in collecting the last check for the 80-acre lease, Shaffer again appeared on the scene and collected the money. Shaffer finally called upon Mrs. Russell after the indictment was returned against him. Due to the fact that it was conclusively shown that these two men were co-conspirators, there was no error in the admission of the evidence complained of.

[3, 4] Both appellants object to the admission of evidence as to the value of the 80-acre lease. The witness Gallinger, as a matter of fact, was an expert. For a period of years he had been engaged in selling New Mexico oil leases, and it was shown that he owned some of these leases. It is well established that an owner of property may testify as to its value. People v. More, 10 Cal.App.2d 144, 51 P.2d 175. Both appellants also object to the introduction into evidence of the transactions by which said Ralph Gallinger sold three oil leases to appellant Shaffer in 1938 for $6.50 each, claiming the same was prejudicial by reason of the fact that it would imply that Shaffer had defrauded other persons. All this evidence amounts to is to show that Shaffer had established contacts with Gallinger previous to the instant transaction. It does nothing more than identify the parties, the business that they were engaged in, and the fact that business had been conducted previous to the instant transaction.

[5] Appellants object to the admission into evidence of the telephone conversation to the effect that Mr. Walbridge had been killed in an accident. So far as the record shows, only Shaffer, Jacobson and the Russells had any knowledge that Shaffer, alias Walbridge, of Albuquerque, New Mexico, was negotiating to purchase the 80-acre lease from Mrs. Russell, and this conversation which would tend to lull Mrs. Russell into a state of inactivity, benefited not only Shaffer but Jacobson, also. This evidence was admissible as a part of appellants' plan to defraud.

[6] Appellant Jacobson cites as error the admission in evidence of the testimony of the deputy real estate commissioner with reference to the map of Chaves county, New Mexico. It was shown that this map was prepared by the Department of the Interior of the United States government and the witness testified he had personally covered the territory during the early part of June, 1939, and had visited every well in Chaves county. There was no error in allowing this map to be introduced in evidence. Sec. 1936, Code Civ.Proc.

[7] Finally, it is claimed that the court erred in allowing in evidence the first two leases and the checks which Mrs. Russell gave to appellant Jacobson in payment therefor. This evidence was admissible to show that there was a definite tie between appellants at the time in question; neither appellant was prejudiced by it.

For the foregoing reasons, the judgments and the order appealed from are, and each of them is, affirmed.

We concur: DORAN, J.; WHITE, J.



38 Cal.App.2d 512

PEOPLE v. COON et al.

Cr. 3214.

District Court of Appeal, Second District, Division 1, California.

April 19, 1940.

1. Criminal law ⇐1144(13)

On appeal from a conviction, reviewing court is required to state evidence in light most favorable to prosecution.

2. Larceny ⇐41

Where original taking of property by defendant was lawful and done for purpose of protecting it from fire, it was incumbent on prosecution to show a subsequent appropriation or conversion of the property to justify defendant's conviction of theft.

3. Larceny ⇐3(1), 41

The crime of "theft" requires a specific intent to steal which must be proved by the prosecution, as any other material fact.

See Words and Phrases, Permanent Edition, for all other definitions of "Theft".

4. Larceny ⇐64(1)

An intent to steal, constituting an element of crime of theft, is not presumed from

mere possession of alleged stolen property, where original taking of property was lawful.

5. Larceny ⊂=65

Evidence that police officer stored personal property taken from cabins destroyed by fire in his garage, pursuant to orders of superior officer, who at all times knew of location of property, and that police officer returned property to police station, on first day after he returned to work, was insufficient to justify a conviction for petty or grand theft, especially in absence of evidence establishing that property in possession of police officer was valued over $200, or that he entered into a conspiracy with his codefendants to accomplish an unlawful purpose. Pen.Code, § 487.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

On rehearing.

Former judgment modified.

Prior opinion, 97 P.2d 1006.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

PER CURIAM.

A rehearing was granted in this cause as to appellant Fred C. Zeismer in order that we might give further consideration to the claim that the evidence is insufficient to sustain the conviction and that the record failed to disclose proof showing the value of the property allegedly taken as charged in count 2 of the indictment. 97 P.2d 1006.

In an indictment returned by the grand jury of Los Angeles county appellant and two others were charged jointly with the offense of grand theft in two counts. Following appropriate waiver of jury and submission of the cause to the court, appellant was found guilty of the offense of grand theft as charged in count 2 of the indictment and of the offense of petty theft, a lesser offense than that charged in count 1, but necessarily included therein. From the judgment and the order by which his motion for a new trial was denied appellant prosecutes this appeal.

[1] Stating the evidence in the light most favorable to the prosecution, as we are required to do following a conviction, we find in the record testimony that defendant Carl C. Coon was a member of the Santa Monica fire department, where he had been employed for a continuous period of some nine years; that defendant Charles Powers was employed by the Santa Monica police department as a painter of pedestrian crossings, while appellant Zeismer was a police officer of the city of Santa Monica. On Wednesday, November 23, 1938, a brush fire was raging in the hills close to the Roosevelt highway in the Malibu district north of Santa Monica, and during the afternoon of that day the fire spread across the highway and destroyed several cabins along the water front, including a cabin owned by one Frank Parmenter and another occupied by two young airplane hostesses, Thelma Weld and Kathleen Kay. On the day following the fire—Thanksgiving Day—certain personal belongings of Mr. Parmenter which the trial court found to be of a value less than $200 and certain personal belongings of the airplane hostesses which the court found to be of a value of more than $200, were found to be missing. Subsequently, on the Monday following the fire, these articles of personal property were returned to the Santa Monica police station, and the three hereinbefore named defendants were charged with the theft thereof.

The record further reveals that various people, including policemen and firemen, removed articles of personal property from the fire-threatened cabins. The defendant Coon removed some of the property and took it to a life guard station which was located a short distance from the cabins. Appellant Zeismer arrived at the fire about 4 o'clock Wednesday afternoon, in company with his superior officer, Kenneth Hubbard, a sergeant of police of the Santa Monica police department. The fire was burning at that time, and appellant Zeismer and Hubbard carried out some articles of personal property, placing the same in a police radio car, from which they were later removed and placed in Fireman Coon's car, to be transported to the life guard station. Up to this time appellant Zeismer did not remove any goods from the scene of the fire. Later on the same evening Sergeant Hubbard called appellant Zeismer on the telephone and directed the latter to go to Fireman Coon's house and pick up the articles which Hubbard and Zeismer had taken out of the cabins earlier in the day. Appellant Zeismer was unacquainted with Coon's ad-

dress, whereupon Sergeant Hubbard obtained the address, transmitted the same to appellant Zeismer, and the latter proceeded to the home of Coon, picked up the property as directed by the sergeant, and brought the same to Zeismer's home, where Sergeant Hubbard later met appellant and checked the items which were then in Zeismer's garage, after which he directed Zeismer to take them to the detective bureau. Sergeant Hubbard testified that when he checked the articles at the home of appellant Zeismer he found there all the property taken by him and Zeismer and noted the same as accounted for. The record discloses that when Sergeant Hubbard came to Zeismer's home and asked appellant if all the property taken by him and Hubbard was there present, Zeismer answered in the affirmative, but requested Sergeant Hubbard to check the same, nevertheless, which the latter did. It appears from the testimony that the detective bureau at Santa Monica was not open at night, and that the following day, Thanksgiving Day, appellant Zeismer was not on duty in the police department, nor was he on duty the day following, on which latter day he was in Los Angeles attending to some personal business. There is evidence in the record that on Saturday, the first day upon which appellant Zeismer worked after the personal property came into his possession, he arrived at the police station with his automobile containing the articles in his possession and delivered the same at the office of Captain Lingo, where they remained until Monday, when they were delivered to the owners, as was all the other property taken from the cabins by the fire and police departments. While it is true that Captain Lingo testified he did not see the articles in his office until the Monday following, he, nevertheless, did not testify that the articles were not there, simply saying that he neither saw them brought there nor observed them therein until Monday. The following also appears in the record as part of the testimony of Captain Lingo:

"Q. Now, on Monday morning, the 28th, when you told Mr. Zeismer the girls were up there, he went to his desk and unlocked his desk and took out this cedar box" (which was part of the missing property), "did he not? A. That is right.

"Q. And at that time this cedar box of jewelry was in the traffic bureau in Mr. Zeismer's office under lock and key? A. That is correct.

"Q. Now, you don't know what other articles there were in the office in the traffic bureau? A. No. I do not.

"Q. You did not go in? A. No."

[2] From the foregoing recital of the factual situation here presented, it is apparent that the original taking of the property by appellant Zeismer and his superior officer was lawful and done for the purpose of protecting the same from the fire. It was therefore, incumbent upon the prosecution to show a subsequent appropriation or conversion of the property before appellant Zeismer could be convicted. It is noteworthy that at all times during which the property was in appellant's possession, his superior officer, who, the testimony shows, was on duty Friday, Saturday and Sunday, had knowledge of the whereabouts of such property. It is suggested by the attorney-general that the evidence indicates that it was generally known among the members of the police and fire departments of the city of Santa Monica that a search was being made for the personal belongings of Mr. Parmenter and the two airplane hostesses; but in this connection it should be remembered that appellant Zeismer was not on duty during the succeeding two days following the fire, and he was also aware of the fact that his superior officer, Sergeant Hubbard, who was on duty, knew where the articles in question were located. The course of conduct pursued by appellant Zeismer is not compatible with the ordinary surreptitious activities of a thief.

[3-5] The crime of theft requires a specific intent to steal—in this instance an intent on the part of appellant to convert the property to his use, with the consequent deprivation of possession and enjoyment by the owners thereof. This specific intent must be proved by the prosecution, the same as any other material fact in the case. It is not presumed from mere possession where, as here, the original taking was lawful. People v. Landman, 103 Cal. 577, 37 P. 518; People v. Johnson, 106 Cal. 289, 39 P. 622; People v. Maciel, 71 Cal.App. 213, 234 P. 877. The evidence in the case at bar fails to show any conduct or actions upon the part of the appellant justifying the inference that he either used, spent, wasted or otherwise appropriated the property to his own use. When appellant went to Fireman Coon's home and transported the property therefrom to his own garage he did so under orders of his superior of-

ficer, Sergeant Hubbard, and the latter satisfied himself that his orders were carried out by calling at appellant's home and checking the property. True, he told appellant to take it to the police station, which appellant did on the first day after he returned to work. At all times between Wednesday and Saturday, and even until Monday, when the property was returned to the owners thereof, appellant's superior officer knew of its whereabouts, and that it was in appellant's garage where the sergeant had ordered it taken, and at which place he checked the same. This evidence falls short of the quantum required to prove the guilt of appellant beyond a reasonable doubt. We attach no inculpatory significance to the conversation between appellant and Officer Stedman wherein the former made reference to his aversion to being a "stool pigeon". As we view the conversation in question, it contained no necessarily incriminating statements, and simply indicated that appellant did not desire to say or do anything which would reflect upon other people.

With reference to the conviction of grand theft as charged in count 2 of the indictment, we come now to a consideration of the value of the articles which came into the possession of appellant Zeismer and which formed the basis of said count. We are not referred by the attorney-general to any direct testimony in the record establishing the value of the property in question, and a search by us for any such evidence has proved fruitless. It is true that there is testimony in the record to the effect that all of the property belonging to one of the airplane hostesses, Miss Weld, was reasonably worth $1000, and there is also evidence establishing the value of Miss Kay's property which came into possession of appellant Zeismer as being less than $50, but the record is barren of any testimony showing that the articles which came into possession of appellant Zeismer had a value of over $200. Pen.Code, sec. 487.

Respondent urges that the evidence establishes the existence of a conspiracy in which appellant joined, and that the latter was at all times acting in collusion with his codefendants. We find nothing in the record directly establishing the fact that appellant in any manner or through any contrivance positively or tacitly entered into a mutual understanding with his codefendants or anyone else to accomplish a common and unlawful design; nor is there any convincing evidence that appellant changed an original, lawful design in the taking of the property into a subsequent unlawful conspiracy.

Therefore, the judgment and the order by which appellant Zeismer's motion for a new trial was denied are, and each is, reversed.



38 Cal.App.2d 188

DAVIDSON et al. v. BURNS et al.

Civ. 12464.

District Court of Appeal, Second District, Division 2, California.

April 19, 1940.

Hearing Denied May 27, 1940.

1. Appeal and error ⇐832(1)

A petition for rehearing on ground that appellate court, by its opinion in mandamus proceeding to require city board of pension commissioners to prepare fire and police pension fund budget, eliminated from budget required item of 4 per cent. of estimated total pay rolls of fire and police departments for members thereof included in pension provisions of city charter, must be denied, where opinion stated that expenditures listed in budget should consist of items "thereinafter enumerated", among which was sum equal to 4 per cent. of such pay rolls for such members. Los Angeles City Charter, § 186.

2. Municipal corporations ⇐885

A budget, prepared by city board of pension commissioners, included required item of 4 per cent. of estimated total pay rolls of fire and police departments for members thereof included in pension provisions of city charter, where sum constituting 4 per cent. of such pay rolls was included in budget under item "service pensions", as name under which required item is actually listed is immaterial. Los Angeles City Charter, § 186.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 100 P.2d 1105.

Hearing denied; CARTER, J., dissenting.

Julius V. Patrosso, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick Von Schrader and Leon Thomas David, Asst. City Attys., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondents.

PER CURIAM.

[1] The petition for a rehearing is denied. Petitioner urges that this court has eliminated from the budget, which section 186 of the charter of the city of Los Angeles requires respondent Board of Pension Commissioners to prepare, one item which should be included therein, to wit, 4 per cent of the estimated total pay rolls of the fire and police departments for the next succeeding fiscal year for those members of said departments included within the pension provisions of article XVII. This contention finds no support in the opinion. In the opinion, 100 P.2d 1105, we stated, "* * it is clear that the budget to be prepared by respondent Board of Pension Commissioners should consist of estimated probable revenues as well as expenditures, and that the words 'consist of' as used in the budget mean that the expenditures listed in the budget shall consist of the items *thereinafter enumerated*". (Italics added.)

Among the items *thereinafter enumerated* in section 186 of the city charter is the item of "a sum equal to 4% of the estimated total pay rolls of the fire and police departments for those members of the said departments included within the pension provisions of this article (XVII) for the next succeeding fiscal year".

[2] Neither do we find any merit in petitioner's contention that the budget as prepared by respondent Board of Pension Commissioners fails to include this item. An examination of petitioner's opening brief, page 31, and respondent's reply brief, page 68, discloses that 4 per cent of the estimated total pay rolls of the fire and police departments for those members of the departments included within the pension provisions of article XVII of the charter of the city of Los Angeles for the next fiscal year is $408,321, and that such sum is included in the budget prepared by respondent Board of Pension Commissioners under the item "service pensions". The name under which an item required by section 186 of the city charter to be included in the budget is actually listed is immaterial. The important factor is whether the item has in fact been included as required by the charter. In the present case, as heretofore pointed out, the requirements of the charter provisions have been met.

RAY et al. v. PARKER, Director of Agriculture.

L. A. 17207.

Supreme Court of California.

March 30, 1940.

Rehearing Denied April 29, 1940.

1. Constitutional law ⇐48

All intendments and presumptions are in favor of the constitutionality of a statute and all doubts must be resolved in favor of validity.

2. Food ⇐1

The milk industry bears a close relation to the public welfare and is sufficiently clothed with a public interest to warrant its regulation under exercise of the police power, not only in emergencies but at all times.

3. Appeal and error ⇐878(2)

A finding in substance that Milk Stabilization Act was a proper exercise of the police power was binding on plaintiffs in absence of an appeal by them, so as to preclude them on defendant's appeal from challenging the act in that particular. Agricultural Code, § 735 et seq., St.1935, p. 922, as amended.

4. Statutes ⇐71

A statute is "uniform in operation" if it applies to all persons or objects within a class founded upon a natural, intrinsic or constitutional distinction.

See Words and Phrases, Permanent Edition, for all other definitions of "Uniform in Operation".

5. Statutes ⇐73(1)

The Milk Stabilization Act is not lacking in "uniformity of operation" because of provision therein making violation of the unfair practices provision of a stabilization plan subject, among other things, to a civil penalty of $500, notwithstanding penalty is exacted only from a violator in a marketing area wherein a stabilization plan is in effect. Agricultural Code, § 737.7, St.1935, p. 928, as amended.

6. Appeal and error ⇐878(2)

Where particular statutory section was not among sections found to be invalid by trial court, plaintiffs who had not appealed were not in position to again challenge its validity in face of trial court's finding thereon adverse to them.

7. Constitutional law ⇐42
Statutes ⇐73(1)

The Milk Stabilization Act is not lacking in "uniformity of operation" because license fees required to be paid by distributors, whether or not they operate in a marketing area wherein a stabilization plan exists, go into a fund for the enforcement of the act or any plan thereunder, but in any case, constitutionality of act on such ground could not be challenged by individuals who were not within class of distributors allegedly discriminated against. Agricultural Code, § 737.6, St.1935, p. 928, as amended.

8. Statutes ⇐72

The Milk Stabilization Act is not lacking in "uniformity of operation" because of provisions therein for assessments on producers and distributors. Agricultural Code, §§ 737.6(b), 736.14, St.1937, pp. 51, 1375.

9. Statutes ⇐72

The Milk Stabilization Act is not lacking in "uniformity of operation" because retail stores are exempted from licensing requirements imposed on distributors. Agricultural Code, §§ 737.5, 737.12, St.1935, pp. 928, 929, as amended.

10. Statutes ⇐72

The Milk Stabilization Act is not lacking in "uniformity of operation" as to producers because of those provisions therein which contemplate division of milk into four classes with a different price for each class, though distributors allegedly may discriminate among producers with respect to class of milk purchased from particular producers. Agricultural Code, § 735 et seq., St. 1935, p. 922, as amended; §§ 735.3, 735.4, St.1935, pp. 923, 924, as amended.

11. Constitutional law ⇐62
Food ⇐1

The Milk Stabilization Act is not invalid as an improper "delegation of legislative functions" because of provision authorizing director of agriculture to designate such marketing areas as he deems necessary or advisable to effect the purpose of the Act. Agricultural Code, §§ 735(c), 736, St. 1935, pp. 922, 924, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Delegation of Legislative Functions".

12. Constitutional law ⇐62
Food ⇐1

The Milk Stabilization Act is not invalid as an improper "delegation of legislative

functions" because of powers conferred upon director of agriculture in matter of formulating stabilization and marketing plans. Agricultural Code, § 736.1, St.1935, p. 925, as amended.

13. Constitutional law ⇐62
Food ⇐1

The Milk Stabilization Act is not invalid as an improper "delegation of legislative power" because of provisions therein which allegedly confer upon director of agriculture an unfettered legislative power to classify milk, and to prescribe minimum prices for any one or more of the four classes therein contemplated. Agricultural Code, § 736.3(b), St.1935, p. 926, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Delegation of Legislative Power".

14. Constitutional law ⇐62
Food ⇐1

The Milk Stabilization Act is not invalid as an improper "delegation of legislative power" because of provision therein for fixing of prices for fluid cream. Agricultural Code, § 736.3(d), St.1935, p. 926, as amended.

15. Constitutional law ⇐80(2)
Food ⇐1

Provision in Milk Stabilization Act purporting to give director of agriculture power to fix amount of damages to which a complainant is entitled for failure of distributor to pay for fluid milk or cream is an unconstitutional "delegation of judicial power". Agricultural Code, § 737.11(b), St.1935, p. 929, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Delegation of Judicial Power".

16. Statutes ⇐64(2)

The unconstitutionality of provision in the Milk Stabilization Act purporting to give director of agriculture power to fix amount of damages to which a complainant is entitled for failure of a distributor to pay for fluid milk or cream has no effect upon constitutionality of the remainder of the act. Agricultural Code, § 737.11(b), St.1935, p. 929, as amended.

17. Constitutional law ⇐80(2)
Food ⇐1

The alleged fact that the "review" of orders of the director of agriculture provided for by the Milk Stabilization Act contemplates a review by means of certiorari does not thereby establish that functions of the director are judicial in character, and that provisions conferring such functions are invalid as an improper "delegation of judicial power." Agricultural Code, § 735.6, St.1935, p. 924, as amended.

18. Constitutional law ⇐296(1)

The redesignation of Los Angeles county marketing area after amendment in 1937 of the Milk Stabilization Act was not a deprivation of "due process of law" because made without notice or hearing, particularly where meeting was subsequently held upon notice, redesignation order was rescinded, and another order designating marketing area was issued. Agricultural Code, § 736.1, St.1935, p. 925, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

19. Constitutional law ⇐296(1)

Where, if it were assumed that Milk Stabilization Act required a hearing preliminary to the designation of a marketing area, all persons known to be interested were informed in advance by notice of purpose of hearing and of territory proposed to be included in area, procedure adopted by director of agriculture could not be said to be violative of "due process," particularly where identical area had been designated almost a year previous under earlier act and challenged designation constituted but a redesignation of the area. Agricultural Code, §§ 735(c), 736, St.1935, pp. 922, 924, as amended.

20. Constitutional law ⇐296(1)

The action of the director of agriculture in proceeding with the formulation of a stabilization and marketing plan in response to an expression of opinion to him in the form of individual postcards, did not result in deprivation of "procedural due process" because of alleged insufficiency of such postcard petition. Agricultural Code, § 736.1, St.1935, p. 925, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Procedural Due Process".

21. Food ⇐2

Amendment of Milk Stabilization Act so as to divide milk into four classes did not invalidate petition filed prior to amendment, expressing desire for formulation of stabilization and marketing plan covering milk as a whole, and petition for a plan fil

ed and partially acted upon prior to the amendment could properly be used as a basis for proposing a plan after amendment, and in conformity therewith. Agricultural Code, §§ 735.3, 736.1, St.1935, pp. 923, 925, as amended.

22. Food ⇐1

Postcard petition expressing desire for formulation of stabilization and marketing plan under the Milk Stabilization Act was not defective because when mailed out by local milk control board it was accompanied by a letter which stated that board was petitioning director of agriculture to amend existing plan created prior to revision of the act so as to bring about a possible change in price of a certain class of milk, in absence of evidence that any signers were misled. Agricultural Code, §§ 735.3, 736.1, St. 1935, pp. 923, 925, as amended.

23. Food ⇐1

The Supreme Court could not say, under the evidence, that action of the director of agriculture in relation to petition for formulation of Stabilization and Marketing Plan under the Milk Stabilization Act was arbitrary or capricious or unsupported by the evidence, particularly in view of presumption that official duty had been properly performed, and in absence of finding that petition was defective because not in fact signed by requisite percentage of producers. Agricultural Code, §§ 735.3, 736.1, St.1935, pp. 923, 925, as amended.

24. Constitutional law ⇐296(1)

The procedure employed by the director of agriculture in the matter of notice and hearing on proposed stabilization plan for the Los Angeles Marketing Area under the Milk Stabilization Act did not, under the evidence, result in deprivation of "procedural due process," so as to warrant judicial interference on ground that action of director was arbitrary, capricious or lacking in evidentiary support. Agricultural Code, § 735 et seq., St.1935, p. 922, as amended.

25. Injunction ⇐75

In action to enjoin director of agriculture from enforcing the Milk Stabilization Act in Los Angeles county, and from enforcing a stabilization and marketing plan formulated thereunder, it is not for the court to weigh the evidence and data adduced before and considered by the director preliminary to his issuance of challenged order, and judicial interference should occur only when it can be said that administrative action has been arbitrary and capricious. Agricultural Code, § 735 et seq., St.1935, p. 922, as amended.

26. Injunction ⇐85(2)

Where Milk Stabilization Act and plan formulated thereunder for Los Angeles county were found valid, no damage could be said to result from enforcement of the plan as creature of an unconstitutional statute, as the basis for restraining enforcement of the plan. Agricultural Code, § 735 et seq., St.1935, p. 922, as amended.

27. Appeal and error ⇐478

Where decree was reversed on ground that trial court had erred in permanently enjoining director of agriculture from proceeding in Los Angeles area under the Milk Stabilization Act, petition of director for writ of supersedeas pending determination of cause on appeal, and continued with the merits, became "moot." Agricultural Code, § 735 et seq., St.1935, p. 922, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot".

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by G. S. Ray and others, producers, distributors, and consumers of milk in Los Angeles county against W. B. Parker, as Director of Agriculture of the State of California, to enjoin defendant from enforcing and administering in Los Angeles County the Milk Stabilization Act and the provisions of the Stabilization and Marketing Plan theretofore formulated by defendant for the county. Judgment for plaintiffs and defendant appeals.

Reversed with directions.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for appellant.

Lewis D. Collings and E. M. Selby, both of Los Angeles, for respondents.

Howard B. Crittenden, Jr., of Tracy, amicus curiae for Earnest S. Copley, etc.

CURTIS, Justice.

The defendant, as Director of Agriculture of the State of California, prosecutes this appeal from a decree permanently enjoining him from enforcing and adminis-

tering in Los Angeles county the Milk Stabilization Act (chap. 10, div. IV, Agricultural Code, St.1935, p. 922, as amended) and the terms and provisions of a "Stabilization and Marketing Plan" theretofore formulated thereunder and declared effective by him in said county.

The action was commenced by certain producers, distributors, and consumers of milk in the county, eighty-three in number, and was grounded upon the dual theory that the act and the procedure of the director thereunder ran counter to certain provisions of both the federal and state Constitutions. In many respects, the assaults upon the act itself parallel those advanced and, with one exception, found to be without merit, in the case of Jersey Maid Milk Products Co. v. Brock, 13 Cal. 2d 620, 91 P.2d 577. However, at the time of the commencement, trial, and determination in the court below of the present action, this court had not yet expressed itself in the Jersey Maid case, supra, upon the constitutionality of the act, and consequently the parties hereto and the trial court were without the benefit or guiding influence of the decision in that case. We are satisfied that the determination of the present cause would have been entirely different if the decision in the Jersey Maid case, supra, had been then available. In so stating, we are not unmindful that peculiar to this case there is involved what may be generally termed an issue charging a lack of procedural due process in the conduct and activity of the director under the statute, which was not involved in the Jersey Maid case, supra, but we feel reasonably certain in stating, after examination of the record herein, and particularly the findings, that the determination of the "procedural issue" against the defendant director was greatly influenced by the conclusion of the trial court that the act itself was unconstitutional and unenforceable, with the consequent result that the stabilization and marketing plan under which the director was proceeding in the county was likewise wholly invalid and ineffective from its inception. In the interest of brevity, we hereby refer to pages 626-635 of our opinion in the Jersey Maid case, 13 Cal.2d, 91 P.2d 581–586, where the chronology of the statute and most of its more important provisions are set forth in considerable detail. We deem it unnecessary to repeat them here.

[1-3] As pointed out in the Jersey Maid case, supra, 13 Cal.2d at page 636, 91 P.2d at page 586, discussion as to the constitutionality of any act of the legislature should be premised with the universally recognized principle that all intendments and presumptions are in favor of constitutionality and that all doubts must be resolved in favor of validity. Many of the authorities so holding are collected in the cited case. Preliminarily, too, it should be pointed out that there can no longer be any question that the milk industry bears a close relation to the public welfare and is sufficiently clothed with a public interest to warrant its regulation under the exercise of the police power, not only in emergencies but at all times. Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; Highland Farms Dairy v. Agnew, 300 U.S. 608, 611, 57 S.Ct. 549, 81 L.Ed. 835; Jersey Maid case, supra, 13 Cal.2d at pages 731–732, 91 P.2d at page 584, and cases there cited. Moreover, the trial court substantially so found, and in the absence of an appeal by the plaintiffs-respondents the finding is here binding upon them and they are now precluded from challenging the act in this particular.

While the respondents in their complaint challenged the validity of many other sections of the act, the trial court confined its findings and conclusions of invalidity to sections 735(c), 736, 736.1, 736.3(e), and § 737.11(a–e). A few of these sections were held to be unreasonable and discriminatory but in the main they were found to be invalid because of their asserted improper delegation of the legislative and judicial functions. Based on such findings of invalidity in the act, and aside from asserted procedural defects to be later and separately considered, the trial court also found and concluded that the director was without jurisdiction to proceed thereunder and that his designation of area, his formulation of a stabilization and marketing plan, and his fixation therein of minimum producers' prices and minimum wholesale and retail prices was abortive and wholly ineffective from the beginning and for all purposes. Before directing our attention to specific assaults upon the act, we have no hesitancy in preliminarily stating that nothing in the briefs of respondents herein or of amicus curiae has served to undermine our conclusion announced in the Jersey Maid case, supra, that the act is not susceptible to the constitutional onslaught urged

against it, particularly with reference to the asserted improper delegation of legislative and judicial functions, with one exception noted and held to be separable in the Jersey Maid case, supra, and which will hereinafter be mentioned.

[4-6] We shall adopt the method employed by the parties in their briefs and specifically consider the arguments directed against the constitutionality of the act by the respondents in their effort to uphold the decree entered by the trial court. Respondents urge that the act is special and discriminatory in character and lacking in uniformity of operation. In so contending, they concede the settled rule to be that a statute is uniform in its operation if it applies to all persons or objects within a class founded upon a natural, intrinsic or constitutional distinction. The uniform operation of the act here involved was generally considered in the Jersey Maid case, supra, 13 Cal.2d at pages 639–641, 645–647, 91 P. 2d at pages 588, 589, 591, 592. Respondents assert that a lack of uniformity exists in section 737.7 which makes any violation of the unfair practices provisions of a stabilization plan subject, among other things, to a civil penalty of $500. They claim that this latter penalty is exacted only from a violator in a marketing area wherein a stabilization plan is in effect and is not imposed upon a violator in an area where no plan exists. We are satisfied that such legislative classification or distinction between violators of the act generally and violators of a marketing plan formulated thereunder is not arbitrary but reasonable, the additional penalty for a violation in the latter case finding its justification at least in part in the great expense and effort entailed in the formulation and carrying out of a stabilization plan. But, aside from this, section 737.7, here challenged, is not among the sections found to be invalid by the trial court, and respondents, not having appealed, are not in a position to again challenge its validity in the face of the trial court's finding thereon adverse to them.

[7] Respondents also urge that the act lacks uniformity for the asserted reason that the license fees required to be paid by all distributors under section 737.6 of the act, whether or not they operate in a marketing area where a stabilization plan exists, go into a fund for the enforcement of the act or any plan thereunder. It is contended that by the exaction of such fees distributors in areas wherein no stabilization plan exists are required to support plans in other areas from which they receive no benefit. There are several complete answers to this contention. First, the act does not support it. Under section 735.9 all moneys received by the director go into the "Department of Agriculture Fund" which, under section 26 of the Agricultural Code, St.1933, p. 62, are expended not for any particular stabilization plan or plans but for the better enforcement of the entire act, article or law under which it is derived. It has never been held that fees or assessments must be ear-marked and expended in the territory where collected. The act is for the benefit of the entire state and expenditure of funds collected thereunder wherever beneficial to enforcement is appropriate. In the second place, none of the respondents comes within the class of distributors assertedly discriminated against, i. e., distributors in an area where no plan exists. A plan has been formulated for and declared effective in the Los Angeles area and its operation is stayed only by the decree here under review. It is universally recognized that only those in a class discriminated against may raise the constitutional issue. Finally, the license fees provisions of section 737.6 are not among those found to be invalid by the trial court, and again respondents not having appealed may not challenge adverse findings.

[8] The first and third reasons just above stated, apply with equal force and effect to the contention that section 737.6 (b) and § 736.14, providing respectively for assessments on producers and distributors, also lack in uniformity. For either or both of said reasons the point is without merit.

[9] Nor do we find any merit in the contention that the licensing requirements imposed on distributors by section 737.5 lack in uniformity because of the exemption therefrom of retail stores under the provisions of section 737.12. A similar contention was held to be without merit in Re Willing, 12 Cal.2d 591, 595–596, 86 P. 2d 663, 665, wherein after a detailed statement of facts indicating that a distinction exists between distributors as a class and retail stores as a class, it is concluded that "The separate classification of distributors and retail stores is, therefore, constitutional. It is only where class legislation is arbitrary and unreasonable that it is invalid." Another sufficient answer to the point

is that neither of the cited sections was found by the trial court herein to be discriminatory or invalid and respondents therefore may not now claim otherwise.

[10] The argument is advanced by the respondents that a lack of uniformity in the operation of the act will result as to producers from those provisions thereof which contemplate a division of milk into four classes with a different price for each class. Inasmuch as milk coming within class 4 will bring a lower price than milk in class 1, it is urged that producers will be at the mercy of distributors because the latter may devote all of one producer's milk to class 4 usage and pay him only the price applicable thereto while favoring other producers and employing their milk in the higher classes with a consequent greater financial return to the latter. This weakness, even if it be accepted as such, is not attributable or peculiar to the act for nowhere therein are producers compelled to deliver milk to any particular distributor or distributors. Even before the enactment of this legislation distributors were free to so use a producer's milk or to offer him a nominal or destructive price. The legislation was not intended to, nor does it, stifle competition in the industry. Those engaged therein are still insured the guarantees of industry and efficiency. In addition, the unfair practice provisions of the statute, applicable throughout the state and required to be included in every stabilization plan, section 736.3(a), make it mandatory that the purchase of more than 100 gallons monthly must be by written contract, stating, among other things, the quantity to be paid for as class 1 and class 2, and the price to be paid for each of the several classes of milk, a copy of which contract is to be filed with the director. In our opinion, producers and distributors of milk and the consuming public will benefit more under the protective wing of the act than they did under the destructive practices and influences that formerly prevailed in the industry. An alternative answer to the contention presently under consideration is that here again do we fail to discover any findings by the trial court of lack of uniformity or other constitutional invalidity in the provisions of sections 735.3 and 735.4, or any other sections of the act having to do with the definition, classification, or fixing of minimum prices with respect to the four classes of milk.

[11] However, respondents met with more than a fair degree of success in the trial court in their assault upon the validity of the act based on its asserted improper delegation of legislative functions. In this respect, the act is said to offend in the matter of the powers conferred upon the director (a) in the designation of marketing areas, (b) in the formation of stabilization and marketing plans, and (c) in prescribing the contents of such plans. Substantially the same arguments were advanced in the Jersey Maid case, supra, 13 Cal.2d at pages 641–659, 91 P.2d at pages 589–598. For a full discussion of this subject reference should be had to our decision in the cited case. However, in order to eliminate all doubt that we there held valid as against such challenge the very sections here found by the trial court to be susceptible thereto, we shall specifically, but briefly, touch thereon. As indicated at the commencement of this opinion, the trial court herein found sections 735(c) and 736, among others, invalid as containing an improper delegation of legislative powers. Inasmuch as the former section constitutes but a part of the declaration as to the necessity for the legislation and the purposes underlying the same and in support thereof merely recognizes and declares the existence in the milk industry of conditions requiring the designation of marketing areas and the adoption of regulations therein, we shall give said section but passing mention for what we said in the Jersey Maid case, supra, with respect to section 736, equally disposes of the challenge to section 735(c). The discussion respecting this section of the statute in the Jersey Maid Milk case is found on pages 641–659 of our opinion in that case, of 13 Cal.2d, 91 P.2d on pages 589–598. We find it unnecessary to restate here what we said in that opinion.

Nothing urged in the briefs herein serves to cause us to recede from the foregoing conclusion reached in that case respecting the constitutionality of said section. However, while now recognizing the adequacy of the standards specified in the act for the determination of the boundaries of marketing areas (viz., the existence of reasonably uniform conditions), the respondents contend that section 736 does not require the director to designate a marketing area in every locality where the conditions are reasonably uniform but instead authorizes the director to designate such marketing areas as "he deems necessary or advisable to ef-

fectuate the purpose of this chapter." This, it is asserted, improperly leaves the matter of designation of areas to the sole and uncontrolled discretion of the director. Respondents cite People v. Parks, 58 Cal. 624, in support thereof. We find no merit in the argument. Contrary to the Drainage District Act involved in the cited case, the milk act now before us contains a legislative declaration or preamble fully setting forth the purposes of the act and the evils to be corrected with instructions to the director to designate marketing areas in localities where the conditions are "reasonably uniform" and where such areas are deemed "necessary or advisable to effectuate the purposes of this chapter". Obviously, the legislature could not in advance determine whether these requirements existed in any particular locality or localities and therefore it could properly leave the administrative function of ascertaining the facts to the Director of Agriculture. Under the above-mentioned guides and standards so prescribed in the act, the director does not possess an uncontrolled discretion in the designation of marketing areas. Support for our conclusion is found in United States v. Rock Royal Co-op., 307 U. S. 533, 59 S.Ct. 993, 83 L.Ed. 1446. The following excerpt from the concurring opinion of Justice McKinstry in the case of People v. Parks, supra, 58 Cal. at page 655, relied on by the respondents, emphasizes the distinction between the statute now before us and the one there involved. It was there said that, "The act does not contain a legislative declaration that the draining of any and all overflowed lands in the State shall constitute a public benefit, or that the draining of any definite tract of such lands will be of benefit to the occupants or owners of adjacent lands—as a sanitary measure or otherwise. If the act had declared that lands specifically described should be drained, I am not prepared to say that the task of ascertaining what lands would be benefited might not be assigned to executive officers, or that the lands reported by such officers would not constitute a legal assessment district." Moreover, the Parks case was decided at an early date and long prior to the full development of administrative boards and the law applicable thereto as we now know them. The case of In re Peppers, 189 Cal. 682, 209 P. 896, also relied on by respondents, was distinguished by us in the Jersey Maid case, supra, 13 Cal.2d at pages 656–657, 91 P.2d at pages, 596, 597. Additional discussion of that case is here unnecessary. Other authorities cited in this connection by respondents do not shake our conclusion and need not be specifically mentioned. Each necessarily turned upon the provisions of the particular act involved.

[12] We are of the view that the trial court also erred in finding, pursuant to respondents' contention which is here reiterated, that section 736.1 of the act having to do with the formulation of stabilization plans following designation of marketing areas is likewise unconstitutional. Here, too, it is urged that the director has been clothed with an uncontrolled discretion. It is argued that even after the filing of a petition or the holding of a hearing under the section showing the desires of the producers in a marketing area as to the formulation of a stabilization plan, it still remains in the complete discretion of the director to determine whether such a plan, with all of its incidents, shall be formulated for the area. What has been said under the point next preceding is equally applicable here. True, the section does not make the formulation of a plan dependent solely on the desires of the producers, but equally the director is not unconfined in his action. When the producers in the area signify their desire in the premises, it then becomes essential to the initiation of a stabilization plan that the director determine whether one is required in said area to accomplish the declared purposes of the act. As indicated under the point last above discussed, the result is not to confide in the director an unbridled discretion but merely an authority to determine under all the circumstances the necessity for a plan measured by the standards and restrictions declared in the act. The Rock Royal case, supra, which distinguishes the factual situation present in Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, cited by respondents, may again be cited in support of our conclusion. Moreover, the contention that section 736.1 improperly confers legislative functions upon the director was fully considered and appropriately rejected in the Jersey Maid case. See pages 644, 645 of our opinion therein, 13 Cal.2d, 91 P.2d at pages 590, 591.

A provision substantially similar to the one in our act was contained in the Virginia Milk Act of 1934 and that act was

upheld in its entirety against assertions that it improperly delegated legislative authority. Reynolds v. Milk Comm. of Virginia, 163 Va. 957, 179 S.E. 507, 509, 514; see, also, Highland Farms Dairy v. Agnew, D.C., 16 F.Supp. 575, 577, 581.

[13] Respondents urge that certain other provisions of the act having to do with the contents or substance of stabilization plans likewise run afoul of the constitutional inhibition in that they assertedly confer upon the director an unfettered legislative power to classify milk and to prescribe minimum prices for any one or more of the four classes therein contemplated. Respondents do not question the right of the legislature to fix the price of milk but object to the method prescribed therefor in the act under consideration. While they discuss section 736.3 (a, b, c, d, and e), they challenge only subdivision "b" thereof and urge with respect thereto that if the director, rather than fix the prices of the four classes of milk, as authorized by the act, adopts the authorized alternative of designating methods or formulae therefor, he is not carrying out the legislative mandate but instead is making a "law" for the purpose of providing a method by which the minimum prices are determined. There is no merit in the point. Section 735.3(b) provides for the division of milk into four classes according to usage and sections 735.4(b) (4) and 736.3(b) authorize the fixing of minimum producers' prices or the adoption of methods therefor for any one or more of said classes. However, none of the three last mentioned sections was found by the trial court to be susceptible to the constitutional objection now urged or to any other charge of invalidity and respondents not having appealed are not, as we have stated before, in a position to challenge adverse findings.

[14] This is equally applicable to section 736.3(d) which provides for the fixing of prices for fluid cream. Aside from this, and on the merits, it may be said that the division of fluid milk into different classes in accordance with the use to which it is put and the fixing of prices therefor are not peculiar to our statute. Milk control acts of other states so provide. The Federal Agricultural Marketing Agreement Act of 1937 contains a substantially similar provision, section 8c (5), 7 U.S.C.A. § 608c (5), for classification of milk according to usage and the fixing by formula of minimum prices for each classification. With respect thereto it was stated in the Rock Royal case, supra, 307 U.S. at page 554, 59 S.Ct. at page 1004, 83 L.Ed. 1446, which upheld the cited act, that "the minimum price each handler should pay for milk is fixed by a formula which varies with the butter-price range for 92-score butter at wholesale in the New York market during the 60 days preceding the 25th day of the preceding month".

In the Jersey Maid case, supra, 13 Cal. 2d at pages 652–656, 91 P.2d at pages 594–596, there is a rather full discussion with respect to the provisions of the act covering the fixation of minimum prices by the director. We find it unnecessary to add anything to our views therein expressed and respecting the subject therein discussed.

Section 736.3(e) of the act relating to equalization pools for pasteurized milk was found by the trial court to contain an improper delegation of legislative power and to be uncertain and discriminatory. Such a pool is not required by the act to be included in every stabilization plan but may be included only after the director has determined, upon petition or hearing therefor, that the designated percentage of producers desire its inclusion. However, the stabilization plan here involved for the Los Angeles area makes no provision for such a pool and, upon the authority of our holding with respect to the pertinent statutory provision in the Jersey Maid case, supra, the respondents now concede in their brief that "it is not involved in this litigation * * * [and] we shall not here present argument on that subdivision". So much for the finding of the trial court with respect to section 736.3(e).

[15, 16] This leaves for consideration sections 737.11 (a, b, c, d, and e), all of which the trial court found to run counter to constitutional inhibitions, principally because of the asserted improper delegation of judicial power. Generally, these sections have to do with the issuance, suspension and revocation of licenses to those engaged in the milk industry. At the outset, we may dismiss subdivision "b" of section 737.11 from further consideration for in so far as it purports to give the director power to fix the amount of damages to which a complainant is entitled for the failure of a distributor to pay for fluid milk or cream, it was held in the Jersey Maid case, supra, 13 Cal.2d at page 651, 91 P.2d at page 594, to be an unconstitutional delegation of ju-

dicial power. However, we also there held that said subdivision was clearly separable and had no bearing or effect upon the constitutionality of the remainder of the act. The same disposition of the point may here be made for the director at no time purported to act thereunder in the Los Angeles area, and the invalidity of the subdivision can have no controlling effect upon the determination of the present cause. As to the other subdivisions of section 737.11 we had considerable to say in the Jersey Maid case, supra, wherein we found no constitutional objection thereto. We there declared, 13 Cal.2d at pages 650-652, 91 P.2d at pages 593, 594.

"These two sections, 737.5 and 737.11, should be read together, and when so read, it will be found that they afford adequate standards not only to guide the director in refusing an application for a license but also in revoking or suspending licenses already issued. Section 737.11 reads in part as follows: '(a) The director may refuse to grant any license herein provided and may, after due hearing upon a verified complaint signed and filed with the director by any interested person, revoke or suspend any such license as the case may require, when he is satisfied that any applicant or licensee has violated any provision of this chapter, or any provision of any stabilization and marketing plan formulated under the provisions of this chapter.' It will be noted that this section refers to an applicant for a license as well as to a licensee. As we construe this section, the applicant may not be granted a license if the director finds, after a hearing, that he has violated any of the provisions of the chapter or any plan promulgated thereunder. He may also revoke or suspend a license for the same reason.

"It is contended by amici curiae that that portion of section 737.11 (a) which provides for a hearing after complaint filed only applies to proceedings for the revocation or suspension of a license and does not apply to the granting of a license. We concede that the section is not as clear as it might be, but the inclusion of the word 'applicant' in the section clearly implies that the proceedings therein provided for applies to a person applying for a license as well as a licensee whose license is sought to be revoked or suspended. Subsection (b) of this same section confirms our conclusion that this section applies both to an applicant for a license, as well as to a licensee, as it is therein stated that 'Such decision (the decision rendered after the hearing provided for in subsection (a) of said section) may include an order refusing, revoking or suspending the license applied for or held by respondent'. * * *

"As we construe these sections, they provide that a license may not be granted by a director after a complaint filed, if after a hearing held upon said complaint, the director finds that the applicant has violated either the terms of the act or the provisions of an established marketing plan. It cannot be said, therefore, that the granting or refusing of a license is left to the arbitrary whim of the director, as a license to any applicant, if complaint is made against its issuance, can only be granted after the hearing provided in section 737.11 (a) of said code, and a finding made in favor of the applicant."

[17] The argument of respondent that the "review" of the director's orders provided for in section 735.6 of the act contemplates a review by means of certiorari, thereby establishing the functions of the director to be judicial in character, is lacking in merit. In Agricultural Prorate Commission v. Superior Court, 31 Cal.App.2d 518, 524, 88 P.2d 253, 256, it was said with respect to a somewhat similar provision in the Prorate Act that "the term 'may be reviewed' is not to be confused with the term 'writ of review'. It is quite clear it was intended by the right of review that an interested party should have a right to put in issue before a superior court a question arising as a result of the promulgation of any order the commission might make." Recently this court has had much to say with respect to the "review" of orders of statewide administrative boards and officers. Standard Oil Co. v. Board of Equalization, 6 Cal.2d 557, 59 P.2d 119; Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1; Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848; McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205.

In concluding our discussion and disposition of the challenges addressed to the constitutionality of the milk act in the Jersey Maid case, supra, 13 Cal.2d at pages 658-659, 91 P.2d at pages 597, 598, we declared that:

"The practice of delegating to administrative officers or boards powers which

were originally performed directly by the legislature is of long standing and has met the approval of the highest courts in this state as well as in other jurisdictions. 'The policy of the law favors the placing of detailed responsibility in administrative officers. The courts uphold statutes vesting such powers in such officers if it is possible fairly to do so, at least where the powers are merely ministerial. In order to justify the courts in declaring a statute imposing particular duties or conferring authority upon administrative officers to be inoperative as a delegation of legislative power, it must clearly appear beyond a reasonable doubt that the duty or authority so imposed or conferred is one appertaining exclusively to the legislative department and that the delegation of it is not warranted under the provisions of the Constitution.' 11 Am. Jur., p. 955.

"In the recent decision of this court entitled East Bay Municipal District v. Department of Public Works, 1 Cal.2d 476, 35 P.2d 1027, 1028, we find the following statement of the law as announced in Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, cited with approval, ' "It has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' " '

"For additional authorities supporting this statement, see cases cited in the opinion in the case of East Bay Municipal Utility District v. Board of Public Works, supra.

"This statement of the law also answers the contention of the respondent and amici curiae that in a number of instances judicial power is conferred upon the director of agriculture in that he is empowered to hold hearings at which evidence is produced and findings of fact are made by him.

"In the case of Globe Cotton Oil Mills v. Zellerbach, 200 Cal. 276, 277, 252 P. 1038, it was held the granting of power to the Fish and Game Commission to hold hearings and determine the facts incidental to the regulation of the fish and game and to the granting of permits to take and use fish, was valid as an administrative or regulatory power, and in nowise transgressed upon the exclusive functions of the judicial department. This ruling is supported by People v. Sacramento Drainage District, 155 Cal. 373, 387, 388, 103 P. 207, and Tarpey v. McClure, 190 Cal. 593, 606, 213 P. 983.

"We, therefore, conclude that, with the exception of the provision in section 737.11 (b) of said chapter 10, division IV, which purports to give to the director the power to fix the amount of damages to which a complainant is entitled for the failure of a distributor to pay for fluid milk or fluid cream purchased of a producer, none of the provisions of said chapter which has been called to our attention by either the respondent or amici curiae is invalid by reason of the alleged delegation of either legislative or judicial power to the director of agriculture.

"We have already considered the effect of the invalidity of this provision of section 737.11(b) upon the other provisions of said chapter, and have shown that it does not in any way render invalid the remaining valid portions of the act.

"Legislation which has for its purpose the regulation and stabilization of the milk industry, even to the extent of fixing prices for which milk may be bought and sold, is not any new development in our social legislation. While it is of recent enactment in this state, it has been in force in other states for many years last past. It has been, with few exceptions, upheld by the courts of the various sections of this country, including the United States Supreme Court and the highest appellate courts of the following states: Illinois, Iowa, New York, Virginia, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Pennsylvania, Wisconsin, Massachusetts, and New Jersey."

[18] As stated at the commencement of this opinion, we have found nothing in the

briefs herein which requires or even suggests that we recede from the views expressed in the Jersey Maid case, supra, upon the constitutionality of the milk act contained in chapter 10 of division IV of the Agricultural Code. This alone requires a reversal of the decree permanently enjoining the director from acting thereunder. We now pass to a consideration of the contentions and arguments advanced against the methods and procedure employed by the director in his designation of the Los Angeles marketing area, his formulation and adoption of a stabilization plan therefor, and his fixation of minimum prices thereunder, all of which it is asserted resulted in a deprivation of procedural due process.

At the outset, it may generally be stated that the respondents are dissatisfied with and have challenged every step taken by the director in the Los Angeles area from the first order designating it as a marketing area down to and including the last order establishing minimum wholesale and retail prices therein. The trial court found that this broadside attack had merit and concluded that General Regulation No. 3 and General Orders Nos. 9, 14, 29, 39 and 40 issued by the director and which will later be more definitely described and identified, were void for several designated reasons, among them being, asserted invalidity of the provisions of the act authorizing the same (disposed of above), asserted improprieties in the hearings conducted by the director preliminary to the making of such orders, and asserted insufficiency of the evidence adduced at such hearings to support said orders. And this, despite the fact that all of such orders except the last one were made more than thirty days prior to the commencement of this action, that being the period of limitation prescribed in section 735.6, above referred to, within which orders of the director may be "reviewed".

In view of our conclusion hereinafter announced upon the merits of the procedure and methods employed by the director, we give but passing notice to the time limitation placed upon a review of the director's orders. While respondents' direct and principal attack is aimed at "General Order No. 40," fixing minimum wholesale and retail prices, it is obvious that they have collaterally challenged everything that preceded said order in the matter of the designation of the Los Angeles marketing area and the formulation, adoption and amendments of its stabilization plan in an effort to thereby break down and destroy the foundation upon which the price fixing order must rest. In order to properly gauge and understand the challenged procedure employed by the director in the Los Angeles area, it is necessary that we again refer to the chronology of the milk act. As already stated, this act (chap. 10, div. IV) was first added to the Agricultural Code in 1935, St.1935, p. 922 et seq. It was then generally provided that a proceeding might be initiated by 65 per cent or more of the commercial producers of milk proposing the establishment of a designated marketing area. Upon receipt of such application, the Director of Agriculture was required to call a meeting of the producers supplying such area at which meeting the producers could nominate candidates from whom the director selected and appointed a local control board of not less than seven nor more than thirteen members. The local control board was authorized to formulate a plan which, among other things, might prescribe the minimum prices to be paid by distributors to producers. Such plan became effective upon approval of the director. Pursuant to this act and in the year 1936, a local control board was appointed for the Los Angeles area and a stabilization plan was made effective therein on July 23, 1936, which fixed the price to be paid by distributors to producers at 59 cents per pound of milk fat contained in the milk. By proper amendment of the plan, this price was raised to 69 cents on August 22, 1936. In January, 1937, the legislature substantially amended and revised chapter 10 as to the manner of designating marketing areas and formulating stabilization plans thereunder. However, in so doing, it provided that "all stabilization and marketing plans in effect on the effective date of this act, and all rights and liabilities accruing under such plans shall not be affected by this act, but such plans may be superseded at any time by a plan formulated as prescribed in said Chapter 10 of Division IV of the Agricultural Code as amended by this act". Sec. 22, chap. 3, Stats.1937. As a result of this first 1937 amendment, section 736 of the milk act was made to read in part that "as soon as possible after the effective date of this chapter the director shall designate marketing areas * * *." Apparently proceeding under the assumption that this required a new designation

of marketing areas, the director on February 3, 1937, issued an order again designating or redesignating Los Angeles County as a marketing area. This order is identified as "General Regulation No. 3" and is assailed by the respondents on the ground that it was made without notice or hearing and thereby resulted in a deprivation of due process of law. Aside from the fact that such redesignation of area was probably an unnecessary act, and aside from the further fact that a mere designation of marketing area can hardly be said to interfere with or have any effect upon life, liberty or property so as to come within the meaning and salutary restrictions of the due process clause, we need give but little consideration to "General Regulation No. 3" for the reason that the director thereafter suffered a change of mind as to the proper procedure to be followed and thereupon gave notice on April 6, 1937, of a public hearing to be held on April 17, 1937, for the designation of an area. This notice which defined the boundaries of the proposed area as commensurate with those of Los Angeles county, was included with a notice given by the director of a public hearing to be held on the same date as to a proposed stabilization plan he had formulated for said area, which plan was formulated upon receipt of what he determined to be a sufficient and adequate petition therefor under section 736.1, as amended. We shall discuss this petition further along in the opinion. At the time designated, April 17, 1937, the director called the meeting to order and asked if any person present had any objection to, or any evidence to offer regarding the area as described in the notice. No evidence was offered by any one present relative to designation of the area whereupon the hearing proceeded to a consideration of the second purpose for which it had been called, viz., formulation of a stabilization plan, to which we shall also refer later. Shortly after this hearing and on April 28, 1937, the director issued "General Order No. 9", here challenged by the respondents, wherein he again designated Los Angeles county as a marketing area and rescinded his prior "General Regulation No. 3" which had redesignated such area without previous hearing. Respondents contend that if the act permits designation of an area without prior hearing it improperly delegates a legislative function to the director. In the Jersey Maid case, supra, and again herein, we have held that sufficient standards have been prescribed for the guidance of the director in this and other respects and that there has not been a delegation of legislative power. In the alternative, respondents urge that if the act contemplates a hearing, the one conducted by the director failed to meet the requirements of due process.

[19] The authorities tend to indicate that a hearing is not essential to the establishment of territorial boundaries of districts of the character here involved, in the absence of specific requirement therefor in the statute itself. In the case of Potter v. Santa Barbara, 160 Cal. 349, 355, 116 P. 1101, 1103, it is declared that, "The formation of this [permanent road division] and similar districts is a function pertaining purely to the legislative branch of the government. The Legislature can create them, or cause them to be created [under prescribed standards], without giving any person a voice or hearing upon the matter." The authority conferred upon the department of agriculture by sections 221(e) and 234 of the Agricultural Code, St.1933, pp. 98, 99, to establish and delimit by proclamation, and without hearing, bovine tuberculosis control areas never has been questioned. An Iowa statute, similarly providing, was upheld against an attack that it made no provision for hearing. Fevold v. Supervisors, 202 Iowa 1019, 210 N.W. 139, 141; Peverill v. Supervisors, 208 Iowa 94, 222 N.W. 535, 541. The appellant director asserts that milk statutes of other states have been generally upheld in the absence of provisions for hearings in connection with the designation of areas, citing, Franklin v. State, 232 Ala. 637, 169 So. 295; Miami v. Milk Control Bd., 124 Fla. 797, 169 So. 541; Bohannan v. Duncan, 185 Ga. 840, 196 S.E. 897; Albert v. Milk Control Bd., 210 Ind. 283, 200 N.E. 688; State Board of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504, 179 A. 116; Rohrer v. Milk Control Bd., 322 Pa. 257, 186 A. 336; Reynolds v. Milk Comm., 163 Va. 957, 179 S.E. 507; State v. Lincoln Dairy, 221 Wis. 1, 265 N.W. 197, 851; Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835; Id., Dist.Ct. Opinion, 16 F.Supp. 575. As stated hereinabove, a hearing upon the designation of area would not appear indispensable to "due process" for no one thereby suffers any injury to or loss of life, liberty, or property

within the meaning of that clause of the Constitution. As stated by us in the Jersey Maid case, supra, 13 Cal.2d at page 649, 91 P.2d at page 593, "As all producers and distributors have the right to participate in the final meeting at which the plan is adopted, none can complain that he is deprived of any right without an opportunity to be heard." However, assuming for the present purposes that the act requires a hearing preliminary to the designation of area (and this is by no means certain because of the apparent inconsistency between the general provisions of section 735(c) and the specific provisions of section 736), we are of the view that the procedure adopted by the director satisfied all essential requirements for all persons known to be interested were informed in advance by the notice of the purpose of the hearing and the territory proposed to be included in the area. Requests by the director for evidence and for suggestions with respect thereto went unheeded at the hearing. Respondents should not be permitted to ignore the opportunity so afforded them to be heard upon the designation of the area and at this late date be allowed to assert that a denial of due process occurred therein. Particularly when, as already indicated, the identical area had been designated almost a year previous under the earlier act and "General Order No. 9," here challenged, constituted but a redesignation thereof. To require the introduction of evidence by the director at such hearing in order to assist him in determining a matter he had already determined months previously would be to sacrifice substance to form. The authorities suggest another complete answer to respondents' contention with respect to the nature of the hearing held prior to the designation of area by "General Order No. 9," but inasmuch as the trial court found, and respondents urge generally, that not only that order but all subsequent orders of the director are void because of the substantially similar and assertedly improper manner in which he conducted the hearings thereon, we proceed to an outline of such other proceedings and orders, returning later to a discussion of the objection addressed to all of them.

After designation of the area, the first essential in the formulation of a stabilization and marketing plan, under section 736.1 as amended in 1937, is either a hearing or the filing of a petition to determine whether the requisite number (65%) of qualified producers desire the same. In the Los Angeles area no hearing was held by the director prior to his formulation of the proposed stabilization plan submitted by him at the noticed hearing of April 17, 1937, above mentioned, but instead he proceeded upon a petition, briefly mentioned above, which had assumed the form of individual postcards which, shortly after the first 1937 amendment of the milk act, had been mailed out to producers on or about February 13, 1937, by the local Milk Control Board, which board, as above stated, was in existence under the old law and prior to the 1937 revision thereof. Six hundred and twenty-eight of these cards, duly signed, were filed with the director on or about March 17, 1937, and it was upon the basis of this postcard petition that the director prepared and formulated a proposed plan for the Los Angeles area, which proposed plan he attached to his above-mentioned notice of April 6, 1937, wherein he designated April 17, 1937, for a public hearing not only as to the redesignation of area, already discussed, but for the purpose of hearing evidence upon, or suggestions and objections with respect to his proposed plan for the area.

[20, 21] We find no support for the trial court's findings with respect to, and no merit in the respondents' arguments in connection with, the asserted insufficiency of this postcard petition. The finding and contention addressed to the unconstitutionality of section 736.1, under which the petition was filed, has been shown to be without merit by our decision in the Jersey Maid case, supra, and our holding hereinabove. The fact that section 735.3 was amended by the legislature effective April 21, 1937, St.1937, p. 151, after the director had noticed and held a public hearing on the proposed plan but before he had made any order with respect thereto, could not, and did not, contrary to the trial court's finding and the respondents' contention, invalidate the petition theretofore filed under section 736.1. The amendment of section 735.3 merely amended the definition of milk so as to divide it, for the first time, into four classes. While it is true, the original proposed plan prepared and submitted by the director covered milk as a whole, the amendment dividing milk into four classes not yet having been enacted, it is equally true that such amendment became effective prior to the making of any order by the director following the public hearing on his

original proposed plan and in view of such amendment he made no order with respect to the original proposed plan but instead prepared a new proposed plan conforming to the statutory amendment dividing milk into four classes. By notice given on April 28, 1937, a public hearing was called on the new proposed plan for May 10, 1937. As to such later hearing and the order resulting therefrom we shall have more to say later. We are now confining our discussion to the sufficiency of the petition for a plan and are of the opinion that the trial court and the respondents are in error in concluding that the petition for a plan filed and partially acted upon prior to the statutory amendment which divided milk into four classes could not properly be used as the basis for proposing a plan after such statutory amendment. Neither reason nor logic supports such a conclusion. It completely loses sight of the purpose of section 736.1 which is to determine, by hearing or petition, whether 65 per cent of the producers desire any stabilization plan and not to ascertain whether such producers desire a particular plan. Contrary to accepted practice, any other conclusion would give to the amendment of section 735.3 a retroactive effect in the absence of legislative expression thereon.

[22, 23] Nor do we think that the postcard petition was defective or misleading because when mailed out by the local Milk Control Board it was accompanied by a letter which stated that such board was petitioning the director to amend the existing plan, created as stated above under the old act and prior to the 1937 revision of the law, so as to bring about a possible change in the price of class 1 milk from 69 cents to 79 cents. The postcard itself made no reference to any price change but merely requested and petitioned the director to formulate a plan under the 1937 amendment of the act. However, when the director received knowledge of the letter that had accompanied the postcard petition, he immediately, in order to obviate any uncertainty that might arise from the mention of a price therein, communicated with the local board and expressed a fear that mention of a price might be misconstrued and cause some producers to be misled into signing the postcard petition upon the assumption that a 79 cent price would be fixed in the plan to be proposed by him pursuant to the petition. As a result of this apprehension, the local board on March 4, 1937, before any hearing on the original proposed plan or any subsequent revisions thereof, mailed out to all producers who theretofore had been sent the postcard petition, a letter setting forth the entire situation and stating that if any had been misled by mention of a price in the earlier letter they were free to request a return of their signed cards. There is no evidence herein that any requests were made for a return or withdrawal of cards. The minutes of the local board recite that not a single withdrawal of any petition was requested. In fact, 143 signed cards were received by the local board after the second letter had been sent out correcting any misapprehension that might exist. There is no evidence that any of the signers, or any of the respondents herein, some of whom had signed these cards, were misled in any particular. In this connection, see Rock Royal case, supra, 307 U.S. at page 558, 59 S.Ct. at page 993, 83 L.Ed. 446. Ultimately as already stated, 628 signed cards were received by the local board from producers requesting and petitioning the director to formulate a plan for the area, which cards were thereupon forwarded to the director causing him to formulate the original proposed "whole-milk" plan upon which there was a public hearing, as already stated, on April 17, 1937, followed by a further hearing on May 10, 1937, with respect to revisions therein necessitated by the subsequent amendment dividing milk into four classes. In view of what has been said we are satisfied that there is no substantial support for the trial court's findings or the respondents' contention that the postcard petition was misleading and caused the signers thereof to assume that the plan to be thereafter proposed by the director would be based on a 79 cent producers' price. Nor is there any support for the trial court's finding or respondents' contention, that no evidence was offered or finding made by the director at the original hearing on the proposed plan that the postcard petition for a plan complied with section 736.1. As already indicated, the cited section authorizes the initiation of proceedings for a plan either by hearing or petition. Here the petition method was employed and the section expressly declares that in such event it is not "necessary that such hearing be held". Naturally, under the petition method the director would, and the evidence shows that

he did, check the petition to ascertain to his own satisfaction that it represented the requisite production before proceeding thereunder. We need not here go into a detailed discussion of the evidence on the point for we perceive nothing of substance that undermines the director's conclusion with respect thereto. We cannot say that the director's action in this respect was arbitrary or capricious or wholly unsupported by the evidence. Silberchein v. United States, 266 U.S. 221, 45 S.Ct. 69, 69 L.Ed. 256; Union Transportation Co. v. Bassett, 118 Cal. 604, 610, 50 P. 754; Maxwell v. Civil Service Comm., 169 Cal. 336, 339, 146 P. 869. In addition, there is always a presumption that official duty has been properly performed. Moreover, it does not appear, and it was not found, that the petition was defective because not in fact signed by the requisite percentage of producers.

[24, 25] Following his receipt and check of the sufficiency of the postcard petition signed by 628 producers requesting formulation of a plan for the area, the director, as stated above, prepared and, after notice thereof, submitted a proposed plan at the public hearing of April 17, 1937. But, as already mentioned, because of the subsequent amendment of the act dividing milk into four classes the plan so prepared and proposed was out of harmony with the amended act and consequently the director made no order following the original hearing but instead formulated a new plan based on the division of milk into four classes, and issued notice on April 28, 1937, of a public hearing to be held May 10, 1037, on the "revised stabilization and marketing plan". A copy of the proposed revised plan was attached to the notice of hearing. Following this hearing and on May 15, 1937, the director issued "General Order No. 14" by which the plan in effect in Los Angeles county since 1936 under the old act and before its revision by the Legislature in 1937, was terminated and the new plan upon which the public hearing had been had on May 10, 1937, was declared to be effective in the area on and after June 1, 1937. The 69 cent price for class 1 fluid milk existent and prevailing under the old terminated plan was carried over into the new plan.

In the meantime, the legislature had again amended the milk act and in order to cause the plan then in effect in the Los Angeles area to comply therewith, the director on September 17, 1937, gave notice of a public hearing to be held September 28, 1937, for the purpose of considering a proposed amended or revised plan, a copy of which was again attached to the notice. Among other things, the proposed revised plan was to cause the unfair practices provisions of the plan to comport with recent legislative changes. Said revised plan also provided for a 72 cent producers' price for class 1 milk, an increase of 3 cents over the old price. Following such public hearing, the director issued "General Order No. 29" on October 4, 1937, by which he declared the revised stabilization plan effective in the area on October 23, 1937.

Thereafter, and on December 29, 1937, the director gave notice of a public hearing to be held January 15, 1938, for the purpose of considering further revision of the plan, a copy of the proposed amendment again being attached to the notice. Following such public hearing, the plan was by "General Order No. 39", dated January 18, 1938, again amended or revised, effective February 1, 1938, so as to return the producers' price of class 1 milk to its former level of 69 cents.

In the interim, the legislature had added article 2a to the milk act, mentioned at the commencement of this opinion, wherein provision was made for the fixation of minimum wholesale and retail prices. Again in order to keep the plan in effect in the Los Angeles area abreast of the repeated legislative changes, the director on December 24, 1937, sent out notice of a public hearing to be held on January 14, 1938, with respect to a proposed order, copy of which again was attached to the notice, for the fixation of minimum wholesale and retail prices as then authorized by amendment of the act. Following such hearing and on January 18, 1938, the director issued "General Order No. 40", declaring the order for the establishment of minimum wholesale and retail prices in effect on February 1, 1938.

Thus, we have before us an outline of the proceedings taken by the director with respect to the Los Angeles area and while, as already stated, respondents' principal attack thereon is addressed to the last order, No. 40, fixing or prescribing minimum wholesale and retail prices, their challenge of all prior proceedings and orders for the purpose of destroying the

structure upon which the last or price fixing order must rest, also met with uniform success in the trial court. Much of what we have already said herein disposes of many of the unsupported findings of the court below, and the corresponding contentions of respondents, with respect to the invalidity of the several described orders because of an asserted lack of jurisdiction in the director to proceed. Such findings, as we have shown, were based on the equally unsupported and erroneous findings and conclusions, already considered, that the act itself and the petition for formulation of a plan thereunder were ineffective and void. We shall now direct our discussion to those findings and contentions relative to the manner in which the director conducted the respective hearings which preceded the making of the several orders above designated. As already stated, a copy of each proposed order or contemplated revision of the plan was attached to each of the notices sent out by the director with respect to the public hearing to be thereafter held thereon. Those interested therein were thereby adequately informed in advance by the director as to the exact nature and purpose of each hearing and of the character of the order thereafter to be made. Upon the calling of the several hearings to order, the director almost invariably would invite those present to offer any suggestions, objections or evidence pertinent to the subject upon which the hearing had been noticed. In some instances, those present remained silent, offering neither suggestion nor objection. Upon other occasions, evidence was offered by interested persons. Certain of the director's assistants and experts who had gathered information and data for his proposed orders were present at the hearings, and declared by him to be available to the examination or cross-examination of participants at the hearings, an offer which was availed of on several occasions. Without cluttering the record therewith, it was also generally stated by the director at the hearings that the data and information theretofore collected by him after extensive investigation and research and upon which necessarily his orders in part at least had to be predicated were open and available to the scrutiny of persons present. Much technical and statistical data gathered by his assistants, who are recognized experts in the milk field, concededly is reflected in the director's formulation and several subsequent revisions of the Los Angeles stabilization plan, though not directly placed in evidence by him at the several hearings. As we shall presently show the authorities attest to the propriety of this action at hearings of the character here involved. The fact that section 736.1 requires him to formulate a proposed plan prior to hearing thereon contemplates his previous acquisition of basic data and information. To attempt to outline the exact nature and scope of each of the several hearings would unduly prolong this opinion. Suffice it to say, that the record herein discloses that at each of the several hearings conducted by him the director evinced a willingness to hear all who cared to be heard and a desire to afford every opportunity therefor. Consequently, we are of the opinion that ample notice and an opportunity to be heard was accorded by the director and that the hearings conducted by him satisfied the provisions of the statute and all other appropriate legal requirements. The authorities definitely indicate that hearings of the type conducted by the director under the milk act differ materially from and are not circumscribed by the restrictions applicable to judicial or quasi judicial adversary proceedings. In this connection, it may be said that the subject received some attention from the United States Supreme Court in Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 303, 307, 308, 53 S.Ct. 350, 354, 77 L. Ed. 796, having to do with a statute which created a tariff commission designed to make investigations ascertain facts and report to the President for the purpose of enabling him to establish and change tariff rates. Among other things, it was there said that:

"The decision of this case hinges upon our answer to the question whether the petitioner has been 'heard' in accordance with the statute. Does the requirement of a hearing mean that every producer or importer affected by a tariff may explore at will the data collected by the Commission as to the capital, the wages, the cost of material and manufacture, in the business of any other person similarly affected, and may cross-examine investigators and competitors upon the data thus laid bare? If something less than this is exacted, is there still a minimum of disclosure without which the

purpose of the hearing will be thwarted altogether, and was this minimum attained by what was done by the Commission here? * * *

"The statute does not say that the parties affected by the duty may be present during the preliminary investigation by the agents of the Commission. They are to be present at a hearing, which may be public or private as the Commission shall determine. The statute does not say that they are to have an opportunity to produce evidence and to be heard to whatever extent they may desire. It says that they are to have a reasonable opportunity, and this subject to the power of the Commission to adopt such reasonable procedure, rules and regulations as it may deem necessary. Nothing in the statute suggests a belief of the lawmakers that every producer or importer was to be viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series. 'There must be a limit to individual argument in such matters if government is to go on.'"

In the so-called "Assigned Car Cases," 274 U.S. 564, 47 S.Ct. 727, 733, 71 L.Ed. 1204, there was involved an order to the interstate commerce commission by which railroad cars available for coal mines were ratably apportioned among the mines. Those seeking to enjoin enforcement of the order consisted of certain railroads, mine operators, coal distributors, and coal consumers. It was there held, among other things, that, "There was ample evidence to support the Commission's findings. It is not for courts to weigh the evidence introduced before the Commission * * * or to inquire into the soundness of the reasoning by which its conclusions are reached * * *. These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' * * * The argument [as to the insufficiency of the evidence to support the Commission's finding] overlooks the difference in the character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under sections 1, 3, and 15 of the Interstate Commerce Act. [49 U.S.C.A. §§ 1, 3, 15]. In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general."

The case of Highland Farms Dairy v. Agnew, D. C., 16 F.Supp. 575, 586, wherein hearings held under the Virginia milk act were under discussion and scrutiny, declares:

"The plaintiffs also complain that the action of the Milk Board in establishing the market area and fixing the minimum prices for production and distribution of milk was not had in accordance with the provisions of the statute, and was taken in violation of due process of law. The point relates to the nature of the public hearing which the Commission conducted. Section 3(i) provides that the Commission shall not exercise its power in a market until a public hearing has been held for such market and the Commission determines that it will be to the public interest to exercise its powers therein; and section 3(j) provides that the Commission, after public hearing and investigation, may fix the prices to be paid producers by distributors and to be charged in the wholesale and retail distribution of milk, taking into consideration in determining the reasonableness of the prices, the cost of production and distribution, and the welfare of the general public.

"A public meeting was held in Richmond, Va., on February 20, 1936, at which were present a score of dairymen and milk producers and some discussion as to the establishment of the market area and the prices of milk took place. It is stipulated that thereafter the Commission established the area and the rules and regulations not only upon the basis of the information obtained by it at this public hearing, but also upon the basis of information subsequently furnished it by interested persons during the month of March, the Commission having announced at the hearing that it would receive additional communications. The Commission also took into consideration certain treatises which the Commission had in its files or received subsequent to the hearing bearing upon the general subject of the marketing of milk. It is contended that not only was the evidence presented

at the hearing entirely inadequate to enable the Commission to carry out the duties imposed upon it by the act, but that the Commission violated the rules of proper procedure when it took into consideration material not offered at the hearing.

"The plaintiffs particularly rely on the decision in Morgan v. United States [298 U.S. 468], 56 S.Ct. 906, 80 L.Ed. 1288, which dealt with the duty imposed upon the Secretary of Agriculture to grant a full hearing and receive evidence before fixing rates for stockyard services under the Packers' and Stock Yards' Act of 1921 (7 U.S.C.A. § 181 et seq.). It was held that while the order of the Secretary was legislative, the proceeding had special attributes, and that the Secretary was required to make his determination in accordance with the procedural requirements contemplated by the statute, including a full hearing and the reception of evidence adequate to support the necessary findings of fact. Attention was called to the provision of the Packers' and Stock Yards' Act which makes applicable to the jurisdiction, powers, and duties of the Secretary, all laws relating to the suspension or restraint of the enforcement of orders of the Interstate Commerce Commission. The cases cited by the Supreme Court show that it is well established that a proceeding of this character before the Interstate Commerce Commission has a quasi judicial character and that the usual incidents of due process applicable to an adversary proceeding must be followed.

"But it is our view, expressed in the absence of a controlling interpretation by the state court, that these cases have no application to the sort of hearing contemplated by the Virginia Milk Control Act. The proceeding before the Milk Commission was not quasi judicial, but legislative. It is true that the act made provision for a public hearing without which the Commission was not authorized either to exercise its powers in any market area or to fix prices; but this hearing was to be of the same nature as that held by a legislative committee in considering proposed legislation. The act contains no directions as to the kind of notice to be given, and evidently merely contemplated notice by advertisement to the general public. No other notice was feasible, considering the large number of persons engaged in production and distribution of milk. The Commission was undoubtedly justified in the exercise of its legislative function in taking into consideration not only the facts presented at the public hearing, but those which came to it subsequently from interested parties or were disclosed by its own investigation into the facts and the literature bearing upon the subject. See State Board of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504, 179 A. 116, 125, 126; Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 296, 308, 53 S.Ct. 350, 355, 77 L.Ed. 796." The United States Supreme Court affirmed this decree in 300 U.S. 608, 57 S.Ct. 549, 81 L. Ed. 835.

In State Board of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504, 179 A. 116, 125, 126, which arose under the New Jersey milk statute, the following appears:

"And the claim that the prescription of minimum prices, 'without an investigation by the control board of the milk industry and without notice to the defendant or opportunity afforded it to be heard,' constituted a deprivation of constitutional rights is likewise untenable. In the absence of a specific constitutional or statutory requirement thereof, notice of proceedings before the subordinate body exercising, as here, the administrative function is not requisite to valid action by that body. Nor is a hearing required in the absence of a provision therefor in the organic or statutory law. The due process clause of the Fourteenth Amendment imposes no such requirement; and, for obvious reasons, the like clauses in the state Constitution bear the same construction.

"As pointed out, the respondent board merely exercises the administrative function to effectuate the definitely declared legislative policy. Such regulation is purely a legislative function; and, even when exercised by a subordinate body, upon which it is conferred, the notice of hearing essential in judicial proceedings is not indispensable to a valid exercise of the power. If the regulation undertaken is arbitrary or unreasonable, and, in the case of rates and charges imposed upon a business clothed with a public interest, confiscatory, relief may be had in the courts. A judicial review of administrative proceedings, on notice, satisfies the demand of the due process clauses. Home Telephone, etc., Co. v. Los Angeles, 211 U.S. 265, 29 S.Ct. 50, 53 L.Ed. 176. The

principle of due process is to secure the citizen against the exercise of arbitrary power. 'The omission (in a statute conferring such power upon a public utility commission) of the requirement of notice assimilates the procedure of the Commission to that characterizing legislative action, and it is justified and sustained by those reasons of public policy upon which notice is dispensed with in legislation.' Randall Gas Co. v. Star Glass Co., 78 W. Va. 252, 88 S.E. 840, 842. See, also, 12 C.J. 1240, 1268, 1269, 1282; 51 C.J. 57.

"The statute here imposes no such requirement. The board may, in its discretion, hold 'a public hearing * * * and invite producers, consumers, local dealers, and public health officials in this State to submit such proofs as they may desire to aid the board in making its determination hereunder.' N.J.St.Annual 1933, § 81—162A (31). The presumption arises that the order made is a reasonable and valid exercise of the authority conferred; and the burden of establishing the contrary is upon him who asserts it."

Baldwin v. Dellwood Dairy Co., 150 Misc. 762, 270 N.Y.S. 418, 421–422, contains the following:

"First. It is urged that the Board before making orders 32, 34, and 35, failed to make the investigation required by the statute and failed to give the reasonable notice required thereby; and that the investigations made and hearings held by the Board failed to justify the prices fixed in said orders; and that the said orders were not issued pursuant to the requirements of the statute and were null and void.

"The presumption is that the Board did its duty in the emergency efforts required of it in the making of investigations, giving notice of hearings, conducting the hearings, and making such orders. Such presumption was not overcome so far as the original validity of such orders was concerned. The Board had the benefit of the voluminous and carefully prepared report of the Joint Legislative Committee to Investigate the Milk Industry (known as the Pitcher Report), which recommended this emergency legislation. The Board had been investigating for three months and had held a number of hearings and had issued a number of orders before the hearing of July 14, 1933, after which orders 34 and 35 were promulgated, effective July 21, 1933. The statute, section 312 (f), provides for reasonable notice to all parties interested and to the public of a hearing before making an order fixing prices, such notice to be given 'in such newspaper or newspapers as in the judgment of the board shall afford sufficient notice and publicity.' This hearing of July 14th was for the purpose of 'supplementing, altering, revising and/or amending any and all official orders heretofore promulgated,' and was so noticed on July 11th by posting in the main office of the Board and by news release to the press. * * * Whether the hearing of July 14th failed to justify the prices fixed in orders 34 and 35 should not be determined upon the record of the hearing alone. The Board had before it the data of its own investigations * * *. At most the courts could hold only that the Board acted arbitrarily or capriciously. They could not substitute their judgment for that of the Board. I cannot say that the Board acted arbitrarily."

The case of Colteryahn Sanitary Dairy v. Milk Control Commission, 332 Pa. 15, 1 A.2d 775, 122 A.L.R. 1049, cited by respondents, recognizes the right of the appropriate commission or director to make independent surveys and investigations but declares that the result thereof should be placed in evidence at the hearings. Aside from differences in the statutes there and here involved, the case was principally concerned with the practice of interested persons withholding evidence before the Commission and thereafter attempting to use the same on the direct appeal there allowed. That case does not intimate that all information and data obtained by the Commission as a result of independent investigation must be placed in the record but only the "result" thereof. In effect, that was done here. While the director did not offer in evidence at the several hearings every book, pamphlet, government labor and agricultural report, statistical table, cost study, etc., he did, in substance, place before each hearing the "result" of his investigations and surveys, and the expert assistant (Dr. Tinley) who had made the same was available and was in many instances subjected to examination by those present at the hearings.

As already stated, we are of the view that the notices given of and the hearings conducted by the director with respect to the matters included in the sev-

eral orders above designated, sufficiently satisfied all statutory and other appropriate requirements. Under the foregoing authorities, and others cited earlier in connection with our discussion of the validity of the petition for formulation of a marketing plan, we cannot say that the action of the director in any particular has been arbitrary, capricious or so entirely lacking in evidentiary support as to warrant judicial interference with his several orders. In an action of this character challenging proceedings and hearings of the type here involved, it is not for the courts to weigh the evidence and data adduced before and considered by the director preliminary to his issuance of the several orders here challenged. Under the circumstances here present, judicial interference should occur only when it can be said that administrative action has been arbitrary and capricious. Silberchein v. United States, supra; Union Transportation Co. v. Bassett, supra. As stated in Maxwell v. Civil Service Comm., 169 Cal. 336, 339, 146 P. 869, 871, "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. * * * Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere." This same thought found expression very recently in the decision of the United States Supreme Court in Federal Commun. Comm. v. Pottsville Broadcasting Co., 60 S.Ct. 437, 443, 84 L.Ed. 656, January 29, 1940, wherein it is declared that "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process." It clearly appears from the record herein that the proper discharge of the functions confided by the legislature to the discretion of the director, within the standards prescribed by the statute, and particularly the establishment of minimum wholesale and retail prices, involve highly technical matters requiring the assistance of skilled and trained experts and economists and the gathering and study of large amounts of statistical data and information. It is apparent from the record herein that the Department of Agriculture, with the assistance of its experts, had exhaustively explored appropriate fields before proceeding. It is impractical to here attempt an outline of the evidence adduced at the hearings or of the data and information collected by the director and which constituted the bases upon which his several orders were made to rest. At the hearing on order No. 40, fixing minimum wholesale and retail prices, the director stated that the data and information collected by him and his experts were open and available to all present who desired to delve into the same. The testimony at this hearing of Dr. Tinley, an economist and milk expert from the University of California, who throughout the proceedings conducted in the Los Angeles area advised and consulted with the director, definitely tends to indicate that the then proposed order No. 40 was not the result of arbitrary action but, in fact, was the aftermath of much investigation and study of facts pertinent to such price fixing order. His testimony (and he was subjected to examination by persons present, including some of the respondents herein) and the other evidence, including exhibits, adduced at this hearing and occupying several hundred pages of transcript, cannot here be set forth. It should be stated, however, that it appears that the problem of fixing prices of milk is tremendous and highly technical because of the many types of distribution employed and the various sizes of containers used. As stated in Nebbia v. New York, 291 U.S. 502, 539, 54 S.Ct. 505, 517, 78 L.Ed. 940, 89 A.L.R. 1469, "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." In this connection, we are satisfied that the director complied with all requirements specified in the act and we cannot say, nor did the trial court find, that the director acted arbitrarily or capriciously at any time during the proceedings.

[26] We find no merit in respondents' assertion that irreparable injury has and will result to them under "General Order No. 40." Aside from the fact that some of them generally so testified (without producing their records to support the same, and on cross-examination their testimony was considerably weakened), it appears that the allegations of their complaint specifically

alleging irreparable damage were found by the trial court to be untrue. In addition to other matters, paragraphs XXI and XXII of this complaint alleged, in substance, that "General Order No. 40" establishing minimum wholesale and retail prices would, if continued in effect, cause damage and destruction to the business of many of the respondents to their great and irreparable injury. Paragraph XXVIII of the complaint alleged, in part, that said order would preclude the consumer-respondents from purchasing adequate quantities of milk. All three of these specific allegations were found by the court below to be untrue and respondents not having appealed may not here challenge them. The only other reference to the subject appears in "Finding XXV" which merely finds "That the allegations contained in paragraph XXIX of plaintiffs' complaint are true." Inspection of said paragraph of the complaint discloses that it merely alleges that the director, unless restrained, threatens to enforce against plaintiffs, to their alleged irreparable damage, the stabilization plan formulated by him, including order No. 40, "notwithstanding that all of said acts and threatened acts" of the director "are in violation of the laws and Constitution of the State of California and of the Constitution of the United States". It is immediately apparent that this allegation of irreparable damage, and the finding thereon, are not addressed to asserted damage that may result from the minimum prices prescribed in order No. 40, but, on the contrary, are based on the proposition that damage will result from the enforcement of a stabilization plan alleged and found to be the creature of an unconstitutional statute. This allegation and finding must necessarily fall with the findings, already shown to be without support, that the statute, and consequently everything done thereunder by the director, run counter to constitutional inhibitions. The statute and the plan here formulated being valid, no damage can be said to result from the enforcement of an asserted void plan created under an alleged unconstitutional statute.

What we have said earlier in this opinion upon the same subject in our discussion of the constitutionality of the act necessarily disposes of the allegation and finding that monopoly will result from the asserted fact that distributors may use all of the milk of certain producers as class 1 milk while that of others may be relegated by them to the lower classes bringing a smaller return. The discussion on this subject above appearing need not here be repeated. It discloses the finding and respondents' contention in connection therewith to be wholly without support.

[27] We have attempted to discuss and dispose of all material contentions and findings. Obviously, because of the great number thereof we cannot here refer to them all in detail. Those not specifically mentioned are either sufficiently covered by and included in what we have said or are so lacking in merit and support as not to require further attention. We are satisfied that the trial court clearly erred in permanently enjoining the appellant director from proceeding in the Los Angeles area under the act and under the stabilization plan theretofore proposed, adopted and declared effective by him in said area. The decree must, therefore, be reversed. The petition of the appellant director for a writ of supersedeas pending determination of this cause on appeal, and continued with the merits, necessarily becomes moot.

The petition for supersedeas is denied. The judgment is reversed with directions to the court below to proceed in accordance with the views herein expressed.

We concur: SHENK, J.; WASTE, C. J.; GIBSON, J.; CARTER, J.

EDMONDS, Justice (dissenting).

I do not know, nor do I consider it the judicial function to decide—as the majority of this court has done—that "producers and distributors of milk and the consuming public will benefit more under the protective wing of the act than they did under the destructive practices and influences" of free competition in the milk industry. Price fixing legislation is still in an experimental stage, and its ultimate worth as an economic policy is for the people of the state to judge. This court's only duty is to determine whether the legislature, in the particular instance, has dealt with this complex subject within the bounds of organic law and whether the officers entrusted with its administration have followed the authority committed to them.

I am of the opinion that in one provision of the present Milk Control Act the legislature has surrendered too large a share of its powers to administrative action. It may be conceded that a legislative body may delegate to administrative officers the au-

thority to determine facts which will put enactments into effect (Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 238 P. 703; Brock v. Superior Court, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127; Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; Hampton & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624) and to devise rules and incidental regulations which are necessary to implement and make effective the more general powers conferred. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175; United States v. Grimaud, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563. But the purpose which the legislature seeks to accomplish and the standards by which that purpose is to be made effective must be stated with sufficient exactness to enable both the administrative agency and those affected by the law to understand the limits of administrative authority. Tarpey v. McClure, 190 Cal. 593; People v. Parks, 58 Cal. 624; Schechter Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. Undefined authority is objectionable not only because it may be abused, but also because it is referable to no legal standard by which abuse may be controlled.

By section 736 of the Milk Control Act, the director of agriculture is authorized to designate marketing areas "which he deems necessary or advisable to effectuate the purposes of this chapter, and wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream or both are reasonably uniform". To my mind, this standard is so vague as to constitute no standard at all. The enforcement of the act in any particular area of the state and the determination of the size and location of such an area are matters which have been committed entirely to the unfettered discretion of the director. That such a delegation of power is unlawful seems to me to be too clear for argument. I am, therefore, of the opinion that the decision on this point in Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577, is not in accordance with established law and should be overruled.

I am also of the opinion that in the conduct of the hearing upon order 40, by which minimum wholesale and retail prices were established, the director did not regularly pursue the authority conferred upon him by the act. The opinion of the majority of the court shows that in this hearing, as in the others, the director did not conceive it to be his duty to introduce any evidence to support the findings and order which he afterwards promulgated; in fact he refused to do so.

At the hearing which the director called, counsel for the milk producers requested "that the Department put on its case briefly or in extenso so that we may have some appreciation of how these prices and regulations were arrived at and be prepared to answer them". To this request the director replied: "The Department has made a study of this particular area. We have with us information which you may delve into if you like. If you don't oppose the Plan at this hearing, or call upon us to give evidence upon some particular point that you want, I can see no object in that. We will just waste that much time, whereas if we can get your objection then we might be able to meet it. I think we will save time by having your man take the witness stand, or you take it, and make the proposals at this time, and let us consider them. Then if you want to know why we arrived at the procedure or the particular section of the Plan you have in mind, we will be glad to show you why."

To be sure, the director declared that his files were open for the examination of any one interested, and he invited those present to offer suggestions, objections or evidence concerning the proposed order. Moreover, the director's experts, who had worked up the evidence upon which the order was based, were available for questioning by interested objectors, and through this opportunity a considerable amount of evidence of a desultory nature was extracted. But the fact remains that the director refused to present, even in a general way, the foundational facts upon which his specific findings and order were based.

The majority of the court justifies this procedure by calling the present hearing a "legislative" as distinguished from a "judicial" or "quasi-judicial" hearing, from which it would follow that a hearing could be dispensed with entirely. To support this conclusion their opinion quotes at some length from Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796; "Assigned Car Cases", 274 U.S. 564, 47 S.Ct. 727, 71 L.Ed. 1204; Highland Farms Dairy v. Agnew, D.C., 16 F.Supp. 575; State Board

of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504, 179 A. 116, and Baldwin v. Dellwood Dairy Co., 150 Misc. 762, 270 N.Y.S. 418. These cases may be good authority for the proposition that the legislature in drafting the present law was not required under the due process clause to provide for a full judicial hearing, but not one of them justifies the interpretation given the statute now before the court.

For example, Norwegian Nitrogen Products Co. v. United States, supra, involved provisions of the Tariff Act of 1922 which required the tariff commission to make investigations and hold private hearings and report to the president upon proposed changes in tariff rates. It was held that in view of the history and background of the statute, the provision for a hearing did not require the commission to disclose secret trade information furnished to it in confidence. The decisions requiring public utility commissions to hold full public hearings in the exercise of their rate-making power were distinguished in this way [288 U.S. 294, 53 S.Ct. 359, 77 L.Ed. 796]: "The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial [citing cases]. Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. * * * The Commerce Act [49 U.S.C.A. § 1 et seq.], as it stands today, and kindred statutes in the states, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision. No such inference is to be drawn from the act before us now."

In the present case the director ordains; he does not advise. Moreover, the California Milk Control Act, like the public utility rate-fixing statutes, and unlike the Tariff Act of 1922, 42 Stat. 858, contemplates a judicial review of the administrative orders. For these reasons, in my judgment, the present case could have been more readily correlated to such decisions as Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288; St. Joseph Stock Yard Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033; and Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129, in which administrative action impinged directly upon legal rights through the fixing of rates for personal services. Assuming, however, that the regulation of the milk industry stands upon a different footing (Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469), the decisions of other jurisdictions interpreting particular milk control laws are not authority for a decision construing the very different terms of the California statute which contemplates the introduction of evidence by the director of agriculture to support an administrative order.

In the promulgation of an order establishing minimum wholesale and retail prices, the director is required first to investigate cost conditions in the distribution of milk and then after giving appropriate notice to "hold one or more public hearings, take testimony and may subpoena witnesses". All testimony received must be given under oath. A record of the proceedings must be kept and made available for the inspection of any interested person. The director is then required to make written findings determining that the prices which he proposes to establish comply with specified conditions and standards. All of these steps are conditions precedent to the issuance of the administrative order (sec. 736.12). Once made, such an order may be reviewed by any court of competent jurisdiction at the suit of any party substantially affected (sec. 735.6).

In my opinion these provisions clearly contemplate that no order shall be made by the director unless he shall present affirmative proof of facts justifying some action by him, and the particular requirements later made by his order must be reasonably supported by that evidence and any which may be offered in opposition to it. Any other procedure makes an empty form of the requirement for a hearing and an order based upon evidence and specific written findings. Moreover, it is only through such procedure that efficient judicial review of administrative orders may be had. As the court pointed out in Norwegian Nitrogen Products Co. v. United States, supra, an administrative hearing should be of "a kind that the courts will understand why a commission has

acted as it has". If no evidence is introduced at the hearing, a reviewing court cannot decide whether a challenged order was justified unless there is produced before it the evidence which the administrative officer should have heard. The point finds apt illustration in the present proceedings.

Complaint is made that the retail carry-out price fixed by Order 40 with respect to sales of milk in gallon lots is discriminatory because the differential is too slight between that price and the retail delivered price per gallon. Retailers who sell to the consumer at their stores in gallon lots claim that they cannot stay in business unless they can sell at a price substantially below the delivered price. There is some suggestion in the administrative record that the director was unable to secure cost statistics from gallon-lot retailers; at least there is no affirmative proof that the retail carry-out price per gallon was fixed with reference to the costs of such retailers. Section 736.12 requires that each particular price be "sufficient, but not more than sufficient, to cover all necessary costs, according to the method or type of distribution". But upon the record made, no reviewing court can determine whether the director complied with the statute in this particular.

For these reasons, I am of the opinion that the judgment should be affirmed.



15 Cal.2d 319

PENDLETON v. FERGUSON et al.

L. A. 16184.

Supreme Court of California.

April 29, 1940.

Patents ⇐190

In suit to quiet title to patents wherein defendant claimed right to the patents under an agreement granting to him exclusive right to manufacture, lease, use, sell and distribute in a stated area all pumps covered by patents mentioned in agreement and improvements thereon, reviewing court could not quiet title in plaintiff to two patents not mentioned in agreement where no issue was raised at the trial or on appeal whether patents covered improvements on the pumps and therefore passed under the agreement.

In Bank.

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

On rehearing.

Rehearing denied.

Prior opinion, 101 P.2d 81.

Arthur F. Larrabee and Randall & Bartlett, all of Los Angeles (Kenneth W. Kearney, of Los Angeles, of counsel), for appellants.

Marshall Nuckolls, of San Francisco, and Edmund S. Green, of Los Angeles, for appellant W. W. Thayer.

Ben F. Griffith and Malcolm Archbald, both of Los Angeles, for respondent.

PER CURIAM.

Respondent has petitioned for a rehearing or a modification of our decision to the extent of affirming the judgment of the Superior Court quieting respondent's title to two of the five patents which are the subject of this action. The two patents referred to are No. 1837669 issued December 22, 1931 and No. 1872801 issued August 23, 1932. Neither of these patents is mentioned in the agreement of May 15, 1924, under which agreement defendants Ferguson and Automatic Deep Well Pump Company claim to have acquired the rights asserted by them to the remaining three patents. Said agreement, however, granted to defendant Ferguson the exclusive right to manufacture, lease, use, sell and distribute all pumps and improvements thereon in the State of California and Mexico covered by the patents mentioned in said agreement.

No issue was raised at the trial nor on this appeal as to whether the patents issued on December 22, 1931 and August 23, 1932, respectively covered improvements on said pumps and therefore passed to defendants Ferguson and Automatic Deep Well Pump Company under the terms of the agreement of May 15, 1924, and the record in this case is insufficient to enable us to pass on this issue.

We did not purport to pass upon this issue in our decision, and in the event of a retrial of this case it will be within the province of the trial court to determine the same. Respondent's petition for a rehearing or modification of our decision is therefore denied.

15 Cal.2d 406

STERLING REALTY CO. v. RELFE et al.

S. F. 16366.

Supreme Court of California.

April 22, 1940.

1. Appeal and error ⇐597(1)

The statute authorizing appellant to specify such of the pleadings, papers, records, and files in "said cause" as he desires to have incorporated in transcript limits the transcript to pleadings, papers, records, and files in the "cause" tried before the court which pronounced the judgment appealed from. Code Civ.Proc. § 953a.

See Words and Phrases, Permanent Edition, for all other definitions of "Said Cause".

2. Appeal and error ⇐597(1)

Matters relating to application for temporary restraining order and temporary injunction were properly excluded from transcript on appeal from judgment on the merits, where proceeding on such application was had in another department of the superior court and before another judge, and application and affidavit in support thereof were not introduced in evidence on trial of cause on merits and were not before trial court in arriving at decision on merits. Code Civ.Proc. §§ 652, 953a.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Sterling Realty Company against Emily Relfe and others to quiet title. From a judgment for defendants, plaintiff appealed, and applied to have transcript of record certified with inclusion therein of matters ordered stricken by the trial judge, and an order to show cause was issued.

Order to show cause discharged, and petition denied.

Phil F. Garvey, of San Francisco, for appellant.

Ralph Alfred Wood, Jr., of San Francisco, for respondents Emily Relfe and Federal Const. Co.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco, for other respondents.

SHENK, Justice.

The petitioner, Sterling Realty Company, applied to this court to prove the reporter's transcript of the record on appeal in the case of Sterling Realty Co., Plaintiff, v. Emily Relfe et al., Defendants, (No. 279945 in the superior court in and for the city and county of San Francisco) and to have the chief justice certify such record, pursuant to the provisions of section 652 of the Code of Civil Procedure. An order to show cause was issued.

The plaintiff commenced the pending action to quiet title to numerous lots in the city and county of San Francisco. The petition herein discloses that the plaintiff had been the owner of the lots, but that they had been sold to Emily Relfe, defendant in said action, pursuant to street improvement assessment bond foreclosures. The plaintiff in said action applied for a temporary restraining order and a temporary injunction. The court issued an order restraining the execution and delivery of any deed or deeds to the property pending the hearing on an order to show cause why a temporary injunction should not be granted. The defendants answered and the issues framed by the pleadings came on for trial without any further action or hearing in the injunction proceeding. The court made and filed its findings of fact and conclusions of law in favor of the defendant and rendered judgment accordingly.

The plaintiff appealed from the judgment and gave notice for the preparation of a transcript pursuant to section 953a of the Code of Civil Procedure. Upon the hearing for the settlement of said transcript, the defendant, city and county of San Francisco, moved to strike therefrom the application for the restraining order, the affidavit in support thereof and the order to show cause issued thereon. The court granted the motion on the ground that the same were not a part of the trial proceedings and refused to certify the transcript as "in accordance with the facts", unless such matter was deleted. The plaintiff thereupon applied to this court to have the transcript certified with the inclusion therein of the matters ordered stricken by the trial judge.

The petitioner asserts that the refusal of the trial judge "to certify the transcript in accordance with the facts" will deprive it "of its substantive legal rights in the prosecution and presentation of its appeal". But nowhere is it shown that the exclusion or inclusion of said matter would affect any question arising upon the appeal from the judgment, which is on the merits of the case. The petitioner appears to rest upon the contention that certain language of section 953a of the Code of Civil Procedure authorizes the granting of its request. The pertinent provision of that section is: "If the judgment, order or decree appealed from, be not included in the judgment roll, the party desiring to appeal shall, on the filing of said notice, specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in said [reporter's] transcript in addition to the matters hereinbefore required and the same shall be included."

[1, 2] The foregoing provision limits the transcript prepared thereunder to the pleadings, papers, records and files "in said cause". It refers to the "cause" tried before the court which pronounced the judgment appealed from. The injunction proceeding here in question was not a part of the cause tried. It related to a provisional remedy sought in advance of the trial. The return to the order to show cause herein shows that the proceeding on the application for a temporary restraining order and a temporary injunction was had in another department of the superior court and before another judge; and that the application and affidavit in support thereof were not introduced in evidence on the trial of the cause on the merits and were not before the trial court in arriving at its decision.

The petitioner makes no contention that the transcript is not otherwise in compliance with the statute. As the additional matters sought now to be included had no part in the determination of the case, we conclude that the trial judge properly refused to include them in the transcript. The petitioner is, therefore, not entitled to the relief sought. Gallardo v. Atlantic Pac. Tel. etc., 49 Cal. 510.

The order to show cause is discharged and the petition is denied.

We concur: WASTE, C. J.; CURTIS, J.; CARTER, J.; GIBSON, J.; HOUSER, J.; EDMONDS, J.

McDONALD v. MORLEY et al.

MORLEY v. McDONALD.

L. A. 16773.

Supreme Court of California.

April 23, 1940.

1. Joint tenancy ⇐1

An estate in "joint tenancy" requires unity of interest, title, time and possession.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

2. Joint tenancy ⇐6

A distinguishing incident of estate in "joint tenancy" is right of survivorship.

3. Descent and distribution ⇐11
Joint tenancy ⇐5
Tenancy in common ⇐3

A provision of spouses' property settlement contract, made before their divorce, that if either died, deceased's interest in realty held by them as joint tenants should go to their daughter, was inconsistent with estate in "joint tenancy", which was thereby terminated, and spouses were thereafter "tenants in common" with separate descendible interests.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenants in Common".

4. Appeal and error ⇐1039(2)

On appeal from judgment on issues presented by appellant's complaint and respondent's answer thereto in consolidated actions brought by appellant and respondent against each other, it is immaterial whether respondent's complaint stated cause of action, where evidence fully supported findings which compelled judgment rendered and respondent was given no relief on cause of action alleged in her complaint.

5. Appeal and error ⇐882(10)

Defendant, appealing from judgment rendered, is in no position to complain of trial judge's refusal to allow defendant to offer evidence on his cross-complaint, where defendant's counsel said, when allegations of such pleading were called to trial judge's attention, that "we won't urge that", thereby in effect renouncing defendant's right to trial of his alleged cause of action for damages.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Consolidated actions by James C. McDonald against Helen Katherine Morley, individually and as executrix of the Estate of Evelyn McDonald, deceased, to quiet title to realty, in which defendant filed a cross-complaint for declaratory relief, specific performance of a property settlement agreement and establishment of a trust, and by Helen K. Morley against James C. McDonald for decedent's half interest in realty and defendant's interest therein, subject to his life estate, in which defendant filed a cross-complaint to recover damages for malicious prosecution and rent of such property. From the judgment rendered, James C. McDonald appeals.

Affirmed.

Arthur E. Schifferman, of Los Angeles, for appellant.

Dana Ong and Le Roy Anderson, both of Los Angeles, for respondents.

EDMONDS, Justice.

Under a contract made by the appellant and Evelyn McDonald, his wife, before their divorce, they agreed to a disposition of the real property which is here in controversy. She subsequently died and the judgment appealed from upholds the contentions of the respondent, who is their daughter, that she succeeds to an undivided one-half interest in it under her mother's will. The rights of the parties depend upon a provision of the property settlement agreement concerning joint tenancy.

The agreement recites that the property shall "be and remain in Joint Tenancy, as it now stands, until such property can be sold for a sum of not less than ten thousand dollars * * * [which amount] or such other sales price as the parties may agree upon * * * to be equally divided between the parties hereto. It is further understood and agreed that * * * [Mrs. McDonald] shall pay for all repair work on said property that may be found necessary by * * * [her], and further that * * * [she] shall receive all income from this property until such time as same can be sold". Other provisions of the contract are that Mrs. McDonald shall have the right to reside on the property until it is sold or she desires to reside elsewhere; that she may operate a school thereon and receive all income therefrom as her separate property; and that each of the parties shall pay one-half of the "interest on present loan", taxes, insurance, and other carrying charges.

The parties also agreed that in the event of the death of either of them, then "his or her share and interest therein shall become the property of their daughter, Helen K. Morley". A futher provision is that for the protection of Mrs. Morley, "a suitable legal instrument shall be made by each of the parties". This requirement was not complied with, nor was the property sold.

The appellant's action is against his daughter in her capacity as executrix of her mother's will, of which she is the sole beneficiary, and as an individual, to quiet title to the property. She filed an answer denying the allegations of the complaint and claiming title in herself. By a cross-complaint, she alleged that the contract made by him and her mother entitled her to declaratory relief, specific performance of the provisions of the agreement by a conveyance of appellant's interest in the property to her, and a determination by the court that he is now holding his interest in trust for her. A demurrer to the cross-complaint was sustained without leave to amend, but no appeal has been taken from that ruling.

Mrs. Morley later filed a separate suit against her father, claiming that she is entitled to the undivided one-half interest in the property which belonged to her mother. She also asked the court to require the appellant to convey his interest in the property, subject to a life estate in his favor, to her. He demurred generally and specially, and moved to strike the complaint. The motion was denied and the demurrers overruled. He then filed an answer which included nine affirmative defenses and two counts by way of cross-complaint. In the cross-complaint he demanded damages for malicious prosecution upon the ground that the same cause of action was asserted by his daughter in her cross-complaint to the action to quiet title. He also sought to recover rent of the property.

The two actions were consolidated and upon trial the court rendered judgment that the estate of Evelyn McDonald and James C. McDonald are each entitled to an undivided one-half interest in the real property and also to one-half of its income after Mrs. McDonald's death, with carrying charges to be apportioned accordingly. A further provision is that, in accordance

with the terms of Mrs. McDonald's will, the respondent is entitled to her mother's share of the property, subject to administration. The appeal is from this judgment.

The appellant's main contention is that the trial court erred in construing the property settlement agreement. He takes the position that as the property was to "be and remain in joint tenancy" until sale, there could be no severance of the joint tenancy until that event occurred, hence, he is now entitled to his former wife's interest in it by virtue of his right of survivorship. He also insists that the provision concerning his daughter's right to the property in the event of his or Mrs. McDonald's death was ineffective for any purpose because the "legal instruments" contemplated by the parties were never executed. Another point relied upon by him is that the complaint filed by his daughter does not state a cause of action in equity, and the court erred in refusing to hear evidence upon his cross-complaint for malicious prosecution.

The trial court found "that the right of survivorship of the joint tenancy was severed between the parties by agreement" and, more particularly, that it was their intention to do so. It also found that Mrs. McDonald carried out the terms of this agreement by making a will, and that so far as its provisions concern the disposition of the property after the death of either of the parties, it was made for the benefit of the respondent.

[1-3] At the time when Mr. and Mrs. McDonald made their agreement, they held title to the property "as joint tenants". Such an estate requires unity of interest, unity of title, unity of time, and unity of possession. DeWitt v. San Francisco, 2 Cal. 289; Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003; Swartzbaugh v. Sampson, 11 Cal.App.2d 451, 54 P.2d 73; Tiffany, "Real Property", 3d ed., vol. 2, sec. 418. A distinguishing incident of it is the right of survivorship. Siberell v. Siberell, supra. But by their contract the parties specifically provided that if either one of them died, the interest of that one should not go to the survivor but to the daughter. This is entirely inconsistent with an estate in joint tenancy, which was thereby terminated. Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513. Thereafter, Mr. and Mrs. McDonald were tenants in common with separate descendible interests.

[4, 5] It is immaterial whether the respondent's complaint stated a cause of action, because the evidence fully supports the findings which compelled the judgment rendered. This judgment is upon the issues presented by the appellant's complaint to quiet title and the respondent's answer thereto. She was given no relief upon the cause of action alleged in her complaint. Also, the appellant is in no position to complain that he was not allowed to offer evidence upon his cross-complaint charging malicious prosecution. When the allegations of this pleading were called to the attention of the trial judge, after some discussion counsel for appellant said, "All right, we won't urge that." This statement was, in effect, a renunciation of any right the appellant may have had to a trial of his alleged cause of action for damages.

The judgment is affirmed.

We concur: WASTE, C. J.; GIBSON, J.; CARTER, J.; HOUSER, J.; CURTIS, J.; SHENK, J.



15 Cal.2d 439

BALLARD et al. v. MacCALLUM et al.
L. A. 16750.

Supreme Court of California.

April 26, 1940.

1. Trusts ⇦13

Where trustor, aged 85, conveyed property to trustee in consideration of monthly payments from beneficiary for life and provided for conveyance of property to beneficiary upon trustor's death, fact that trustor died shortly after the agreement was made, so that actual obligations of the beneficiary were slight, did not render transaction inequitable.

2. Trusts ⇦13

Where trust agreement provided for payment of certain charges and payments to trustor by beneficiary and that, in case of default for 10 days or 30 days after notice in writing, trustor at his option could cancel trust, beneficiary's claim to rights in trust estate was not rendered inequitable

by failure to make required payments, since she was still obligated to pay at decedent's death and remedy of forfeiture after notice was available if she refused.

3. Contracts ⇐318

Equity will relieve even against an express provision for forfeiture. Civ.Code, §§ 3275, 3369.

4. Trusts ⇐112

Where there were two possible constructions of a trust instrument, one of which would lead to forfeiture of beneficiary's rights in the corpus of the trust and the other would avoid forfeiture, that construction would be adopted which avoids forfeiture.

5. Trusts ⇐59(2)

Where beneficiary agreed to pay monthly sum to trustor and other charges and trust agreement provided that in default of payments for 10 or 30 days after notice in writing trustor at his option could cancel trust, and declaration of trust provided that, on default of beneficiary to make payments and failure to cure default in accordance with terms of agreement, trustee should reconvey the property to trustor and trust should cease, beneficiary's default in making payments did not automatically terminate her rights, but gave trustor election to serve notice of default and thereby terminate such rights after failure to cure default within required period.

In Bank.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Willa Ballard and another, as administrators of the estate of William Alpheus Ballard, also known as W. A. Ballard, deceased, against Emilie G. MacCallum and others, to cancel a trust created by decedent as trustor and to obtain a reconveyance of the corpus of the estate. From a judgment for the defendants, plaintiffs appeal.

Affirmed.

William L. Kuehn and Franz R. Sachse, both of Los Angeles, for appellants.

Phillip N. McCaughan, of Long Beach, for respondent Emilie G. MacCallum.

Edmund Nelson and Hugo Steinmeyer, both of Los Angeles, for respondent Bank of America Nat. Trust & Savings Ass'n.

GIBSON, Justice.

This is an action by the administrators of the estate of William A. Ballard to cancel a trust created by decedent as trustor, and to obtain a reconveyance of the corpus of the estate. The trial court gave judgment for defendant and plaintiffs appealed. The appeal involves the interpretation of two instruments, one denominated a "contract of annuity for life" and the other a "declaration of trust".

On January 14, 1935, decedent, then eighty-five years of age, executed the annuity contract under which he agreed to convey certain property to the California First National Bank of Long Beach as trustee, for the benefit of defendant Emilie G. MacCallum. In consideration therefor she agreed to pay him the sum of $110 per month during his natural life and also to pay all taxes, assessments and insurance premiums, and to keep the property in repair. It is stated that time is of the essence of the contract and that if the payment or charges be not paid as provided therein the interest of Miss MacCallum shall be forfeited and the property shall revert to Ballard. The trustee is authorized by Ballard to convey the property to Miss MacCallum upon his death, if the agreement is fully kept.

It is further provided that in the event of default in payments by the beneficiary, which default shall continue for ten (10) days after notice in writing given by the trustor or trustee, or in the event of default in discharging liens or encumbrances which shall continue for thirty (30) days after such notice in writing, or in the event of failure to pay any of the taxes or assessments in the time provided by law, the trustor, "at his option, after thirty (30) days' notice" may declare the agreement cancelled, and the trustee shall then reconvey the real property to the trustor. The contract declares that all of the obligations of the beneficiary are "conditions precedent to be faithfully kept and performed * * * strictly in accordance with the terms of this agreement" to entitle her to continue in possession of the property.

A declaration of trust was contemporaneously executed by the California First National Bank of Long Beach as trustee, and decedent as trustor, for the benefit of Miss MacCallum, to carry out the terms of the annuity contract, which was incorporated by reference. The declaration provides

that "in the event of the failure of the Beneficiary hereunder to make the payments as and when provided for under the agreement", or any other default by the beneficiary, "providing further that said default has not been cured in accordance with the terms of said agreement", then the trustee shall reconvey the property to the trustor, "and said trust, upon such reconveyance, shall absolutely cease and determine * * *". It is further provided that in the event of the death of the trustor, "this trust shall ipso facto cease and determine at the time of such demise, and the entire trust property shall be by said Trustee conveyed and delivered so far as it may then be able, to Emilie G. MacCallum, a single woman, provided the payments and obligations of said agreement * * * be fully performed until the death of said Trustor".

Defendant Bank of America succeeded the First National Bank of Long Beach as trustee. On December 22, 1936, Ballard died intestate and plaintiffs duly qualified as administrators of the estate. Thereafter plaintiffs brought this action to compel the reconveyance of the property to the estate.

Four causes of action were set forth in the complaint. The first was based upon the alleged failure of Miss MacCallum to make payments and to perform other obligations of the contract. The second alleged incompetency of Ballard and undue influence of Miss MacCallum at the time of the execution of the contract and declaration of trust. The third cause of action alleged that the consideration for the contract and declaration of trust was wholly inadequate. The fourth alleged that the consideration had failed by reason of nonperformance of defendant MacCallum. The complaint contained no allegation that notice of the alleged default or nonperformance by Miss MacCallum was ever given to her.

At the trial defendant objected to the introduction of evidence on the ground that the annuity contract and declaration of trust provide for termination only after notice of default given to the beneficiary, and that the complaint failed to state a cause of action because no such notice was alleged. The court sustained this objection as to the first and fourth causes of action. After trial on the second and third causes, the court found against plaintiffs on the issues raised and rendered judgment for defendants.

As already stated, the determination of this appeal depends upon the proper construction of these two instruments. No question is raised as to the sufficiency of the evidence to justify the findings in favor of defendants on the other issues.

An inspection of the provisions of the two instruments discloses the controversy between plaintiffs and defendant MacCallum as to their effect. Certain language suggests that if the beneficiary fails in her obligation to make the monthly payments or to meet other charges against the property, the right shall *automatically* cease, that is, they shall be forfeited and the land shall revest in the trustor and his successors without any action on their part. This inference may be drawn, for example, from the provision that all of the rights "shall cease and determine and be forfeited * * * and the property shall revert", and the provision that each and all of the terms of the agreement are "conditions precedent" and must be strictly performed by the beneficiary to entitle her "to continue in possession". Other language justifies the opposite inference, namely, that there is no automatic forfeiture or divestment of rights of the beneficiary upon default, but that written notice of default, followed by failure to cure the same for a specified period, is a prerequisite to the power to forfeit rights of the beneficiary and to retake the property. This is the normal effect of the provisions of the agreement that in case of default for ten days or thirty days after notice in writing, the trustor at his option may cancel the agreement. This view is reinforced by the statement in the trust instrument providing for termination of the trust upon default, "and, providing further, that said default has not been cured in accordance with the terms of said agreement".

Faced with these contradictory provisions the trial court adopted the latter view, holding that the mere default by the beneficiary did not immediately terminate all her rights, but gave the trustor an election to serve notice of default and thereby terminate after the failure to cure the same within the required period. This interpretation of the trial court, if reasonable, must be upheld.

Plaintiffs attack the judgment on several grounds. They first call attention to the

familiar rule that inconsistencies in an instrument should if possible be reconciled so as to give effect to every part of the agreement. They contend that the court has given effect only to the provisions requiring notice prior to cancellation, and has ignored the provisions for automatic forfeiture upon default. Their suggested reconciliation is to treat the trust as terminable by the trustor during his lifetime only after notice of default, but to hold it subject to forfeiture without notice if at the death of the trustor the beneficiary has not fully performed. In support of their theory they lean heavily upon the provision that performance by the beneficiary is a "condition precedent". They also argue that the trial court's construction of the instruments is inequitable, in that it permits the beneficiary to reap the benefits of the contract even though it is alleged that she did not perform on her part.

[1] We may first notice the argument based on the so-called equities of the case, and here it is important to grasp the distinction between what the contract contemplates and what may happen by reason of unforeseen circumstances. There is nothing inequitable in a bargain merely because it turns out better for one party than the other. The fact that the trustor died shortly after the agreement was made, so that the actual obligations of the beneficiary were slight, was simply one of the contemplated possibilities. He might have lived a considerable time and her obligations might have been quite large. These uncertainties are inherent in any agreement of this character. The original agreement gave the trustor the assurance of support for the rest of his life in exchange for a transfer of his property, and its fairness is not open to question.

[2] Nor is it necessarily inequitable that defendant claims rights in the property despite failure to make her required payments. She was still obligated to pay at decedent's death and the remedy of forfeiture after notice was concededly available if she refused. If she has not yet paid she can still be held liable. In short, the contract itself provides an ample remedy for any default on the part of defendant and the agreement as thus interpreted is not therefore rendered inequitable by any alleged failure of defendant to perform.

Next we have the assertion that the court fails to give effect to the whole of the contract. The answer is, of course, that where the agreement contains inconsistent provisions, it is impossible to give each its full effect, and plaintiffs' argument is nothing more than a plea that we choose those favorable to them. The suggestion that the provisions differ depending on whether the trustor is living or dead is without any support in the text of the agreement, and the distinction has no relevant connection with the objects of the parties.

[3] In the face of these plain contradictions in the instruments, a fundamental rule of construction becomes applicable. the interpretation sought by plaintiffs is one which would lead to the forfeiture of property rights by reason of the mere failure to make payments strictly on time. In this state, by a long line of decisions, we have recognized such forfeitures in instalment contracts for the purchase of land and in conditional sales of goods. But aside from these special situations, our courts follow the accepted doctrine that equity will relieve even against an express provision for forfeiture. See Civ.Code, §§ 3275, 3369; Ebbert v. Mercantile Trust Company, 213 Cal. 496, 2 P.2d 776; Hopkins v. Woodward, 216 Cal. 619, 15 P.2d 499; Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 69 P.2d 849; 20 Cal.L.Rev. 194; 21 Cal.L.Rev. 516; 18 Cal.L.Rev. 681; 52 Harv.L.Rev. 129.

[4] In the instant case we are not required to apply this doctrine and grant relief from express and unmistakable language compelling a forfeiture. The problem here is much simpler. We have two possible constructions, one of which leads to a forfeiture and the other avoids it. In such a case the policy and rule are settled, both in the interpretation of ordinary contracts and instruments transferring property, that the construction which avoids forfeiture must be made if it is at all possible. See Hawley v. Kafitz, 148 Cal. 393, 83 P. 248, 3 L.R.A.,N.S., 741, 113 Am.St. Rep. 282; Henck v. Lake Hemet Water Co., supra; Restatement, Property, sec. 45, comment i.

[5] The interpretation urged by plaintiffs could give rise to great injustice in the operation of this contract. Under their theory the beneficiary could keep on paying monthly sums to the trustor and all the expenses of maintaining the property for a period of years, and yet the slightest subsequent failure in the prompt perform-

ance of any one of her obligations would automatically terminate all of her rights and deprive her of the only return provided for her performance. In the Ebbert case, supra [213 Cal. 496, 2 P.2d 777], this court found that the terms of the contract were to this effect, and that the provision for forfeiture expressly applied "irrespective of the kind or extent of default in performance, or the amount of beneficial performance already received". There it became necessary to overturn the very language of the agreement in order to avoid such a grossly inequitable result. Here it is only necessary to reconcile the conflicting provisions of the instruments in favor of those which avoid the inequitable forfeiture urged by plaintiffs.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; CARTER, J.; HOUSER, J.; EDMONDS, J.



15 Cal.2d 413

CALIFORNIA-WESTERN STATES LIFE INS. CO. v. FEINSTEIN et al.

L. A. 16865.

Supreme Court of California.

April 25, 1940.

1. Appeal and error ⇐1011(1)

Findings of trial court, based on conflicting evidence, will not be disturbed on appeal.

2. Insurance ⇐367(1)

Under policy containing life and disability provisions, the provisions of policy relating to paid-up and automatic extended insurance were not applicable to the disability provisions, and insurer could declare policy forfeited as to disability provisions before termination of grace period, on nonpayment of premiums.

3. Insurance ⇐388(3)

An insurer which sent two letters to insured, which were unanswered, urging a reply by return mail in order to keep life and disability policy in force, and which thereafter sent insured an application for reinstatement of lapsed policy, did not "waive" its right to claim lapse of policy.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Insurance ⇐365(2)

An insurer could not "waive" its right to rescind disability provisions of policy, on ground of false representations made by insured in his answers to questions in application for reinstatement of lapsed policy, until insurer had become aware of the falsity of the representations.

5. Insurance ⇐255

Answers to written questions set forth in applications for insurance are generally deemed "material representations". St.1935, p. 505, § 334.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Representations".

6. Insurance ⇐256(2)

The presence of an intent to deceive at time of making a false representation, which is material to the risk, in application for insurance, is not essential to justify rescission of policy. St.1935, p. 505, § 334.

7. Insurance ⇐365(2)

A false answer to question, in application for reinstatement of lapsed life and disability policy, whether insured had consulted a physician for any ailments since policy was issued, constituted a "material representation" justifying cancellation of disability provisions where policy permitted reinstatement only on production of evidence of insurability satisfactory to insurer and false representation was material to the risk. St. 1935, p. 505, § 334.

8. Evidence ⇐516

In action to cancel disability provisions of life and disability policy on ground of false representations in application to reinstate lapsed policy, testimony of insurance experts, as to usage of insurers in matter of rejecting a risk had insurers been apprised of facts concealed by insured, was admissible.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by the California-Western States Life Insurance Company against Philip Feinstein and others, to cancel the disability provisions of a life policy. From an adverse judgment, defendants appeal.

Affirmed.

L. E. Dadmun, of Los Angeles, for appellants.

John J. Ford, Frank M. Benedict, and Ford, Benedict & Ford, all of Los Angeles, for respondent.

PER CURIAM.

This appeal was taken from a judgment entered in favor of plaintiff in an action brought by the plaintiff insurance company to have canceled the disability provisions of an insurance policy issued to defendant Philip Feinstein. The other defendants are beneficiaries under the life provisions of the policy.

The facts as found to be true by the trial court appear as follows: That on or about the 28th day of October, 1925, the plaintiff's predecessor issued a life insurance policy in favor of defendant Philip Feinstein; that a premium which was due the plaintiff company on October 28, 1935, was not paid when due, nor during the grace period thereafter; that on November 28, 1935, by reason of such nonpayment of premium, the policy lapsed; that on or about December 30, 1935, the insured executed a written application for the reinstatement of said policy (which at that time included provisions for both total and permanent disability benefits); and that on January 10, 1936, the company purportedly reinstated the said policy.

It was further found that for the purpose of inducing the plaintiff to reinstate the policy the insured made false representations in the application therefor, to the effect that at the time he executed the same he had no "injury, deformity or symptoms of sickness" nor had he "consulted a physician for any ailments since said policy of insurance was issued"; that the representations were made with the intent that the plaintiff should rely and act thereon; and that the plaintiff, "relying solely upon the representations" made by the insured and without knowledge of the falsity of the representations, reinstated the policy. It also was found that the insured had declared in the application that he had carefully read each of the answers to the several questions; that they were each written as made by him and that each was "full, complete and * * * true when made", although at that time he knew them to be false. Furthermore, in that connection it was found that if the insurer had known that the representations were false it would not have reinstated the provisions of the policy which related to total and permanent disability benefits, which had been set forth in a rider attached to the policy and designated "Special Benefits".

It also appeared that on June 1, 1936, approximately five months after the policy had been reinstated, the insured made application for both total and permanent disability benefits under the policy, and in said application he disclosed the names of doctors with whom he had consulted both before and after he had executed the application for reinstatement. Upon receipt by the plaintiff insurer of the application for disability benefits, for the first time, it learned of the falsity of the representations which the insured had made in his application for reinstatement of the policy. Thereafter, the insurance company brought the instant action to have rescinded those provisions of the policy which related to total and permanent disability benefits.

On the trial it was shown by uncontradicted evidence that on August 12, 1935, the insured had consulted Dr. Samuel Swezey, a physician and surgeon, with regard to certain physical ailments of which the insured complained at that time, and that thereafter he had undergone a series of twenty-six treatments by Dr. Swezey, the final of which occurred on October 16, 1935. It also appeared that in November, 1935, the insured had consulted an osteopathic physician for similar ailments.

However, in other respects, the evidence was sharply conflicting, as shown by the following resume: The insured testified that on December 30, 1935, at the time he executed the application for reinstatement, he was present at the office of his son, Jerry Feinstein (who also was engaged in the insurance business); that on that occasion Mr. Gerald Page, one of the insurer's agents, brought the application form to that office and requested the insured to write his answers to the questions set forth therein; and that the insured thought the form was an application to change the premium payments on the policy. With regard to the first question which related to whether applicant had consulted a physician for any ailments since issuance of the policy, and whether he was then suffering from any illness, injury, etc., the insured testified that he had stated to Mr. Page that he had seen a doctor with reference to a cold and indigestion, and inquired "whether that meant anything"; and that Mr. Page, in effect, had replied

that the company was not interested in minor ailments—that if the insured had not been in a hospital nor had an operation he could write the answer "no" to the first question. The insured further testified that after the application form had been filled in Mr. Page signed it (as a witness) and *took it away with him.* The foregoing testimony was corroborated by Jerry Feinstein who asserted he was present when the conversation last referred to took place, and that he had heard Mr. Page state that the application form was one which related to a change in the premium payments. It might here be stated that despite Philip Feinstein's testimony that Mr. Page had told him that he could write the answer "no" to the first question, the insured did not at that time nor at any time thereafter fill in an answer to that question; in fact, it was conceded that that question remained unanswered until after the executed application had been returned to the plaintiff insurance company.

In direct conflict with the testimony set forth by the insured concerning the time and place at which the application for reinstatement was made is that adduced by the plaintiff. In that regard Mr. Page gave positive testimony that he did not take the application form to Philip Feinstein in person; that not only was it sent to the latter through the mail but that it was returned to the company by mail; and that Mr. Page was not present on December 30, 1935, at the time or place mentioned by the insured in the presence of either Philip or Jerry Feinstein, or otherwise. Mr. Page further testified that after the application had been returned to the company he had examined and signed it and on discovering that the first question had not been answered he telephoned to Philip Feinstein and informed him of his failure in that regard; that he asked the insured what answer he desired to make to the said first question; and that he was told the answer would be "no", whereupon Mr. Page wrote that answer in the blank space provided therefor. Another of the plaintiff's employees, Mr. John A. Mason, who acted as cashier of the insurance company, testified that the executed application was returned to the office of the company *through the mail* on December 31, 1935. He also testified that the words "Received, December 31, 1935, Southern California Branch Office" which were shown to have been stamped on the back of the application form were imprinted thereon by a stamp which the plaintiff company was using at that time to record the date of receipt of incoming mail.

It further appeared that in filling in the blanks on the application form the insured gave an affirmative answer to the question "Did the attached application for reinstatement come to you by mail?" On the trial the insured was asked why he wrote the word "yes" as his answer to the question above quoted. He replied that Mr. Page had told him to answer that question in the affirmative. However, it was shown that that question appeared in a portion of the printed form of application which contained questions not intended to be answered by the applicant but which was designed for the notation of data to be made by the insurer after the executed application form had been returned to the latter. Also it appeared that the insured had not placed his signature on the line designated therefor in the application, but that he had placed it likewise in that portion of the application form which was not intended to be completed by the insured.

It is at once apparent that the conclusions to be drawn by the trial court from the testimony hereinbefore recited, together with the inferences which might have been drawn therefrom, became of paramount importance in the determination of the question of the right of the plaintiff insurance company to rescind the contract on the ground that it had been induced to reinstate the insurance policy by reason of the false representations made by the insured in the application for reinstatement. The trial judge, who saw the witnesses and heard them testify, believed the evidence adduced by the plaintiff, namely, that the application form had been executed by the insured at a time when Mr. Page was not present; that the insured had returned the same to the plaintiff through the mail; and that thereafter he had voluntarily authorized the writing of the answer "no" to the first question, as hereinbefore referred to.

The record shows that the trial court drew the following inferences from the evidence hereinbefore recited: That had Mr. Page been present personally when the application form was executed, he then and there would have required Mr. Feinstein to fill in the answer to the first question—and, therefore, that that answer would not have appeared on the form in Mr. Page's handwriting; that he would

have made certain that the signature of Mr. Feinstein was placed on the proper line designated therefor in the application form, and that he would not have permitted it to be placed in a portion of the form not intended to be used by the insured; furthermore, that had Mr. Page been present he would have examined the form and found that the insured had signed his name on the wrong line, and he would then have requested the latter to re-sign his name on the proper line. Also, with regard to the testimony of the insured that he thought the form which Mr. Page gave him was a form for change of premium payments, the trial court drew the inference that if Mr. Page in fact had been present he would not have made any statement to that effect—since the latter was shown to have been familiar with the various printed forms used by the insurer in its business and, therefore, he would not have represented that particular form to be anything other than what it was, inasmuch as no purpose would have been served at that time by the making of a misrepresentation in that regard. It further was shown that the insured had permitted the policy to lapse on other occasions in the past and as a consequence thereof in each such former instance, in accordance with the terms of the policy, the insured had executed a form of application for reinstatement practically identical in language with that here concerned; that, therefore, he could not be said to have been unfamiliar with the nature of the particular form which he executed on December 30, 1935, and that, consequently, his statement that he thought the application form was one for change of premium payments was open to question.

Also, with regard to the fact that the insured wrote the answer "yes" to the printed question whether he had received the form of application through the mail, —aside from the fact that that question was not intended to be answered by the insured,—there appears to have been no reason at that time for the making of a false answer thereto. Therefore, the trial court might well have inferred that had Mr. Page been present he would not have told the insured to write the answer "yes" to that question, nor would he have permitted the insured to write anything whatever in the space reserved for data to be recorded by the insurer.

[1] Other evidence, both written and oral, was adduced by the respective parties which tended to support that given by each on the question whether Mr. Page was present when the application form was executed and was therefore in a position to have advised the insured in the respects testified to by the latter, or whether in fact the insured executed the application form without such asserted advice and returned it by mail to the insurer. However, sufficient has been set forth hereinbefore to indicate that the evidence presented a clear and substantial conflict. Not only was the evidence elicited from each party diametrically contrary to that offered by the other on material questions, but in some respects the evidence thereon offered by each was in itself conflicting. Under those circumstances, it is a well-established rule that on a review of the evidence, together with the inferences which could have been drawn therefrom, the conclusion to be reached was solely for the trial court, who saw the witnesses and heard them testify, and that the findings made thereon by the trial court may not be disturbed.

[2] Appellants contend that under the provisions of the policy that relate to "paid-up" and "automatic extended insurance", after three full years' premiums have been paid, a forfeiture of the policy (including both life and disability insurance) could not have been declared because of the insured's failure to make the premium payment before termination of the grace period. It here may be said that the validity of the life provisions of the said policy are not being questioned. However, respondent points to certain language of the life policy as well as to that appearing in the provisions of the disability insurance which, it contends, shows conclusively that the provisions for "automatic extended insurance" were intended to apply only to that part of the policy that relates to life insurance, as distinguished from the provisions of the rider which cover the "Special Benefits" or disability insurance. One of the provisions of the rider is as follows: "If at any other time than at the end of the original premium payment period this policy shall be continued under any paid-up or extended insurance provisions thereof, these 'Special Benefits' shall thereupon become null and void and all liability of the Company under the same shall cease." In that regard respondent cites the

case entitled Henricks v. Metropolitan Life Ins. Co., 7 Cal.2d 619, 61 P.2d 1162, 1170, in which the court was construing section 450, Civil Code (now section 10151, Ins. Code), and in which case it was pointed out that the section was designed to prevent the loss of the reserve to the insured (in the event of nonaction on the part of insured) where a life insurance policy had lapsed by reason of nonpayment of a premium after three full years' premiums had been paid thereon. In that case it was held that under the language of the code section and by "the great weight of authority * * * double indemnity benefits are not carried over to nonforfeiture insurance". Furthermore, in the instant case, the provisions with regard to paid-up insurance state that after three full years' premiums shall have been paid on the said policy, the company "will grant to the Insured an amount of paid-up *life* insurance, not less than the cash value, if any, will purchase". And in that part of the policy relating to "automatic extended insurance", it is provided that after premiums have been paid thereon for three full years, in event of nonpayment of premium before date when due, the full amount of insurance under the policy will be automatically extended from said due date "as term insurance" for such period as the cash value of the policy, if any, less any indebtedness thereon, "will purchase as a net single premium at the then attained age of the Insured, according to the American Experience Table of Mortality"—which calculation obviously would not be used in connection with *disability* insurance. It is also stated in the last-mentioned provision that in lieu of such "automatic term insurance", upon proper request therefor by the insured, the company "will endorse on the policy the amount of paid-up *life* insurance which the excess of the cash value of this policy, if any, over such indebtedness will purchase at the then attained age of the Insured on the mortality and interest basis heretofore designated, or will pay said excess in cash". (Emphasis added.) From the foregoing it is clear that the provisions of the policy here concerned which relate to automatically extended insurance may not be held applicable to the "Special Benefits" (disability) insurance.

[3, 4] Appellants further argue that even assuming that there was a breach in the insurance contract by the failure of insured to pay the premium which fell due on October 28, 1935, the company "continued to recognize the existence of the policy as in force until October 9, 1936", and that such conduct on the part of the insurer constituted a waiver of the breach. However, in making that contention appellants apparently have overlooked the force and effect of the fact that by virtue of its having required,—pursuant to its right in that regard,—shortly after November 28, 1935, that the insured execute an application for *reinstatement,* the respondent necessarily had recognized the lapsing of the policy as of that date. Under the facts hereinbefore stated, it therefore cannot seriously or successfully be contended that respondent "continued to recognize the existence of the policy as in force" from October 28, 1935, until October 9, 1936. Obviously, the fact that following lapse of the policy the insurer required the insured to execute an application for reinstatement would negative any asserted claim by the insured that the insurance company had waived its right to recognize the policy as having lapsed. The evidence shows that on December 2, 1935, and again on December 13, 1935, the insurer mailed a letter to the insured concerning a proposed plan to change the method of payment of the premiums, and that in each of those letters the insurer urged a reply "by return mail in order to keep the policy in force", but that the insurer received no reply to either of those letters. The most that can be said concerning the effect of those letters is that, before exercising its right to require the insured to file an application for reinstatement, the insurer was extending to the insured a reasonable opportunity to keep the policy in force, which was made conditional upon its receipt of a prompt reply from the insured. It also appears that on December 27, 1935, the insurer again wrote to the insured stating that on December 26, 1935, it had received from him the "Blue Note" (in accordance with the plan of premium payment theretofore used by the parties), but advising the insured that since the grace period had expired on November 28, 1935, it would require him to sign "the attached health certificate" (application for reinstatement). As hereinbefore has been indicated, the insured was familiar with the procedure of the insurance company in the matter of requiring the filing of an application for reinstatement following lapse of the policy for nonpayment of premiums. The evi-

dence does not show that the insurer misled the insured into believing it had waived the lapsing of the policy (McDanels v. General Ins. Co., 1 Cal.App.2d 454, 460, 36 P.2d 829), nor that the company was lax in the matter of exercising its right to compel the insured to make an application for reinstatement. Nor may it be said that the insurer could have waived its right to rescind, on the ground of false representations made by the insured in his answers to the questions as set forth in the application for reinstatement, until the insurer had become aware of the falsity of those representations. McDanels v. General Ins. Co., 1 Cal.App.2d 454, 460, 36 P.2d 829; Schick v. Equitable Life Assur. Soc., 15 Cal.App.2d 28, 34, 59 P.2d 163. It was only after the insured had filed his claim for disability payments in June, 1936, at which time an investigation was made with regard to the ailments for which he had undergone treatment by a physician, that the falsity of the representations which the insured had made in the application for reinstatement was disclosed. On that state of the record it cannot be said that the insurer had waived any of the rights which it subsequently asserted against the insured.

[5-7] Appellants next contend that the representations made by the insured in the application form were not material representations in that the illness for which insured had received the several treatments in the fall of 1935, assertedly, was not of a substantial character and, consequently, that a failure on his part to disclose such illness did not constitute fraud. However, a reading of the application shows that the insured was not questioned with respect to the gravity of the illness, if any, for which he had consulted a physician. The question presented was "Have you consulted a physician for any ailments since the above-numbered policy was issued? List below all details in regard thereto * * *" That question merely called for information relating to simple matters of fact within the knowledge of the insured. It has been held that answers to written questions set forth in application forms relative to insurance are generally *deemed* material representations (Pierre v. Metropolitan Life Ins. Co., 22 Cal.App.2d 346, 70 P.2d 985; Iverson v. Metropolitan Life, etc., Co., 151 Cal. 746, 749, 91 P. 609, 13 L.R.A.,N.S., 866; Westphall v. Metropolitan Life Ins. Co., 27 Cal.App. 734, 151 P. 159; McEwen v. New York Life Ins. Co., 42 Cal.App. 133, 146, 183 P. 373); and that in the making of a false representation which is material to the risk the presence of an intent to deceive is not essential. Telford v. New York Life Ins. Co., 9 Cal. 2d 103, 105, 69 P.2d 835. The materiality of a representation is to be determined "solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries". Ins.Code, sec. 334, St.1935, p. 505. In the present case it also appears from one of the provisions of the policy that following default in the payment of a premium the policy might be reinstated "upon production of evidence of insurability *satisfactory to the Company*". (Emphasis added.) In the case of Greenberg v. Continental Cas. Co., 24 Cal.App.2d 506, 75 P.2d 644, the court was construing a provision of an insurance policy which was practically identical in language with that just referred to, and it was there held that by making that language a part of the contract the parties had agreed to place on the insurer the responsibility of the determination of the question whether the "evidence of insurability" was satisfactory. See, also, Columbian Nat. Life Ins. Co. v. Morey, 1 Cir., 1928, 26 F.2d 580, 582. Moreover, the record shows that evidence was elicited on the part of the insurer to the effect that where an insured sought reinstatement and was found to have been of the age of insured herein and to have shown the symptoms manifested by him at the time he consulted Dr. Swezey, in accordance with a practice or custom in existence among life insurance companies, such a disclosure would have led either to a rejection of the application for reinstatement or to an investigation of the underlying causes which gave rise to the symptoms reported. Much of the medical evidence adduced by the insurance company in the present case was to the effect that the symptoms shown by the insured at the time he consulted Dr. Swezey in August, 1935, were possible indications of a heart condition such as the insured claimed to have been suffering from in June, 1936. Therefore, under the circumstances hereinbefore recited, it may not be said that the information which the insurer sought to obtain by the questions set forth in the application form was not material to the risk.

[8] Appellants also contend that the court erred in its rulings on the admissibility of evidence presented by insurance experts on behalf of the respondent insurer. This court finds no error in that regard. The questions propounded to those witnesses did not call for an opinion on the question whether the undisclosed facts here in issue were material to the risk. The witnesses were merely asked relative to a usage or custom of insurance companies in the matter of rejecting a risk had the companies been apprised of facts such as here were concealed. Boyer v. United States F. & G. Co., 206 Cal. 273, 274 P. 57.

In view of the conclusions reached herein it becomes unnecessary to discuss other contentions made by counsel.

The judgment is affirmed.



38 Cal.App.2d 573

MORSE et al. v. CUSTIS et al.

Civ. 6342.

District Court of Appeal, Third District, California.

April 23, 1940.

1. Appeal and error ⇐931(1)

Reviewing court must give findings of trial court a liberal construction in support of the judgment, and, whenever the facts found are such as might authorize different inferences therefrom, it will be presumed that the inference made by trial court was one that will uphold rather than defeat the judgment.

2. Appeal and error ⇐996

Where facts found by trial court are such as might authorize different inferences therefrom, the appellate court will not draw from those facts any inference of fact contrary to that which might have been drawn by trial court for purpose of rendering its judgment.

3. Appeal and error ⇐907(3)

On appeal upon judgment roll alone from judgment holding that word "whenever", as used in instrument establishing a trust, which provided that trustee should divide the proceeds of property among grantor's heirs "whenever" property was sold, meant "in the event" or "if", and did not obligate trustee to sell property, District Court of Appeal would assume that there was sufficient evidence to justify trial court in its construction of the instrument, although a contrary inference could have been drawn, where there was ample authority for trial court's construction.

> The word "whenever" is an adverb of time, rather than of place, frequently looking to the future rather than the past, and in its common acceptation means as long as; as often as; as soon as; at any time; at any time when; at whatever time; at whatever time it shall happen; or at what time soever.
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Whenever", "If", and "In the Event".

4. Appeal and error ⇐907(3)

On appeal upon judgment roll alone from judgment construing an instrument establishing a trust, District Court of Appeal was without power to substitute its own construction for that adopted by trial court, where there was ample authority for trial court's construction.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Mahlon T. Morse and James M. Morse against Pearl Custis, Hattie Thompson and others, to have adjudged that defendant Hattie Thompson holds certain realty in trust for plaintiffs, and to require such defendant to render an account. From an adverse judgment, plaintiffs appeal.

Affirmed.

David E. Hinckle, of Los Angeles, for appellants.

Volney P. Mooney, Jr., and Sylvester Hoffmann, both of Los Angeles, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to have the court adjudge that respondent Hattie Thompson holds certain real property in trust for appellants, and to require respondent to render an account. The trial court found against the contention of appellants, and

judgment was entered accordingly. The appeal is from such judgment, and is based upon the judgment roll alone. The sole question is whether or not the findings support the judgment.

The essential facts and background as disclosed by the findings are as follows: Mary E. Morse executed a grant deed to Hattie Thompson, her daughter. Attached to the deed was an instrument signed by the grantor, and reading as follows:

"West Los Angeles, Calif.,
"December 22, 1932.

"I request Hattie Thompson whenever this property is sold to pay to each of my heirs, share and share alike, the proceeds from the sale of this property described as Lot Twelve, in Block Ten, of San Vicente Park, in the City of Los Angeles, Calif.

"(Signed) Mary E. Morse."

The deed was delivered to a son of Mary E. Morse, with a request that he deliver it to the grantee upon the death of the grantor. Upon the death of the latter, the deed was duly delivered and recorded. The judgment reads: "That the legal title to Lot 12 in Block 10 of San Vicente Park, in the City of Los Angeles, County of Los Angeles, State of California, as shown in Map Book 12, at page 62, in the office of the Recorder of said County, is held by defendant, Hattie Thompson in trust for the heirs of her mother, Mary E. Morse, as beneficiaries; that said heirs are Mahlon T. Morse, James M. Morse, Alfred N. Morse, Pearl Custis, Hattie Thompson, Bernice Jacobs and Dorothy Kumpher; that while she so holds said title, she shall have the possession of, and the right to use said property, and to lease it to others, and shall have the rents, issues and profits thereof; that such part of said rents, issues, and profits as may be necessary for the purpose of paying taxes and assessments levied on said property and of preserving the corpus of the estate for the beneficiaries in as good condition as it was when conveyed to her in trust, ordinary wear and tear and damage by act of God and from causes beyond her control excepted, she shall use for such purpose; that she shall have as hers absolutely, free and clear of any claim by the other heirs of said Mary E. Morse, any part of said rents, issues and profits remaining after such taxes, assessments and maintenance have been so paid; that she may, at her sole discretion, sell or continue to hold the said real property, during her lifetime, for the uses and purposes hereinabove set forth, and that she shall not be required to account to any of the heirs or parties to this action as to any receipts or disbursements prior to such sale; and that when said property is sold she shall divide the proceeds, as and when they are received by her, among the said heirs of said Mary E. Morse as follows: To Mahlon T. Morse, James M. Morse, Alfred N. Morse, Pearl Custis and Hattie Thompson each one-sixth of said proceeds, and to Bernice Jacobs and Dorothy Kumpher each one-twelfth of said proceeds."

It is the contention of appellants, who are the heirs of Mary E. Morse, that the judgment should have provided: "That the conditions of the trust upon which said property was conveyed to Hattie Thompson were that she should hold the legal title thereof for the benefit of all the heirs of the trustor; that she should sell said property as soon as she could do so with reasonable diligence; that she should divide the proceeds in equal shares per stirpes among the heirs of the trustor; that she should obtain such rentals for the property as she could with reasonable diligence while the title remained in her name; that out of such rentals she should pay the taxes, upkeep and other maintenance of the property; and that the balance, if any, remaining should be divided at reasonable times in equal shares per stirpes among the heirs of the trustor, after deducting the trustee's reasonable fees and expenses."

It will be observed that the court *did* adjudge that the property was held in trust by respondent, and this portion of appellants' contention was upheld. Appellants insist, however, that the court should have further decreed a sale of the property within a reasonable time, and a division of the proceeds of such sale among the heirs. They argue that when the grantor used the word "whenever" in the instrument attached to the deed, she thereby intended that the property *must* be put up for sale by the grantee.

[1, 2] It is an elemental rule that it is the duty of the reviewing court to give the findings a liberal construction in support of the judgment, "and whenever the facts found are such as might authorize different inferences therefrom, it will be presumed that the inference made by the trial court was one that will uphold rather than defeat the judgment. In such case the appellate court will not draw from those facts any inference of fact contrary to that which might have been drawn by the trial court for the

purpose of rendering its judgment". 2 Cal. Jur., p. 871, § 511.

[3, 4] This case coming to us upon the judgment roll alone, we must assume that there was sufficient evidence to justify the trial court in its construction of the instrument which established the trust. It is obvious that the trial court found that when the grantor used the word "whenever", she intended to convey the meaning "in the event", or "if", and consequently it held and concluded that respondent was not obligated to sell the property, and that she might hold it during her lifetime. It may be that a contrary inference could have been drawn, but even so, under the rule stated, we would be without power to substitute our own construction for that adopted by the trial court. That there is ample authority for the action of the court, appears in the definition of "whenever" in 68 C.J. page 250: "An adverb of time, rather than of place, frequently looking to the future rather than the past. It has been said that in its common acceptation 'whenever' means, or its natural meaning is, as long as; as often as; as soon as; at any time; at any time when; at whatever time; at whatever time it shall happen; or at what time soever."

The case relied upon by appellants is Campbell v. Kennedy, 177 Cal. 430, 170 P. 1107. The plaintiff conveyed certain real property to defendant, and the latter executed a writing whereby he agreed that whenever he sold the property he would, after deducting and retaining the amounts advanced by him, give one-half of the balance of purchase price to plaintiff. The record upon appeal included a transcript of the testimony, and the court found that the defendant had promised plaintiff he would, and could, sell the land within a reasonable time. Consequently, when the court construed the word "whenever", it was guided and controlled by the evidence in arriving at the intent of the parties. Here, *we* have nothing but the word itself. The *trial* court, however, had the evidence before it. It is not so much a question of an abstract definition, but rather a matter of how the grantor intended to use the word under the facts and circumstances disclosed by the record.

No valid reason being shown for a reversal of the judgment, it is ordered that it be affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

38 Cal.App.2d 601

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 2534.

District Court of Appeal, Fourth District, California.

April 24, 1940.

1. Workmen's compensation ⇐564, 1716, 1939

A subsequent accident aggravating an original injury may be of such a nature as to make such aggravation the proximate and natural result of original injury, and whether subsequent accident is such, or is an independent intervening cause, is a question of fact for the commission, and its conclusion must be sustained by reviewing courts whenever there is any reasonable theory evidenced by the record on which conclusion can be upheld.

2. Workmen's compensation ⇐1543

Evidence sustained finding of Industrial Accident Commission that drugstore employee who struck his knee on a drawer pull sustained a new and compensable injury more than a year afterward when the slipping of the loose cartilage in the knee caused the knee to lock. St.1937, p. 265, § 3201 et seq.

3. Workmen's compensation ⇐1903

In original proceeding to review an award of the Industrial Accident Commission, reviewing court must accept as correct certified copy of employee's application for compensation, included in the return of the commission, although such certified copy does not correspond with the copy included in the petition to review. St.1937, p. 265, § 3201 et seq.

4. Workmen's compensation ⇐1325

Industrial Accident Commission had power to permit an amendment of an application for compensation so as to show that injury occurred on named date. St. 1937, p. 265, § 3201 et seq.

5. Workmen's compensation ⇐1852

Insurance carrier which did not object to amendment of an application for compensation, in proceeding before Industrial Accident Commission, could not claim error for the first time before reviewing court.

6. Workmen's compensation ⇐1689

Where insurance carrier raised no question as to sufficiency of notice of a compensation hearing, in compensation proceeding, and participated in hearing without objection and cross-examined compensation claimant, insurance carrier "waived" any defects in notice given to it.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

7. Workmen's compensation ⇐1968

An insurance carrier was not prejudiced by failure to give to it notice of an application for compensation, where Industrial Accident Commission found against compensation on claim and made no award against insurance carrier under the application.

Original proceeding on application for a writ to review an award of the Industrial Accident Commission by Ocean Accident & Guarantee Corporation, Limited, a corporation, against the Industrial Accident Commission of the state of California, and J. Warren Little.

Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

MARKS, Justice.

This is an original proceeding to review an award of the Industrial Accident Commission made on October 16, 1939, giving J. Warren Little medical treatment and disability indemnity of $19.24 per week for an injury found to have been suffered by him on February 3, 1939, while employed by A. Matthews who conducted his business under the name of City Pharmacy.

Petitioner urges the following grounds for annulment of the award: (1) The evidence is insufficient to support the commission's finding that Little suffered any compensable injury on February 3, 1939; (2) petitioner suffered prejudice because of the commission separating the original claim into separate claims for separate injuries and in failing to give petitioner any notce of a claim "filed June 15, 1939, as of June 5, 1939".

The hearing before the commission was held on June 5, 1939. Petitioner was represented by counsel. The evidence consisted of the testimony of Little and a letter written to petitioner by Dr. F. L. R. Burks on February 10, 1939, who, at the request of petitioner, had examined Little on that day.

Little testified that in January, 1938, while working in the City Pharmacy he hit his left knee on a drawer pull; that his knee hurt him for ten or fifteen minutes; that a short time later his knee "started popping"; that he consulted a physician who prescribed wearing an "ace bandage" which he did for about four months; that there was no pain in the knee but that it continued popping and there was a "slight catch" in it a couple of times; that it did not lock until February 3, 1939; that on that date while Little was stooping over the knee locked for the first time; that it locked on other occasions after that date; that he lost no time from his employment because of the injury.

We quote the following from the letter of Dr. Burks: "About two weeks ago he squatted down and there was a popping in the knee, the knee locked and he could not straighten up. After a little manipulation he was able to straighten the leg. The knee was locked on two occasions. * * * Left Knee. There is no swelling or discoloration. Extension is normal. Flexion is normal. There is no lateral or anterior-posterior preternatural mobility. When pressure is made over the internal semilum or cartilage he complains of some slight discomfort. When the patient is in a squatting position with weight bearing there is a loud popping sound in the left knee. This is greatly accentuated as he balances himself and increases and decreases the flexion of the knee in a squatting position. This popping is accompanied by a definite vibration within the knee joint. No such condition exists in the right knee. * * * This man evidently received an injury to the internal semilunar cartilage. However, the clinical picture at the time of the original injury is not altogether diagnostic. There seemed to be no swelling or discoloration at that time. The mechanics of the injury was not typical of the mechanics which produces an injury to the internal semilunar. The fact that the knee locks, and the popping sound, is typical of an internal semilunar which has become loosened and rolls under the articulating surface of the femur. A loose joint body would cause the same

symptoms and findings. He states definitely that the knee was normal before the alleged injury. It seems that it will be necessary to surgically explore this joint, and most likely we will find a loosened cartilage."

Upon the foregoing evidence the commission found that Little had suffered a compensable injury on February 3, 1939, and made the award we have mentioned.

All parties admit that Little suffered a compensable injury in January, 1938. Petitioner maintains that there was no new injury on February 3, 1939, but that the locking of the knee on that date was merely the proximate and natural result of the accident of the year before. On the other hand, the commission argues that the slipping of the loose cartilage for the first time, causing the knee to lock, was a new and compensable injury under the provisions of division IV of the Labor Code, St.1937, p. 265, § 3201 et seq.

[1] The rules governing a case involving a first injury and an aggravation of it at a later date are thus announced in Head Drilling Co. v. Industrial Accident Commission, 177 Cal. 194, 170 P. 157, 158: "It is earnestly argued that there is no support in the evidence for this finding in so far as it establishes that the separation of the broken portions of the fibula was not due to any independent intervening cause, but was in fact a proximate and natural result of the original injury. * * * We are of the opinion that a subsequent incident or accident aggravating the original injury may be of such a nature and occur under such circumstances as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such, or should be regarded as an independent intervening cause is a question of fact for the commission, to be decided in view of all of the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld."

Massachusetts Bonding & Insurance Co. v. Industrial Acc. Com., Cal.App., 96 P.2d 1009, and Limited Mutual Compensation Insurance Co. v. Industrial Acc. Com., Cal. App., 98 P.2d 827, also involved recurrent or aggravated injuries, the latter an injury to the knee. It was there held, on evidence of no greater strength then we have before us, that whether the final disability was the natural and proximate result of a first injury or an aggravation of it caused by a second incident, so as to constitute a second compensable injury, was a question of fact to be finally settled by the commission.

[2] Under the three authorities cited we have concluded that the inferences drawn by the commission from the meager evidence before it are not so unreasonable that they may be set aside here.

[3] On the record furnished us by the commission there can be little merit in the second contention of petitioner. In this connection it should be observed that the copy, in the petition before us, of the first application for adjustment filed by Little on April 26, 1939, does not correspond to the copy of the same document in the return of the commission, the correctness of which is certified to by the secretary of the commission. We must accept as correct the certified copy of the application in the return of the commission. We presume that the differences in the two applications are explained by the reference to an amendment of the application referred to in the minutes of the hearing from which we will quote.

The first application filed was given claim number 63754 and, according to the return of the commission, sought compensation for an injury suffered on February 3, 1939. It referred to the letter written by Dr. Burks, from which we have already quoted, for a description of the injury. A second application bearing claim number 64620 was "filed June 15, 1939, as of June 5, 1939". The award under review here was made under the first application. An award was denied under the second application on the ground that the claim was barred by the statute of limitations.

The hearing was held on June 5, 1939, at which time petitioner was represented by counsel. The record shows that the following occurred at that hearing:

"It is admitted:

"1. That J. Warren Little, age 26, was employed as a Pharmacist during January, 1938 (Claim No. 64620), and on February 3rd, 1939 (Claim No. 63754), at Hanford, California, by the City Pharmacy, whose insurance carrier was Ocean Accident & Guarantee Corporation, Ltd. * * *

"It Is Ordered that the application (Claim No. 63754) filed April 26, 1939, be

amended to show the date of injury as 2-3-39.

"It Is Ordered that Claim No. 64620 and Claim No. 63754 be consolidated for the purpose of hearing the evidence."

[4–6] It was within the power of the commission to permit the amendment of the application, claim number 63754. Petitioner did not object to that amendment and may not now be heard to claim error because of it for the first time here. Petitioner raised no question as to the sufficiency of its notice of the hearing on June 5, 1939. It participated in the hearing without objection and its counsel cross-examined Little. Petitioner must be held to have waived the defects, if any, in the notices given to it. Hammond Lumber Co. v. Bloodgood, 101 Cal.App. 561, 281 P. 1101.

[7] If we understand the arguments correctly petitioner urges prejudice because no notice of the filing of claim number 64620 (injury of January, 1938) was given to it. We may assume the soundness of all of petitioner's arguments on this question and still have no ground to annul the award. The commission found against Little on this claim and made no award against petitioner under this application. Therefore petitioner was not prejudiced by any erroneous ruling, or lack of notice, if any, in connection with this claim.

The award is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



38 Cal.App.2d 619

DANIELS v. JOHNSON et al.

Civ. 12506.

District Court of Appeal, Second District, Division 2, California.

April 26, 1940.

1. Master and servant ⇐277

Evidence that painter agreed to paint certain property owned by defendant, a dentist, in exchange for dental work, that defendant furnished all equipment and material used except brushes, and that painter was given instruction as to manner of doing work, sustained finding that painter was an "employee", and not an "independent contractor", so as to be entitled to recover for injuries sustained when he fell from defective ladder, notwithstanding painter had other employment in addition to working on defendant's property. St.1937, pp. 267, 271, §§ 3353, 3700, 3706; p. 299, § 5705.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

2. Master and servant ⇐277

Evidence that painter was to do work for defendant, a dentist, in exchange for dental work of value of $50 at rate of 50 cents an hour, established that parties did not contemplate that work would be completed in 10 days, and hence painter's employment was not "casual employment" within Labor Code, so as to prevent painter from claiming rights of an "employee" when injured as result of fall from defective ladder. St.1937, p. 267, §§ 3352–3354.

See Words and Phrases, Permanent Edition, for all other definitions of "Casual Employment".

3. Trial ⇐28(3)

In action based upon Labor Code for injuries sustained by painter when he fell from defective ladder while working on defendant's property, the testing of ladder from which painter fell by trial judge at building where trial was conducted, rather than on premises where painter fell, was not error. St.1937, p. 271, §§ 3700, 3706.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Darold F. Daniels against Alvin E. Johnson and others for injuries sustained by plaintiff when he fell from a defective ladder while working as a painter for named defendant. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

C. Ibeson Sweet, of Los Angeles, for appellant.

Edwin C. Boehler and Ezra Neff, both of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff recovered a judgment in the sum of $1,109 for damages which he suffered when he fell from a defective ladder while working as a painter for defendant Alvin E. Johnson. Plaintiff also recovered the sum of $250 as attorneys' fees. He bases his action upon section 3706 of the Labor Code, St.1937, p. 271, defendant having failed to secure the payment of compensation for plaintiff by either of the methods provided in section 3700 of that code.

[1] Defendant contends that the court's finding that plaintiff was not an independent contractor is not supported by the evidence. Defendant, a practicing dentist, was the owner of a number of buildings which he rented to tenants. Plaintiff, an experienced house painter, applied to defendant for dental work and it was arranged between them that defendant would perform dental work for plaintiff of the value of $50 and that plaintiff would paint certain property owned by defendant at the rate of fifty cents per hour. At that time nothing was said as to the location at which plaintiff was to work. Defendant was to furnish all the equipment and material to be used except paint brushes. Plaintiff was first instructed to paint a fence on the property of defendant. When plaintiff finished putting the first coat of paint on the fence defendant examined the fence and ordered plaintiff to put a second coat upon it. Thereafter plaintiff was directed by defendant to a different location and was instructed to paint two houses on the premises, the rear house to be painted first. Plaintiff was given directions as to the manner of mixing the paints. Defendant did not specify the number of coats of paint which were to be applied, but when the first coat had been applied to the house plaintiff was directed to apply a second coat, since the first coat was too dark. Plaintiff had other employment but he was to work on defendant's property when he was free to do so. However, the fact that plaintiff had separate and independent employment did not make him an independent contractor. Moody v. Industrial Accident Commission, 204 Cal. 668, 672, 269 P. 542, 60 A.L.R. 299. In section 3353 of the Labor Code an independent contractor is defined as "any person who renders service for a specified recompense for a specified result under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished". Although defendant's testimony was contradictory to that of plaintiff, the trial court doubtless credited the statements made by plaintiff and made its findings accordingly. It is provided in section 5705 of the Labor Code that the burden of proof rests upon the employer to establish that "an injured person claiming to be an employee was an independent contractor * * *." We are satisfied that there is sufficient evidence to sustain the finding of the court.

[2] Defendant contends that plaintiff may not claim the rights of an employee as set forth in the Labor Code, since by section 3352 of that code the word "employee" excludes any person whose employment is both casual and not in the course, trade, business, profession or occupation of his employer. In section 3354 of the Labor Code the word "casual" is defined as referring only to employments where the work contemplated is to be completed in not exceeding ten working days. We are satisfied that the evidence is sufficient to support the court's finding that plaintiff's employment was not casual within the meaning of section 3354. The court found from the evidence introduced that the customary and usual working day in and about Los Angeles at the time of the accident in question was a working day of eight hours. It is apparent that it would take plaintiff more than ten days to do work of the value of $50 at the rate of fifty cents per hour. The parties evidently contemplated that the work would not be completed in ten days.

[3] The ladder from which plaintiff fell was brought to court and examined by the judge, who made a test at the building where the session of court was conducted. Defendant contends that the test should have been made on the premises where the plaintiff fell. There is no merit in this contention.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

38 Cal.App.2d 611

WALKER et al. v. ETCHEVERRY et al.

Civ. 2542.

District Court of Appeal, Fourth District, California.

April 25, 1940.

1. Appeal and error ⇐607(1), 985

The matter of granting or denying an application for an order terminating proceedings for preparation of record on appeal is largely within discretion of trial court, exercise of which will not be disturbed on appeal without rather clear showing of abuse of discretion.

2. Appeal and error ⇐607(1)

Where appellant's attorney, misunderstanding instructions of appellant's other attorney, directed clerk to delay preparation of transcript until further notice, and nothing further was done about the transcript, because one attorney assumed that transcript was being prepared and other attorney assumed that negotiations for settlement were still continuing, due diligence was not shown as a matter of law, and trial court did not abuse discretion by terminating proceedings for preparation of transcript.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Thomas E. Walker and others against Filbert Joe Etcheverry and another. From an order terminating the proceedings for the preparation of a transcript to be used on appeal and denying defendants' motion for relief from default, defendants appeal.

Affirmed.

Borton, Petrini, Conron & Borton, of Bakersfield, and Farnsworth, Burke & Maddox, of Visalia, for appellants.

Bradley & Bradley, of Visalia, for respondents.

BARNARD, Presiding Justice.

This an appeal from an order terminating the proceedings for the preparation of a transcript to be used on appeal and denying a motion made by appellants for relief from default in that regard.

Judgment was entered on August 7, 1939, and a motion for a new trial was denied on September 6, 1939. On September 16, 1939, the defendants filed a notice of appeal, a notice and demand for the preparation of a transcript, a waiver of undertaking signed by the court reporter, and an order signed by the court directing the clerk to prepare a transcript. A few days later an undertaking on appeal was also filed. On November 30, 1939, the respondents filed a notice of motion to terminate proceedings for the preparation of a transcript, and a few days later the appellants filed a notice of motion for an order granting them relief from any default in connection with the preparation of a transcript. The two motions were heard together, the first being granted and the latter denied, and this appeal followed.

The matter was heard on affidavits submitted by both parties, which disclosed the following facts. The appellants were represented by a firm of attorneys in Bakersfield and another firm in Visalia. One lawyer from each of these firms participated in the trial. The appeal papers were prepared by this Bakersfield lawyer and sent by him to this Visalia lawyer, who secured the necessary signatures and filed the papers. In a letter transmitting these papers the Bakersfield lawyer asked the Visalia lawyer to "orally tell the clerk and the reporter to hold off the actual commencement of preparation for a few days while I attempt to settle the case with Bradley & Bradley". Instead of strictly complying with this request, the Visalia lawyer told both the clerk and the reporter not to start the actual commencement of the transcript on appeal until notified to start the same by him. On September 16, 1939, this lawyer wrote to the Bakersfield lawyer stating that he had served and filed the notice of appeal and other appeal papers, but saying nothing about what he had told the clerk and reporter with reference to holding up the preparation of the transcript until further notification from him. On September 18, 1939, the Bakersfield lawyer wrote to the attorneys for the respondents, suggesting that the case could be settled if a very substantial reduction in the amount of the judgment was made, and mentioning the legal points that could be raised upon an appeal. Several letters between the respondents' attorneys and this Bakersfield lawyer followed, the last being one written by the respondents' attorneys under date of September 27, 1939, to which the Bakersfield attorney did not reply. These various

letters referred to the merits of the appeal and to authorities relating thereto, and nothing very definite was said in any of them with respect to terms of a settlement.

[1] It seems to be well settled that the matter of granting or denying an application for an order terminating proceedings for the preparation of a record on appeal is one very largely within the discretion of the trial court which, when exercised, will not be disturbed on appeal in the absence of a rather clear showing of an abuse of that discretion. Crocker v. Crocker, 76 Cal.App. 606, 245 P. 438; O'Banion v. California C. P. Growers, 109 Cal.App. 328, 292 P. 975; Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468; Shutz v. Western Wholesale L. Dist., 24 Cal.App.2d 659, 76 P.2d 135; Hohnemann v. Pacific Gas & Elec. Co., 31 Cal.App.2d 692, 88 P.2d 748, 749. In the last named case, the general rules are thus stated:

"As to the law governing a proceeding of this kind, it is well settled that when, as here, an appellant has complied with the jurisdictional requirement of said section 953a by filing the notice and request mentioned therein, and it is claimed by the respondent that on account of lack of diligence on the part of the appellant or the court officers, or for any other cause, there has been unreasonable delay in procuring the transcript, the respondent's only remedy is by way of motion in the trial court to terminate the proceedings for the preparation of the transcript; that neither by statute nor court rule is there any mandatory provision prescribing a limit to the time within which the transcript is to be prepared, and that the determination of the question of whether the delay complained of has been unreasonable or is justifiable is committed very largely to the discretionary power of the trial court, which power should be liberally exercised against terminating the proceedings for the preparation of the transcript; and that whether the trial court grants or denies the motion therefor, its decision in the matter will not be disturbed by a reviewing court unless it clearly appears from the record upon which the trial court's decision is based that its discretionary power has been abused; also that it is seldom that the facts of any particular case can be used as a precedent for the determination of another proceeding of like character."

Appellants' main contention is that an abuse of such discretion here appears. In support thereof it is argued that there was no lack of diligence on the part of appellants' attorneys, but merely an inadvertence arising from the fact that the Visalia lawyer misconstrued the instructions given him by the Bakersfield lawyer, the instruction having been to orally tell the clerk and reporter to delay the preparation of the transcript "for a few days". It is argued that the Bakersfield lawyer did not know that the instruction actually given was to delay the matter until further notification, and that, therefore, he supposed that the transcript was being prepared. And, further, that the Visalia lawyer was justified in taking no further action because he supposed that negotiations for a settlement were still being carried on between the Bakersfield lawyer and the attorneys for the respondents. It is argued that such cases as Wood v. Peterson Farms Co., supra, and O'Banion v. California C. P. Growers, supra, are to be distinguished from the instant case because in those cases the appellants knew that it was incumbent upon them to have a transcript prepared, while in the instant case, due to this misunderstanding, the appellants did not know that the time was running against them.

It appears here, however, that the Visalia lawyer who had notified the clerk and reporter not to proceed until further orders from him, should have known that the transcript was not being prepared and that he made no effort to find out whether negotiations for a settlement were still in progress. At the same time, the Bakersfield lawyer knew that negotiations for a settlement had ceased, nothing having been done after September 27, 1939. It should be further noted that he should have known that the preparation of the transcript was being unduly delayed since he did not receive a bill for the transcript or notice of its completion, and it was hardly to be expected that it would take more than two months to prepare the transcript where the trial had lasted but two days. From the respondent's standpoint negotiations for a settlement had stopped, they regarded both of the other attorneys as acting for the appellants, no extension of time had been asked, and they had no knowledge of any inadvertence or misunderstanding on the part of either of the other attorneys or of the fact that the instructions, as given

to the clerk and reporter, were not as intended by the attorneys for the appellants.

[2] We are unable to hold that no lack of diligence appears, and it cannot be said, as a matter of law, that it affirmatively appears that the appellants were entitled to relief from their default or failure with respect to the use of due diligence in securing a transcript. Conceding that relief might well have been given, in this case, with the resulting refusal to order a termination of the proceedings for the preparation of a transcript, we are of the opinion that the matter was one entirely within the discretion of the trial court and that no facts are shown on this appeal which disclose and establish an abuse of that discretion.

The orders appealed from are affirmed.

We concur: MARKS, J.; GRIFFIN, J.



38 Cal.App.2d 496

JEFFERSON v. KENOSS et al.

Civ. 12343.

District Court of Appeal, Second District, Division 2, California.

April 18, 1940.

Hearing Denied June 17, 1940.

1. Husband and wife ⇐333(9)

More evidence is required to support a judgment for alienation of affections against a parent than against a stranger.

2. Husband and wife ⇐325

When a parent from improper motives induces his son to separate from his wife, such parent will be liable in damages to the aggrieved spouse.

3. Husband and wife ⇐325

When a parent induces his son to separate from his wife, it is not necessary, in establishing liability for alienation of affections, to prove that the parent is moved by a malignant and revengeful disposition, but it is sufficient if it is shown that he acted from improper motives.

4. Husband and wife ⇐325

If the evidence is sufficient to show that the separation of husband and wife was the result of improper and active interference of a parent and if it appears that the husband would have gone back to his wife but for such interference, either by threats, persuasions, or argument, then the parent has done a wrong to his son's wife and she is entitled to compensation for the wrong.

5. Husband and wife ⇐325

A wife has the right to conjugal affection and society of her husband, and such right is a valuable one, and, for loss thereof by reason of unlawful interference of another, the wife is entitled to compensation.

6. Husband and wife ⇐325

No one is privileged to deprive a wife of the comfort and happiness which is hers by reason of her marital status and of her fulfillment of her own marital obligations.

7. Husband and wife ⇐324, 325

The welfare of children of husband and wife gives to each the right to the affection, companionship, and society of the other.

8. Husband and wife ⇐325

A parent has wide liberty in giving advice to his son relative to his domestic relations and may even advise him that his health or happiness will be rendered more nearly secure by putting away his wife so long as he has not been actuated by malice or improper motive, but, where there is evidence that a parent accused of enticing away his son was actuated by a revengeful spirit, he is liable in damages for his causing the separation of his son from his wife.

9. Husband and wife ⇐325

If the facts are sufficient to warrant jury in believing that father has acted maliciously and unjustifiably in bringing about a separation of his son from his wife, the father is as liable to the injured spouse as if he were a stranger.

10. Husband and wife ⇐333(9)

Evidence disclosing that father-in-law refused to visit hospital where his grandchild was born, that he refused to enter home of his daughter-in-law in the absence of his son, that he advised his son to transport his wife back to her mother's home, that father-in-law took an active interest in the prosecution of divorce proceedings instituted by the son, and that father-in-law encour-

aged son to marry another, sustained judgment against father-in-law for alienation of affections on ground that father-in-law was prompted by malice.

11. Limitation of actions ⇐55(1)

A cause of action for a tort accrues on the day of the wrongful act.

12. Limitation of actions ⇐55(4)

Where, within the year preceding the institution of wife's action for alienation of affections, husband had reaffirmed his vows of loyalty and, from marriage until husband's final desertion of wife, father-in-law had been persistent in his course of insulting his daughter-in-law in the presence of his son, if the time began to run the day the alienation was consummated, the action was not barred by one-year statute of limitations. Civ.Code, § 49; Code Civ.Proc. § 340, subd. 3.

13. Limitation of actions ⇐95(1)

Statute of limitations on right to recover for alienation of affections did not commence to run before wife had knowledge of husband's desertion. Code Civ.Proc. § 340, subd. 3.

14. Limitation of actions ⇐55(4)

In determining whether wife's action for alienation of affections was barred by limitations, the fact that husband and wife had been living in separate establishments in different counties and that their visits were only occasional was a factor to be considered. Code Civ.Proc. § 340, subd. 3.

15. Limitation of actions ⇐95(1)

An action for alienation of affections instituted April 13, 1938, was not barred by one-year statute of limitations where, on January 5, 1937, husband visited wife and they cohabited, on February 13, 1937, husband wrote wife a letter stating "love to both you and the baby", in May, 1937, met wife several times, and first knowledge of husband's desertion came to wife on August 2, 1937. Civ.Code, § 49; Code Civ.Proc. § 340, subd. 3.

16. Limitation of actions ⇐95(1)

The statute of limitation on wife's cause of action for alienation of affections of husband begins to run on date on which wife first obtains knowledge of and has reason to believe that her husband has abandoned her. Code Civ.Proc. § 340, subd. 3.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action for alienation of affections by Maria Theresa Bustos Jefferson against Helen Kenoss, etc., Benjamin H. Jefferson, and others. From a judgment for plaintiff against Benjamin H. Jefferson, he appeals.

Affirmed.

Dockweiler & Dockweiler, of Los Angeles, for appellant.

Wyckoff Westover, of Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an action for alienation of affections brought by the wife of Fleetwood Jefferson against his father, Benjamin H. Jefferson, and other parties. The trial resulted in a verdict in the sum of $5,000 against said Benjamin Jefferson and from the judgment based upon said verdict, he prosecutes this appeal. His contentions may be all discussed under two propositions, namely, (1) the insufficiency of the evidence to support the judgment; and (2) prescription by the one year's statute of limitation. Code Civ.Proc. § 340, subd. 3.

Plaintiff was born in the land of the Aztecs and is of their blood. In the tender years of her childhood, her immigrant parents settled in California and established their home in the city of Ventura. The child grew up in the city of her adoption and soon gave promise of a rare talent for song. Through the assistance of her admiring fellow townsmen, she was enabled to enter Occidental college as a student, where, in 1932, she met the said Fleetwood Jefferson, who was also marked with a flair for the musician's art. Their sudden interest in each other rapidly ripened into a mutual affection. Their marriage was celebrated on the 27th day of February, 1935, in the city of San Bernardino. After a brief honeymoon, Fleetwood escorted his wife to the home of her mother in the city of Ventura while he, himself, took shelter again under the roof of his father in the city of Pasadena. From that time he visited her weekly until the following month of April when they together occupied an apartment on North Marengo avenue. Although defendant had opposed the marriage of his son, little harm came of this.

But, after they had established their own residence within the shadow of defendant's home, the undermining of the foundations of the new domestic relations soon began. On the very day of plaintiff's return from Ventura to Pasadena, defendant called her into his office and there stated to her in the presence of Fleetwood: "Maria, you must remember that you must not come between Fleetwood and his career in any way. As long as you can, you must earn your own living, support yourself and let my son follow his own career."

In the following June when the plaintiff was ill in her home, defendant called in time to greet his son upon arrival, only to reproach him in a querulous tone for not answering the card he had written to the son. Fleetwood excused himself with the explanation that Maria had been ill and he himself had been busy. The defendant replied: "Maria's illness makes no difference. It is just that you think more of Maria than you do of me." Upon Fleetwood's protest that plaintiff was in a serious condition, the defendant proceeded: "That makes no difference; that is not a good reason for ignoring me either." and in making his exit, called out, "Don't you ever speak to me again." Thereafter, on other occasions when plaintiff was ill in her home, defendant accused her of feigning illness and told her that she might very easily become a hypochondriac and make it miserable for his son.

Defendant required Fleetwood to see him or communicate with him by telephone daily. Though he and his son were devoted to each other, the father never visited plaintiff at the hospital after the birth of his grandchild, and never entered the home where she lived in the absence of his son. So incensed was he at the presence of plaintiff that, notwithstanding the deep affection of his son for Maria, on March 1, 1936, acting upon defendant's advice, Fleetwood took Maria to Ventura to remain for a period with her parents. This was the beginning of the end of the continuous conjugal happiness which plaintiff and her husband had enjoyed for almost a year. The next time she met him was in the superior court of Los Angeles county to which Fleetwood had caused his wife to be summoned in an action for divorce. In the course of a conversation, in the silent presence of defendant, Fleetwood explained to his wife that it was his father and his family who had caused him to start divorce proceedings. Defendant had selected and retained an attorney to institute said action and had paid the cost of its prosecution. But, in the midst of the trial, a reconciliation was effected and that action was dismissed. It appeared thereafter for a while that plaintiff would enjoy her home again, but once more she had to drink the dregs of despair. On August 2, 1936, less than one month after said reconciliation, pursuant to appointment, plaintiff came from Ventura to meet her husband at a convenient corner in Hollywood. He was there accompanied by the defendant.

Plaintiff entered the automobile and a conference ensued in which Fleetwood explained that he must stay with his father. To all of her remonstrances, Fleetwood remained adamant in his obedience to the wishes of his father, who thereupon addressed plaintiff, saying: "Will you shut up? Will you stop discussing those things in my presence? Don't dare call me dad, now or ever. You have stolen my son's affections. You have ruined my household; you have about killed me and killed my wife; get out; get out, you damn hussy." Thereupon Fleetwood said to plaintiff: "Now, dear, you can see what hell I have had to go through. Can you understand why everything is so upside down? Can you see how I have tried and tried and I get this every morning and every noon and every night? This is the sort of thing I have to go through for you. You know I love you and the only solution is to get away from this place, as far from my family as possible; we will straighten things out some way or other; we will have to straighten them out. We will go away from Pasadena and we will both go, if necessary, to San Francisco or out of the state. You are my wife and nobody has the right to interfere." Whereupon the defendant said: "All right, drive her to the hotel and be done with it," and when they separated at the hotel, Fleetwood said: "Don't worry too much, dear, it is just fate and the family is getting between us again."

Plaintiff was then left to abide in the home of her parents where she received an occasional visit from her husband. His last visit to her said home was on the 5th day of January, 1937, the occasion of their last act of cohabitation. They met again

on the 28th day of May when they discussed once more the re-establishment of a home. During the spring of that year, plaintiff wrote a number of letters to Fleetwood, while he was residing at the home of the defendant; these letters were never received by the addressee.

Her frail bark was finally shattered on August 2, 1937, when she received a letter from her husband advising her that he had secured a divorce from her in Mexico. This was the first information which the plaintiff received of her husband's intention finally to separate from her. She undertook to communicate with him at the home of defendant where for the first time she was introduced by defendant to Helen Kenoss, who had celebrated a marriage with Fleetwood in the Republic of Mexico and was then living with him as his wife at defendant's home.

In her continued effort to contact Fleetwood, she again knocked at the door of defendant's home and inquired of him where she might find Fleetwood, to which the defendant replied: "I won't tell you" and slammed the door in her face.

In the course of the cross-examination of plaintiff, defendant's counsel elicited the testimony that on one occasion when Fleetwood had returned from a visit with his father, he stated to the plaintiff that his father had said to him: "Maria is not the wife for you, she will always be in the way. She is a spineless, worthless invalid. She has been ill since you were married and I can see no future for you unless you separate from her." And on another occasion, addressing plaintiff, Fleetwood said: I have come to the conclusion, Maria, absolutely, that my family will never like you or like your family. I was terribly embarrassed at your home today. Your mother and your sister prepared a dinner for us but my father absolutely refused even to enter the door of your home, which embarrassed me very much." And again, Fleetwood said: "You know, Maria, I have come to the conclusion that you and I would have been very happy if it had not been for the interference of my parents. Now I am a man, I realize it should not have made any difference whether I married a Chinese or a white girl, or any other nationality. However, it is too late."

The fact that much of the foregoing was contradicted by defendant and his family and that many facts were given in testimony in favor of the defense is of no moment since the verdict is amply supported. No criticism is directed to the instructions of the court, or to the conduct of the jury, or to the behavior of plaintiff's counsel in the course of the trial. It is true that said hearsay evidence was received but it was proof of Fleetwood's state of mind. The letter of Fleetwood to his wife was received in evidence, without objection, to impeach his testimony to the effect that his father had not objected to the marriage.

[1-8] While more evidence is required to support a judgment for alienation of affections against a parent than against a stranger (Horowitz v. Sacks, 89 Cal.App. 336, 265 P. 281), yet when a parent, from improper motives, induces his son to separate from his wife, such parent will be liable in damages to the aggrieved spouse. In such cases, it is not necessary to prove that the parent is moved by a malignant and revengeful disposition but it is sufficient if it be shown that he acted from improper motives. 13 R.C.L. 1471. If the evidence is sufficient to show that the separation was the result of the improper and active interference of the parent and if it appears that the husband would have gone back to his wife but for such interference, either by threats, persuasions or arguments, then such parent has done a wrong to the wife of their son and she is entitled to compensation for the wrong. Oakman v. Belder, 94 Me. 280, 47 A. 553, 80 Am.St.Rep. 396. The wife has the right to the conjugal affection and society of her husband; it is a valuable right and for loss of it by reason of the unlawful interference of another, she is entitled to compensation. No one is privileged to deprive a wife of the comfort and happiness which is hers by reason of her marital status and of her fulfillment of her own marital obligations. Also, the welfare of their children gives to each the right to the affection, companionship and society of the other. Price v. Price, 91 Iowa 693, 60 N.W. 202, 29 L.R.A. 150, 51 Am.St. Rep. 360. Although a parent has wide liberty in giving advice to his son relative to his domestic relations and may even advise him that his health or happiness will be rendered more nearly secure by putting away his wife, so long as he has not been actuated by malice or improper motives, yet where there is evidence that a parent accused of enticing away his son was actuated by a vengeful spirit, he is liable in damages for causing the separation of his

son from his wife. Multer v. Knibbs, 193 Mass. 556, 79 N.E. 762, 9 L.R.A.,N.S., 322, 9 Ann.Cas. 958. "It is no defense to an action for the alienation of the affections of a spouse that the conduct of the defendant was not the sole cause of the separation and loss of affections. It is sufficient if the defendant's conduct was the procuring or controlling cause of the alienation of affections, although other reasons may have contributed to some extent." Rogers v. Haines, 104 Cal.App. 191, 195, 285 P. 412, 414.

[9] The protection afforded the parent in such actions is neither universal nor absolute. If the facts are sufficient to warrant the jury in believing that the father has acted maliciously and unjustifiably in bringing about the separation of his son from his wife, the father is just as liable to the injured spouse as if he were a stranger. Note, 46 L.R.A.,N.S., 469.

[10] In the light of these authorities, the evidence was sufficient to convict the defendant of malice toward the plaintiff. His refusal to visit the hospital where his grandchild was born; his refusal to enter the home of the plaintiff in the absence of Fleetwood; his advice to his son to transport her back to her mother's home in the spring of 1936; his active interest in the prosecution of said divorce proceedings instituted by Fleetwood; his vicious behavior toward the plaintiff at said meeting on the 2d of August, 1936; his encouragement to Fleetwood to marry said Helen Kenoss in 1937, without having satisfactory knowledge of his divorce from the plaintiff, and his numerous discourtesies and incivilities toward plaintiff at her home and at his home are sufficient, if believed by the jury, to prove that in all of his behavior toward plaintiff, he was prompted by malice.

The authorities cited by the defendant are not in point. Smith v. Kiger, 5 Cal. App.2d 608, 43 P.2d 565; Bourne v. Bourne, 43 Cal.App. 516, 185 P. 489; Hall v. Hall, 174 Cal. 718, 164 P. 390. In Smith v. Kiger, supra, the acts of the father complained of were done before her father knew that his daughter had been married. In Bourne v. Bourne, supra, the son had already been estranged by the behavior of his wife when the parents provided him with money to travel to New York. In Hall v. Hall, 174 Cal. 718, 164 P. 390, the wife had sold the furniture out of her home; had taken her son to another city, leaving her husband heartbroken. After some six months had passed, she was visiting her husband at the home of his parents where she caused a summons in her divorce action to be served upon him. There was no evidence of any unfriendly act done by either Mr. or Mrs. Hall calculated to entice their son from his wife prior to her action for divorce.

In view of the action of the jury upon the evidence they heard, under the correct instructions by the court, we see no reason to interfere with the verdict.

II. Defendant's plea of the statute of limitations cannot be sustained. The action was filed April 13, 1938. Within the year preceding, Fleetwood had reaffirmed his vows of loyalty. From plaintiff's marriage until Fleetwood's final desertion of her, defendant had been persistent in his course of insulting plaintiff in the presence of Fleetwood and in much conduct calculated to separate his son from plaintiff.

[11, 12] In actions based upon tort the action accrues on the day of the wrongful act. When the last wrongful act was committed by defendant may be the subject of dispute, but the authorities and the record make it clear that the suit is not barred. Upon two theories it was within time: (1) if time began to run on the day the alienation was consummated, it is not barred. The "abduction" of the husband was a part of the wrong prohibited by section 49 of the Civil Code as it read at the time of the acts complained of. "Until that occurs, the statute of limitations cannot begin to run." Mohn v. Tingley, 191 Cal. 470, 217 P. 733, 735. In this case the final loss of the husband's affections was on a day subsequent to the last unfriendly act shown to have been committed by defendant, but the jury was justified in inferring that said loss was finally due to defendant's malice towards plaintiff.

[13, 14] (2) In no event did it commence to run before she had knowledge of his desertion. Mohn v. Tingley, supra. There were no means by which she could have learned the fact till long after April 13, 1937. Prior to that date plaintiff and her husband had been living in separate establishments and in different counties. Their visits were only occasional. Either the husband visited plaintiff at her home or they met in Los Angeles. This manner of intermittent visiting is a factor to be considered in the conduct of plaintiff with reference to the application of the statute of limitations.

[15] On January 5, 1937, her husband visited plaintiff and they cohabited in the plaintiff's home at Ventura. On February 13th the husband wrote plaintiff a letter in which he said: "Love to both you and the baby." On February 23, 1937, he again wrote plaintiff, saying: "Things are gradually getting ironed out down here. * * * I hope that you and Jeff are making the most of this wonderful weather. * * * Write me and let me know about Jeff. Thanks for your last letter. Love. Fleetwood." In May of 1937, within the year, plaintiff met her husband several times in Los Angeles. On May 28th she accompanied him to dinner at the Angeles Hotel and then they went for a drive. In a long conversation they discussed the reestablishment of their home. He reproached her for not having written him prior to her entrance at the hospital on the occasion of her tonsilectomy. He waxed warm in declaring his love for plaintiff; took her hand; kissed her good night several times and promised that very soon he would have a home for her. Surely she could not have known on that day that he had deserted or intended to desert her.

Her first knowledge of his desertion came on August 2, 1937, when she was advised by his letter that he had secured a divorce from her in the state of Chihuahua. Prior to that letter she had no knowledge or belief that he was contemplating a separation. On that day he had already taken said Helen Kenoss as a wife, of which fact plaintiff was in utter ignorance.

[16] Our courts have followed the rule of fixing the date from which the statute should begin to run as the date on which the wife first had knowledge of and believed that her husband had abandoned her. Mohn v. Tingley, supra. In Davis v. Conant, 10 Cal.App.2d 73, 51 P.2d 151, although defendants' last hostile act towards the plaintiff was on December 26, 1932, the action was filed on December 29, 1933. The statute did not begin to run then because the plaintiff and her husband cohabited after January 1, 1933, showing her lack of knowledge of his purpose to desert her. The first notice by the husband of his intention to desert his wife was when he filed his suit for annulment on February 7, 1933.

Certain authorities appear at first glance to support a contrary rule, but they do not. In the case of Tofte v. Tofte, 12 Cal.App. 2d 111, 112, 54 P.2d 1137, 1138, it is said that "the record * * * is replete with evidence *that respondent knew and believed that her husband's affections had been stolen from her* by the appellant herein as far back as 1927". More than one year preceding the commencement of the action, in her answer to the divorce case filed by her husband February 21, 1928, she affirmatively alleged that her husband deserted her on December 15, 1927. While her action was filed October 13, 1932, she had known that it had accrued five years before, which, of course, barred recovery.

The older case of Bouchard v. Reed, 7 Cal.App.2d 652, 46 P.2d 800, cited by defendant, bases its holding upon Harp v. Ferrell, 115 Cal.App. 160, 300 P. 978. But there is nothing in the latter case contrary to the holdings of Mohn v. Tingley and Davis v. Conant, supra. Mrs. Harp knew the exact period that the wrongful acts of defendant had continued, but because she offered no excuse for her delay in filing her action for over one year and three months after the last act complained of, she failed to toll the statute. The holding in the Bouchard case [7 Cal.App.2d 652, 46 P.2d 801] that "if a cause of action could arise in plaintiff's favor * * * it became barred one year after the last wrongful act of the defendant" was dictum. The facts had been found against the plaintiff. But an inspection of that record discloses that he offered no excuse in his pleading for his delay beyond a year after the acts complained of.

Therefore, upon either theory of calculating the running of time, plaintiff's filing herein was timely.

The judgment is affirmed.

I concur: WOOD, J.

McCOMB, Justice (dissenting).

I dissent.

Stripped of immaterial verbiage, these are the essential facts:

Plaintiff and defendant's son Fleetwood Jefferson were married February 27, 1935, at San Bernardino, California. At the time of the marriage defendant's son was unable to support his wife and defendant advanced him money to enable him to marry and for maintenance for several months thereafter.

Immediately after the marriage the couple went to Santa Monica, California, where they spent the night. The bride then

returned to her mother's home in Ventura, California, and the groom to his father's home in Pasadena, California. In April of the same year the couple took an apartment in Pasadena and plaintiff testified that at this time defendant said:

"Maria, you must remember that you must not come between Fleetwood's career in any way. As long as you can, you must earn your own living, support yourself, and let my son follow his own career."

"Maria, of course you know that I feel that my son also can have a musical career, and I feel in a few years he will be able to sing in the Metropolitan, and it is up to both of us, by not interfering whatsoever, for him to make a success."

"My wife has objected to you because you are not wealthy."

"We have both been interested in having Fleetwood marry a girl with means, and wealth, so that nothing could interfere with his career."

Plaintiff further testified relative to an incident occurring in May, 1935, at which she, her husband, and defendant were present, as follows: "It was in the evening, my husband was coming home from work. I heard footsteps in the hall, and the slamming of a door, and I heard Mr. Jefferson, Sr., say, 'Why didn't you answer my card?' My husband replied: 'Dad, I would have answered your card, but Maria has been so ill, I have been so busy.' Then they proceeded to the room adjoining mine, there was no door between, and Mr. Jefferson, Sr., said, 'Maria's illness makes no difference, it is just that you think more of Maria than you do of me, and more of your home.' And my husband said, 'Dad, you can see for yourself, Maria is in a very serious condition.' And Mr. Jefferson, Sr., replied: 'That makes no difference, that is not a good reason for ignoring me, either.' I remember I was very nervous, and I called: 'Dad, dad, won't you listen to me, I am so ill, we would have answered your card, please forgive me.' And Mr. Jefferson, Sr., just turned around and slammed the door and left the place. My husband came to my side and tried to comfort me for a moment, and he said, 'There, I have to follow my father, he is very angry.' And as Mr. Jefferson, Sr., was walking out the door, he said, 'Don't you ever speak to me again,' and out he went. A few minutes later my husband left."

Also she testified:

(a) My "husband had to visit his father every single day, and call him, or Mr. Jefferson, Sr., would be very disturbed".

(b) Defendant was "always trying to make my husband believe that I was feigning my illness, that I was not as ill as I was. It was only natural".

(c) Defendant said, "'Maria, you must remember having a baby is a normal thing, it seems to me you should know that, think of my own wife and the misery she made me by being ill all of her life.' 'My wife is a hypochondriac, and I can see very easily you can become one if you are not careful, and make it miserable for my son.'"

They lived together in the apartment they had rented in Pasadena until the first part of June, at which time plaintiff, due to illness, went to a hospital, where she remained for several weeks, and upon leaving the hospital she returned to her mother's home in Ventura, where she stayed until approximately the latter part of August, at which time she returned to Pasadena and lived in the same apartment with her husband until December 14, 1935, there having been born on September 29, 1935, to them a son.

On December 14, 1935, the couple moved to a dwelling house in Pasadena, where they lived together until March 1, 1936, at which time plaintiff again returned to her mother's home in Ventura. In March of 1936, plaintiff was served with a summons in a divorce action filed by her husband in Los Angeles county. Defendant objected to his son's bringing an action for divorce, but when he found that the son was determined to proceed he employed a reputable lawyer Mr. Brooks Gifford of Pasadena to represent his son. In July, 1936, a reconciliation was effected between the parties, and on stipulation a judgment was entered denying relief to either party in the action. Immediately after the so-called reconciliation plaintiff returned to her mother's home in Ventura and her husband remained with his father in Pasadena. They never thereafter maintained a common habitation. The next time plaintiff saw her husband was in Hollywood August 2, 1936, at which time she held a conference with him in the presence of defendant, her version of which is as follows: "Well, my husband had asked me to come to Los Angeles, so when I came that Sunday morning, I had an op-

portunity to come, I telephoned his residence and I was told he was taking a voice lesson, so I called his voice teacher, and finally located my husband, and he asked me to meet him at a convenient corner in Hollywood. I met him but he was not alone, he was with my father-in-law. After his greeting me, he kissed me there on the street corner, I recall, and we walked arm in arm to his car. We got there, and I said, 'Good afternoon,' it was after lunch time, and my father-in-law again made no reply, got out of the car, and my husband helped me in the car and he sat next to me, and we went along, and finally I asked my husband, I said, 'Fleetwood, do you think we can reestablish our home, do you think it will be very, very soon?' And my husband said, 'Well, dear, I don't know, my father says that I have to stay with him in Pasadena, and he suggests perhaps it will be a good thing for you to find a little place in Hollywood where you could renew your contacts with the moving picture studios and where you possibly could do some teaching in music and that would help a great deal. In the meantime, I just have to stay with dad, dad wants me to stay with him.' I said, 'Fleetwood, you promised in the court room, you made a statement that we would come and live together in just two or three months, and here I have been so excited, and I want my home, and I want to be with you, don't you love me?' And he said, 'Of course I love you, still my father thinks, he says I must stay with him in Pasadena, and we are to find a place for you here in Hollywood.' I objected, I said, 'Fleetwood, I think that is very impracticable, because the baby is so little I have to take care of him, or I have to pay someone to take care of him while I try to get myself on my feet.' I was still not very well, and I said, 'We could be so happy in just a tiny little place we could get together on what you are earning now, and everything will be just perfect for both of us.' And just then my father-in-law said, 'Will you shut up, will you stop discussing those things in my presence.' I turned to him and I said, 'Well, I am sorry, dad,' I was quite embarrassed, and he just looked at me and said, 'Don't you dare call me dad, now, or ever,' he said, 'you have stolen my son's affections, you have ruined my household, you have about killed me and killed my wife,' and he said, 'get out' and he opened the door of the car and just then he came to the boulevard stop and he opened the door and he said, 'Get out.' I was—I did not expect this, of course, and I said to my father-in-law, I said, 'Dad,' I hesitated, I said, 'I have a right to speak to my husband.' I said, 'Fleetwood, how can you sit there and listen to my father-in-law insult me.' And he said, 'Get out, you damn hussy.'—My father-in-law said that. Of course, by that time I was in tears and I said, 'Fleetwood, can you sit there and listen to your father insult me this way, don't you love me any more?' And my husband said, 'Now, dear, you can see what hell I have had to go through, can you understand why it is everything is so upside down, can you see how I have tried and tried, and I get this every morning and every noon and every night, this is the sort of thing I have to go through for you, you know I love you, and the only solution is to get away from this place, and as far away from my family as possible.' Of course, I was weeping at that time."

Plaintiff did not get out of the car but defendant did and a conversation ensued between herself and her husband. Thereafter defendant got back into the car and said, "All right, drive her to the hotel, and be done with it."

January 5, 1937, plaintiff's husband visited her in Ventura and on that occasion for the last time cohabited with her.

June 21, 1937, defendant's son married a former acquaintance, Helen Kenoss, at Tijuana, Mexico, Miss Kenoss understanding that defendant's son had obtained a divorce which would permit him to marry her. She and her husband occupied an apartment above a garage on the premises of defendant's residence. August 2, 1937, plaintiff's husband wrote her that he had obtained a divorce from her at Chihauhau.

Plaintiff testified that January 29, 1938, she drove to defendant's home in Pasadena with a Mrs. Rideout and that when she asked defendant where she could find his son he slammed the door in her face and said, "I won't tell you." The complaint in the present action was filed April 13, 1938.

Defendant relies for reversal of the judgment, among others, on this proposition:

Plaintiff's cause of action, if any, is barred by the statute of limitations, sec. 340, subsec. 3, Code Civ.Proc.

This proposition is tenable and is governed by the following principles of law:

(1) The period of limitation for bringing an action for alienation of affections is

one year as prescribed in section 340 of subsection 3 of the Code of Civil Procedure. Tofte v. Tofte, 12 Cal.App.2d 111, 112, 54 P.2d 1137.

(2) In an action for alienation of affections the period of limitation begins to run from the last wrongful act of the defendant, Bouchard v. Reed, 7 Cal.App.2d 652, 654, 46 P.2d 800.

In Bouchard v. Reed, supra, it is said, 7 Cal.App.2d at pages 653 and 654, 46 P.2d at page 801: "The judgment in favor of respondent is based upon the conclusion of law of the trial court that plaintiff's cause of action was barred by the statute of limitations. * * * If a cause of action could arise in plaintiff's favor without his wife leaving him, it became barred one year after the last wrongful act of the defendant, Harp v. Ferrell, 115 Cal.App. 160, 300 P. 978. Plaintiff's complaint was filed August 8, 1932, and upon the findings of fact before us his action was barred at that time."

It is to be noted in passing that Mr. Justice Houser, now a member of our Supreme Court, was a member of the court which rendered the decision in Bouchard v. Reed, supra.

From a reading of the case and the portions of the opinion just quoted, I am unable to agree with my learned associates in the statement that the language quoted was dictum.

Applying the foregoing rules to the facts in the instant case, it appears that the complaint was filed April 13, 1938, and that the last wrongful act charged against defendant was August 2, 1936, which was more than a year prior to the filing of the complaint. Therefore, plaintiff's cause of action, if any, was barred by the statute of limitations.

In addition to the fact that in my opinion the statute of limitations has barred any cause of action, I am satisfied that the plaintiff has not sustained the burden of proof which is required to support such an action as the present. In Hall v. Hall, 174 Cal. 718, 164 P. 390, an action for alienation of affections, our Supreme Court at page 726 of 174 Cal., 164 P. at page 393, states the rule: "Actions for damages against parents for the alienation of the affections of their married child from his or her spouse are frequent in the law, and the principles governing the introduction of evidence and the weight to be given it are equally well settled. Having in contemplation the natural solicitude of the parent for its child, and the well-nigh universal experience of mankind that parents in their conduct toward their children are actuated by high and disinterested motives, involving the sacrifice of their own interests for the welfare of the child, it is not to be lightly inferred that the language or conduct of such a parent toward a child is prompted by evil and malicious motives. Therefore, to establish such willful and malicious alienation *'the measure of proof must be extremely high.'*" (Italics added.)

In Cripe v. Cripe, 170 Cal. 91, 93, 148 P. 520, 521, our Supreme Court says: "The decisions require a much stronger case to be made out where the defendant is a parent of the spouse alleged to have been enticed."

In my opinion the facts are no stronger in the instant case than were those in Bourne v. Bourne, 43 Cal.App. 516, 185 P. 489, wherein the court held there was insufficient evidence to sustain an action against a parent for alienating the affections of a child. The evidence in the instant case does not meet the high degree of proof required by the adjudicated cases.

For the foregoing reasons the judgment in my opinion should be reversed.



38 Cal.App.2d 356

STOWE v. KAETZEL et al.

Civ. 11338.

District Court of Appeal, First District, Division 2, California.

April 8, 1940.

1. Evidence ⇐442(6)

Where vendors in written contract inserted no representation that they were in possession of entire area covered by record title, trial court did not err in permitting vendors, in purchaser's action to rescind contract and deed and to recover purchase price on ground vendors misrepresented size of property, to prove written memorandum, allegedly signed by both parties, and either

lost or destroyed at time of trial, showing variance between description in record title and description as made by boundary fences, as a "lost instrument".

See Words and Phrases, Permanent Edition, for all other definitions of "Lost Instrument".

2. Vendor and purchaser ⇐44

Evidence supported finding that vendors made no misrepresentations as to the size of the property, so as to entitle purchaser to rescind contract and deed and to recover purchase price.

3. Limitation of actions ⇐95(1)

Where there was testimony from which trial court was warranted in finding that purchaser had complete knowledge of variance between description in record title and description as made by boundary fences, more than five years before commencing action to rescind contract and deed and to recover purchase price on ground vendors misrepresented size of property, trial court properly found that action was barred by limitations. Code Civ.Proc. § 337, subd. 1; § 338, subd. 4; § 339, subd. 1; § 343.

4. Vendor and purchaser ⇐341(1)

Where purchaser knew of variance between description in record title and description as made by boundary fences for some time before survey was made, and delayed 11 months after survey before bringing action to rescind contract and deed and recover purchase price on ground vendors misrepresented size of property, purchaser was guilty of "laches" barring action.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

Appeal from Superior Court, San Luis Obispo County; J. M. Inman, Judge.

Action by Clarence D. Stowe against C. P. Kaetzel and Gertrude Jack Kaetzel to rescind written contract of sale in deed, and to recover purchase price paid for certain real property. From a judgment for defendants, plaintiff appeals.

Affirmed.

Fred A. Shaeffer, of Santa Maria, for appellant.

M. A. Fitzgerald and C. P. Kaetzel, both of San Luis Obispo, for respondents.

STURTEVANT, Justice.

This is an action brought by the plaintiff against the defendants to rescind the written contract of sale and deed and to recover the purchase price paid for certain real property. The action is in two counts. The first count is to rescind the contract and deed. The second count is to recover damages. The defendants had owned the property involved in this action and lived on the property for more than thirty years. In the early part of February, 1930, the plaintiff, desirous of purchasing some property in San Luis Obispo, contacted one Pete Bachino, who was employed by Ernest Vollmer, a real estate agent in San Luis Obispo. Pete Bachino contacted the defendants and thereafter the plaintiff agreed to purchase the real property from the defendants through Pete Bachino. At the time of purchase the plaintiff went upon the premises and inspected the property and on February 4, 1930, made a payment of $100 to bind the bargain. On February 8, 1930, the defendant C. P. Kaetzel, who is an attorney at law, prepared a contract of sale setting forth all of the terms and conditions of the agreement of sale, and thereafter, on or about the 11th day of February, 1931, prepared a deed to the property.

Marsh street extends from the southwest to the northeast. The property in suit is located on the south line of that street. The record title of the property describes a trapezoid. It fronts on Marsh street 126 feet. The sides are parallel. The north side is 150 feet. The south side is 160 feet. A straight line (length not given) connects the southeast ends of the side lines. A four-foot board fence extends across the lot. That fence intersects the north line at a point 105.75 feet back and it intersects the south line at a point 128.76 feet back. A dwelling is located on the front part of the lot. In the back part and on the westerly side of the fence there are two sheds. As one passes along Marsh street he has a view of the part enclosed back to the fence. Other facts will be stated as it becomes necessary to recite them.

[1] The plaintiff complains because the trial court admitted proof of a written memorandum which the plaintiff contends had the effect of changing the terms of an unambiguous contract. We think the point has no merit. It was the contention of the plaintiff that the defendants mis-

represented the size of the lot. He calls attention to the lengths of the sides of the lot as shown by the record title. He claims the defendants as his agents represented those dimensions to him. The same contention was made at the trial. On the other hand, during the trial the defendants earnestly contended that they did not make such representations. In support of that contention Mr. Kaetzel and Mr. Bachino testified directly. However, the defendants went further. They attempted to show that the contract of sale, and the deed which followed, each set forth the record title. However, to fully inform the purchaser Mr. Kaetzel prepared a written memorandum showing the variance between the description in the record title and the description as made by the boundary fences. That memorandum accompanied the written contract and, as claimed by the defendants, was signed by the vendors and vendees. Said instrument was executed in 1930 but at the time of the trial it had been lost or destroyed. The trial court allowed the defendants to make proof of the memorandum as a lost instrument. In doing so we think it did not err. Said memorandum in no manner attempted to vary the terms of the contract. The defendants in the written contract inserted no representation that they were in possession of the entire area covered by the record title and therefore the written memorandum did not conflict with the terms of the contract in any respect. Bearing in mind that the gravamen of plaintiff's complaint was the making of false representations, it is obvious the subject-matter of the written memorandum was material evidence, whether oral or in writing, and was therefore admissible.

[2] In his next point the plaintiff asserts he had the right to rely upon the statements made by the defendants as to the area of the property and was not under any duty to make an independent investigation of the area of this property for himself. The point seems to be presented ex gratia. We do not understand that the defendants contend to the contrary. On the other hand they offered evidence to the effect that they never made any misrepresentations. The trial court made a specific finding in their behalf. That finding is controlling in a court of review.

[3] The trial court found the plaintiff's action was barred by the provisions of subdivision 1 of section 337, subdivision 4 of section 338, and subdivision 1 of section 339, and section 343 of the Code of Civil Procedure. The plaintiff asserts he did not have any knowledge that the property was not as represented in the contract until July, 1935, when he had a survey made. The action was commenced July 10, 1936. If there were no other evidence in the record the plaintiff's contention would have some merit. But the point presented by the plaintiff fails to take into consideration much evidence that was introduced by the defendants. As shown above, the written memorandum expressly informed the plaintiff as to the variance between the dimensions of the lot as enclosed and its dimensions as shown by the record title. Furthermore, Mr. Kaetzel testified that in April, 1931, he had a conversation with the plaintiff in which said variance was fully discussed. If the trial court believed that testimony, and from its findings we must assume it did, then the trial court was warranted in finding that the plaintiff had complete knowledge of the facts more than five years before the action was commenced. Under those circumstances the trial court correctly found that the action was barred by the statute of limitations.

The defendants make the contention the findings of the court that they never made any representations to the plaintiff as to the area or dimensions of the property are fully sustained by the evidence. It is sufficient to state Mr. Kaetzel and Mr. Bachino both testified directly that neither one made any representation whatever. Mr. Bachino testified that when on February 4, 1930, the plaintiff inspected the property, they were standing on the back porch looking at the board fence above mentioned and the plaintiff inquired if that fence was on the line. Mr. Bachino replied he presumed it was.

[4] The defendants make the further contention that the purported rescission of the plaintiff was not made promptly even though we assume plaintiff's testimony to be the only true facts stated by the witnesses. The survey was made in July, 1935. The plaintiff testified he knew of the variance in the dimensions "quite a little while" before the survey was made. No rescission was attempted until June 20, 1936, thus at least eleven months expired from the time of the survey to the date of rescission, and if we add the "quite a little while", spoken of by the plaintiff

himself, we get a period of well over a year. Bearing in mind that all of the parties lived in the city of San Luis Obispo and that no other obstacles prevented, it may not be said the plaintiff acted promptly. Campbell v. Title Guarantee, etc., Co., 121 Cal.App. 374, 376, 9 P.2d 264.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



38 Cal.App.2d 551

MURDOCK et al. v. EDDY.

Civ. 12474.

District Court of Appeal, Second District, Division 2, California.

April 20, 1940.

1. Judgment ⇐720

A judgment or decree necessarily affirming existence of any fact is conclusive on parties and their privies whenever existence of such fact is again put in issue between them, whether subject matter is same or point arises incidentally in relation to different matter in same or any other court.

2. Judgment ⇐670, 677

When party to action acts in representative capacity and is lawfully authorized to litigate questions at issue for those whom he represents, they, as well as he, are bound by judgment rendered.

3. Judgment ⇐720

A final judgment of Superior Court, determining that divorced husband's obligations to his son under property settlement agreement with wife should terminate when son became 21 years old in action by wife and son against husband to enforce such agreement, was res judicata as to such question in subsequent action, brought by wife and son after he attained majority, to recover from husband money alleged to be due for son's support under such agreement.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Mabel K. Murdock and another against J. O. Eddy to recover money due under a property settlement agreement. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Paul R. Cote and Euler & Subith, all of Los Angeles, for appellants.

Wilson, Compton & Wilson, of Flagstaff, Ariz., and Ernest C. Griffith, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover money alleged to be due under a property settlement agreement, plaintiffs appeal.

The essential facts are:

Plaintiff Mabel K. Murdock and defendant were husband and wife. August 18, 1925, they entered into a property settlement agreement by which defendant was to pay to said plaintiff the sum of $1,040 per month so long as she should remain unmarried and in the event that she should obtain a divorce from defendant and subsequently remarry the sum of $520 per month for the care, maintenance, and support of their minor child, plaintiff Jerome Arthur Eddy.

Among others, the property settlement contained these provisions:

"In case a divorce should be hereafter granted at the suit of either of the parties hereto, and if the party of the second part shall hereafter remarry, then and in that event the party of the first part agrees from the date of such remarriage to pay to the party of the second part the sum of five hundred and twenty dollars ($520.00) a month for the care, maintenance and support of the child of the parties of the first and second part, such payment to be in lieu of all support and maintenance of the said child of the parties of the first and second part, it being agreed that the party of the second part shall have no other claim against the party of the first part for any further sum for her support or maintenance after such remarriage."

"Whereas, the said parties desire to effect a settlement of all the property rights, by way of dower, homestead or other in-

terests, of the party of the second part in any property or income owned by the party of the first part, and desire to settle all question of maintenance and support of the party of the second part and of their child, Jerome Arthur Eddy, being the only child of the parties of the first and second part:"

"And for and in consideration of the consummation of this contract by the party of the first part and the payment of the said sums of money in accordance with the terms of this agreement, said party of the second part does hereby release her right of alimony, temporary and permanent, and all her rights of dower, homestead, widow's award or otherwise, in and to the property and estate of the party of the first part."

Plaintiff Murdock obtained a divorce from defendant September 10, 1925, in the state of Illinois, the divorce decree incorporating the property settlement above referred to. Subsequently said plaintiff remarried. Thereafter plaintiff Murdock and plaintiff Eddy through his guardian, he then being a minor, filed an action against defendant in the superior court of Los Angeles county to enforce the provisions of the property settlement above set forth, wherein defendant agreed to pay for the care, support, and maintenance of Jerome Arthur Eddy, $520 per month. Defendant claimed that he was relieved from further obligations to pay for his son's maintenance and support because his son had married. However, the superior court of Los Angeles county found contrary to this contention and entered a judgment reading in part as follows (Book 976, p. 3 of Judgments of the Superior Court of Los Angeles County):

"That said defendant is obligated, under and by virtue of the decree described in plaintiffs' complaint herein, and of the contract incorporated therein, to pay to said plaintiff, Ralph Sparling, as guardian of the estate of said Jerome Arthur Eddy, the sum of $520.00 on the 18th day of each calendar month, commencing with the month of July, 1937, hereafter, and until said Jerome Arthur Eddy shall become twenty-one years of age."

No appeal has been taken from this judgment and it has become final.

Plaintiff Eddy became twenty-one years of age November 15, 1938, and plaintiffs now seek to enforce the property settlement agreement on the ground that defendant's obligation under it did not terminate when plaintiff's son attained the age of twenty-one years.

The trial court in the instant case found that the questions here raised were res judicata because of the judgment of the Superior Court of Los Angeles County above mentioned.

This is the sole question to be determined:

Did the judgment of the Superior Court referred to above render res judicata the question of the time when defendant's obligation to plaintiffs under the above-mentioned property settlement agreement should terminate?

[1] This question must be answered in the affirmative. The law is established in California that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties and their privies whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point arises incidentally in relation to a different matter in the same or any other court (Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 510, 258 P. 387; Hardy v. Rosenthal, 2 Cal.App.2d 442, 444, 38 P.2d 412).

[2] It is also settled that when a party acts in a representative capacity, and as such is lawfully authorized to litigate the questions at issue for those whom he represents, they as well as he are bound by the judgment (Williams v. Southern Pac. Co., 54 Cal.App. 571, 578, 202 P. 356).

[3] Applying the foregoing rules to the facts of the instant case, it is apparent that the plaintiffs in the present case are identical with the plaintiffs in the Superior Court action above referred to, that the identical provisions of the property settlement agreement were at issue in each case, and that the Superior Court entered a judgment determining that defendant's obligation to his son should terminate when the son became twenty-one years of age. Since the judgment in the prior action has become final, the matter is res judicata and defendant's son having attained his twenty-first birthday, defendant is relieved from further obligation to plaintiffs, or either of them.

For the foregoing reasons the judgment is affirmed.

I concur: MOORE, P. J.

38 Cal.App.2d 533

CALIFORNIA BANK v. BELL et al.

Civ. 6344.

District Court of Appeal, Third District, California.

April 19, 1940.

1. Trusts ⇐1

A conveyance of lots in trust for grantor and others, by one without interest therein, after title thereto passed to another of such beneficiaries as devisee under deceased previous owner's will, was void. Probate Code, § 300.

2. Mortgages ⇐131

Where grantee of lots, devised to grantor by previous owner's will, reconveyed them to devisee after her execution of trust deed to bank as security for loan, title acquired by her on such reconveyance inured to bank's benefit and created lien securing such debt, even if equitable title was in prior grantee when trust deed was executed.

3. Mortgages ⇐131

A trust deed, like mortgage, creates valid lien on realty conveyed to secure a debt for which it is executed, though mortgagor has no title to property at time of execution of deed, if he subsequently acquires title during life of mortgage.

4. Mortgages ⇐131

Title to realty acquired after it is mortgaged is deemed covered by mortgage lien on theory that mortgagor is estopped to deny title. Civ.Code, § 2930.

5. Mortgages ⇐25(2)

There was adequate consideration for execution of note to bank for loan and trust deed securing it, where portion of money loaned was used to pay obligations incurred for mortgagor's benefit and substantial sum remained in trustee's hands for her benefit.

6. Evidence ⇐63

The presumption is that one executing note to bank for money loaned and trust deed securing it before her commitment to mental hospital was sane at time of executing such instruments.

7. Mortgages ⇐86(3)

The facts that one executing note to bank for money loaned and trust deed securing it was once inmate of institution for mentally defective for six months and had not been formally discharged therefrom, or fact that her guardian, appointed when she left institution, had not been discharged, furnished no such substantial evidence of judicial determination of her incompetency as to render her execution of such instruments six years before her commitment to such institution void. Civ.Code, § 40.

8. Limitation of actions ⇐175

The privilege of pleading statute of limitations as defense to obligations arising under instrument, such as note, may be waived.

9. Mortgages ⇐25(2)
Trusts ⇐13

A note and trust deed, executed to bank by devisee of mortgaged realty while of sound mind for loan of money used and remaining in trustee's hands for devisee's benefit, were not void as without consideration or violating terms of previous trust declaration executed by one not shown to have owned mortgaged realty or had authority to execute such instrument.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Suit by the California Bank against Ruth Bell and others to foreclose a trust deed. Judgment for defendants, and plaintiff appeals.

Reversed and remanded.

Swanwick, Donnelly & Proudfit and Donald O. Welton, all of Los Angeles, for appellant.

Mildred Gilmore, Irvin C. Louis, and H. B. Pool, all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The California Bank has appealed from a judgment which was rendered against it in a suit to foreclose a trust deed executed by the defendant, Ruth Bell, to secure a loan of $4,000. The court found that no part of the promissory note which was secured by the trust deed had been paid. The court, however, determined that the note was executed without consideration and that the trust deed was void because it violated the terms of a former declaration of trust made by Frederick T. Goebels, affecting the same property. Judgment was rendered against the plaintiff to the effect that it take nothing by this action.

[1] The record in this case fails to support the findings of the court. It lacks evidence of several essential elements upon which the asserted invalidity of the trust deed and the construction of the former declaration of trust depend. The chief issue is whether Ruth Bell owned the property in question and had the authority to execute her deed of trust to secure the $4,000 loan. A portion of lots "W" and "X" in block 164 of Santa Monica, California, was conveyed in 1911 to Minnie G. Talbott, the mother of Ruth Bell. Mrs. Talbott deeded the lots to Joseph L. Farrell in 1914. Mr. Farrell died testate in 1921, possessed of real property in Los Angeles county, including the lots above referred to. By the terms of his will, which was admitted to probate in the superior court of Los Angeles county, the lots were devised to Ruth Bell. Final distribution of his estate was made March 17, 1926. By the terms of that decree title to the lots was vested in Ruth Bell. Upon the death of Mr. Farrell, May 24, 1921, title to those lots passed immediately to the devisee, subject only to the administration of the estate. Sec. 300, Probate Code. After title to the lots had passed to Ruth Bell by the terms of the will of Joseph L. Farrell, one Frederick T. Goebels purported to convey them to California Trust Company, a corporation, in trust for the support and benefit of Ruth Bell, an unmarried woman; Minnie G. Talbott, her mother; Joanna Goebels and Frederick T. Goebels, during their lives. It does not appear that Goebels ever had any interest in the lots. That conveyance was void. The declaration of trust accompanying the conveyance of the lots from Goebels authorized the trustee to manage and control the property paying the net income therefrom to the beneficiaries as designated. In case of necessity the trustee was authorized in its discretion to mortgage the property to maintain, repair or reconstruct the buildings. The declaration of trust then provided that the beneficiaries could not sell, transfer or mortgage the property so as to impair their interests therein and that their interests should not become liable for the claims of creditors or the processes of law.

The judgment in this case was evidently rendered on the theory that Goebels had title to the property, that his declaration of trust was valid and binding upon Ruth Bell, as a beneficiary, and that her subsequent execution of the deed of trust to secure her loan of $4,000 was prohibited by the terms of that instrument and therefore void.

The conveyance of the lots from Goebels to the California Trust Company and the declaration of trust were executed May 1, 1923. April 15, 1925, Ruth Bell purported to convey to the California Trust Company the lots in question, subject to a mortgage of $1,500 in favor of Katharine Dugan Miles. March 7, 1928, the California Trust Company deeded the property back to Ruth Bell. The following day Ruth Bell reconveyed the lots to California Trust Company, subject to the deed of trust held by California Bank, the plaintiff in this case, to secure the loan of $4,000 previously negotiated by her. February 23, 1928, Ruth Bell negotiated a loan of $4,000 from the plaintiff, California Bank, evidenced by her promissory note for that sum, payable to California Bank in three years from that date at seven per cent interest payable quarterly. That note was secured by the deed of trust above referred to, which is involved in this suit. It is executed by Ruth Bell, a single woman, as trustor to California Trust Company, as trustee, and California Bank, as beneficiary. The $4,000 was paid to California Trust Company. A part of that sum was expended to meet certain obligations incurred under the terms of the declaration of trust executed by Goebels, leaving a balance of $2,466.10 in the hands of California Trust Company, as trustee. It appears that this loan of $4,000 was authorized by Ruth Bell, the owner of the mortgaged land. She voluntarily paid that money to the California Trust Company or authorized it to be paid to that trustee. She defaulted in the payment of the promissory note which was secured by the deed of trust of February 23, 1928. This suit to foreclose the deed of trust was commenced April 6, 1936, slightly more than four years after the maturity of the note for which it was executed. The running of the statute of limitations against the trust deed was expressly waived by the trustor and owner of the property in the following language: "The right to plead any and all statutes of limitations as a defense to any demand secured by this deed of trust is hereby waived."

The California Trust Company failed to appear or answer the complaint. Ruth Bell and Frederick T. Goebels are the only defendants who answered the pleading. There

is no allegation or evidence that Goebels ever owned the land in question or that he had authority to execute the declaration of trust. The trial court assumed that the original declaration of trust was valid and found that the subsequent deed of trust, dated February 23, 1928, was void because it violates the provisions of the declaration of trust prohibiting the "beneficiaries" from transferring or mortgaging the property, and that the trust deed was given without consideration. From the judgment which was accordingly rendered to the effect that the plaintiff take nothing by its action, this appeal was perfected.

[2] The appellant positively declares that Frederick T. Goebels never had title to the lots in question. It further asserts that he had no authority to execute his declaration of trust of May 1, 1923. The respondents fail to meet that challenge. There is no evidence that Goebels ever owned the lots in question or that he had authority to bind Ruth Bell's property by his declaration of trust with respect thereto. The record is uncontradicted that Ruth Bell acquired absolute title to the lots by the decree of distribution from the estate of Joseph L. Farrell, deceased. It belonged to her and not to Goebels. She subsequently deeded the property to California Trust Company, which reconveyed it to her March 8, 1928, about a month after the deed of trust was executed. During all of the time involved in this litigation Ruth Bell held the legal title to the property. Even though the equitable title may have been in California Trust Company at the time her deed of trust to secure the $4,000 loan was executed on February 23, 1928, her title, subsequently acquired by reconveyance of the lots to her on March 8, 1928, inured to the benefit of the mortgagee and created a lien securing the debt for which the deed of trust was previously executed.

[3, 4] It has been repeatedly held that a trust deed, like a mortgage, creates a valid lien on real property to secure a debt for which it is executed, even though the mortgagor has no title to the property at the time of the execution of the instrument provided he subsequently acquires title thereto during the life of the mortgage. Title to real property acquired after it is mortgaged is deemed to be covered by the lien, on the theory that the mortgagor is estopped from denying title under such circumstances. Sec. 2930, Civ.Code; 17 Cal. Jur. 854, sec. 142; 58 A.L.R. 391, note; Orr v. Stewart, 67 Cal. 275, 7 P. 693; Schelling v. Thomas, 96 Cal.App. 682, 688, 274 P. 755.

[5] There was adequate consideration for the execution of the promissory note and trust deed. A portion of that money was used to pay obligations incurred for the benefit of Ruth Bell, and $2,466.10 remains in the hands of the trustee for her benefit.

[6, 7] The evidence supports the finding of the court that the defendant, Ruth Bell, was not of unsound mind when she executed the note and trust deed. Those instruments were therefore not void on that account. It is true that she alleged in her amended answer that she was of unsound mind. But it is not alleged when she was of unsound mind or that she was incompetent when those instruments were executed. She testified that she was an inmate of "a mental hospital in Stanton, Virginia, for six months" in 1934, and that she "came out on the 22nd of July, 1934". She also said that a guardian of her person and estate was then appointed, and that he has not been discharged from that trust. There is no other evidence of her incompetency at the time she executed the note and trust deed six years before her commitment to that institution. There is no evidence she was incompetent February 23, 1928, when those instruments were executed. The presumption is that she was sane. Estate of Perkins, 195 Cal. 699, 235 P. 45; 14 Cal. Jur. 362, sec. 19. The finding of the court that she was not incompetent at that time, or at any time prior to January 23, 1934, is supported by the evidence without conflict. The mere fact that she was once an inmate of an institution for the mentally defective for a period of six months and that she was not formally discharged therefrom, or that her guardian who was then appointed has not been discharged furnishes no substantial evidence of a judicial determination of incompetency under section 40 of the Civil Code, which will render her execution of the note and mortgage six years before that time void. Guardianship of Carniglia, 139 Cal.App. 629, 34 P.2d 752; Albertson v. Schmidt, 128 Cal.App. 344, 17 P.2d 158. It may, therefore, not be said the note and trust deed were void on that account.

[8] The right to plead the statute of limitations as a defense for failure to bring this suit within four years from the ma-

turity of the note, was specifically waived by the terms of the trust deed. The privilege of pleading the statute of limitations as a defense to obligations arising under an instrument may be waived. Brownrigg v. DeFrees, 196 Cal. 534, 238 P. 714; 16 Cal. Jur. 570, secs. 165, 199.

[9] For the foregoing reasons we are of the opinion the record contains no substantial evidence that the promissory note and trust deed of Ruth Bell are void. On the contrary, it appears that the previous declaration of trust of Frederick T. Goebels, upon which the judgment in this case is founded, lacks proof that he ever owned the property or had authority to execute that instrument.

The judgment is reversed and the cause is remanded for a new trial.

We concur: PULLEN, P. J.; TUTTLE, J.



38 Cal.App.2d 561

CHAMBERS v. BOARD OF TRUSTEES OF CITY OF MADERA SCHOOL DIST. et al.

Civ. 6295.

District Court of Appeal, Third District, California.

April 22, 1940.

Hearing Denied June 20, 1940.

1. Mandamus ⇐168(4)

In action to compel petitioner's reinstatement in position of nurse in the city schools, evidence sustained findings that trustees of school district intended to provide a temporary service of same kind and character until petitioner could be deprived of her position as a permanent employee of the district, and that trustees of district had no reasonable ground to believe health service of district would be improved by discontinuing position of school nurse. School Code, § 1.110, and § 5.711, as amended by St. 1935, p. 1885.

2. Schools and school districts ⇐63(1)

Dismissal by trustees of school district of a school nurse who had become a permanent employee and the employment of a physician in her place did not constitute a discontinuation of a particular kind of service and the substitution of another so as to justify, under School Code, nurse's dismissal, since the School Code authorizes board to establish but one kind of service, that of "health inspector", and the employment of a physician would be a continuation of the services of health inspector. School Code, § 1.110, and § 5.711, as amended by St.1935, p. 1885.

3. Schools and school districts ⇐63(1)

Under the statute authorizing boards of trustees of school districts to appoint physical inspectors who may be physicians, teachers, nurses, oculists, dentists, optometrists, or any one or more of such persons, the professions enumerated are merely descriptive and are in the nature of a limitation on the employing powers of a school board. School Code, § 1.110, and § 5.711, as amended by St. 1935, p. 1885.

4. Schools and school districts ⇐63(1)

A school board has wide discretion in the matter of selecting employees, but where that discretion has been exercised, and employee has acquired status of a permanent employee, board cannot dismiss such employee for sole purpose of employing another whose qualifications may seem more desirable. School Code, § 5.711, as amended by St.1935, p. 1885.

Appeal from Superior Court, Madera County; H. S. Schaffer, Judge.

Proceeding on the application of Marie D. Chambers for a writ of mandate to compel Board of Trustees of City of Madera School District, John B. Gordon, Susan H. Ransom, and Marshall Hughes, members of the board, to reinstate the petitioner in the position of school nurse. From a judgment for the petitioner, the defendants appeal.

Affirmed.

George Mordecai, Dist. Atty., and Everett L. Coffee, Deputy Dist. Atty., both of Madera, for appellants.

David E. Peckinpah and L. N. Barber, both of Fresno, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Respondent filed a petition for writ of mandate in the trial court to compel appellants, as trustees of Madera City School

District, to reinstate her in her position of school nurse. Judgment granting the writ was entered, and the trustees now appeal from the same.

Respondent had been employed by appellants for some thirteen years as nurse in the city schools of Madera. Prior to this action, no objection of any character was ever raised by appellants over the manner in which she performed her duties. She had attained the status of a "permanent employee" under the provisions of the School Code.

On March 7, 1939, the respondent board of school trustees adopted the following resolution: "Mrs. Ransom moved, and Mr. Gordon seconded the motion, that the position of school nurse of the City of Madera School District be, and is hereby abolished, to become effective June 30, 1939. Those voting for the motion were Mrs. Ransom and Mr. Gordon. Mr. Hughes was recorded as not voting. The motion carried."

Following this, the respondent board served upon Mrs. Chambers the following notice:

" 'Notice

" 'To Mrs. Marie Chambers:

" 'You are hereby notified that the board of trustees of City of Madera School District, on the 7th day of March, 1939, at a meeting duly held pursuant to law, and upon motion duly made and carried, discontinued the position of School Nurse in said City of Madera School District; that by reason of the discontinuance of said position of School Nurse it has become necessary to decrease the number of permanent employees in said School District, and that after the termination of this present school year, to-wit, July 1, 1938, to June 30, 1939, your services will no longer be required by said City of Madera School District.

" 'You are hereby further notified to appear at a hearing before the Board of Trustees of said School District on the 11th day of April, 1939, for the purpose of determining whether or not you have the necessary qualifications and certification and are qualified and competent to perform the duties rendered by the probationary teachers or certified employees now employed, or will be employed for the ensuing year, to-wit, from July 1, 1939, to June 30, 1940, in said City of Madera School District.' "

The court found the facts substantially as they are alleged in the petition: "That on the 7th day of March, 1939, the respondents, at a meeting of the board of trustees of the City of Madera School District, adopted a resolution discontinuing the position of School Nurse in said School District; that the said resolution did not purport to discontinue the kind and type of service theretofore rendered by petitioner, but respondents in fact intended to provide a temporary service of the same kind and character until petitioner could be deprived of her position as a permanent employee of said District; that at the time of adopting the said resolution, the respondents had no reasonable ground to believe that the health service of the said school district could be improved by discontinuing the position of School Nurse; that the said resolution was unreasonable, arbitrary and discriminatory, and was adopted for the purpose of depriving petitioner of her position as a School Nurse in violation of her right as a permanent employee of said District."

Judgment was entered as follows: "It is ordered, adjudged and decreed that a peremptory writ of mandate issue out of, and under the seal of this court, directing the respondents to rescind that certain resolution adopted by the Board of Trustees of the City of Madera School District upon the 7th day of March, 1939, discontinuing the position of School Nurse in the said School District, and to employ the petitioner Marie D. Chambers in said position for the school year commencing on the first day of July, 1939, and ending on the 30th day of June, 1940."

[1] The findings quoted are questioned in two particulars. First, it is urged that there is no evidentiary support for the finding that "respondents (appellants here), in fact intended to provide a temporary service of the same kind and character until petitioner could be deprived of her position as a permanent employee of the said district". Witness Mabel Johnson testified that she attended a meeting of the school board when the dismissal of respondent was discussed. She testified that one of the appellants stated that she had been to Sacramento about the matter, and that the only way they could get rid of respondent was to abolish the position for one year. Other witnesses testified that some of appellants had stated they wished to employ a physician. Respondent Gordon also testified that the board intended to employ a physician in place of respondent. The finding is supported by sufficient evidence. Second, it is contended that the finding that appellants

"had no reasonable ground to believe the health service of the said School District could be improved by discontinuing the position of school nurse" lacks evidentiary support. There is ample evidence to show that appellants were not actuated by a desire to improve the service, but to discharge respondent. Witnesses testified that appellants, some time prior to the dismissal, had endeavored to compel respondent to accept a reduction in her salary; that she refused to accept the proposal; that appellants thereupon refused to give respondent a contract for the school year, and that she was compelled to employ a lawyer in order to get the salary due her. Witness Mabel Johnson, who attended a meeting of appellants, testified as to what took place there, as follows: "They seemed to think she (respondent) was all right, only her salary was too high, and they had asked her to resign, and she wouldn't do it, or take a cut in her wages". There is sufficient evidence to sustain the finding. The court could reasonably infer and conclude that improvement in the health service was not the real reason for the dismissal.

Section 1.110 of the School Code provides as follows: "For the purposes set forth elsewhere in this Chapter, said boards may appoint a physical inspector, or physical inspectors, as the board may determine, to consist of a physician, teacher, nurse, oculist, dentist, optometrist, or any one or more of said persons. In case of the appointment of more than one physical inspector, said inspectors may, in the discretion of the board, all be chosen from any one of the classes designated. Said board may also appoint such number of nurses and dental hygienists as it may be deemed necessary to work under the direction of the physical inspector or inspectors, and may provide for the compensation of such employees, but no money set aside for the payment of teachers' salaries or for library purposes may be used for this purpose".

Section 5.711 of the same code provides: "Whenever it becomes necessary to decrease the number of permanent employees in a school district on account of the discontinuance of a particular kind of service in such district, the governing board may dismiss so many of such employees as may be necessary at the close of the school year. In making such dismissals, employees shall be dismissed in the inverse of the order in which they were employed."

[2-4] Appellants contend, that although the findings are supported by the evidence, they do not support the judgment. They argue that appellants had the right to dismiss respondent, and to employ a physician in her place. This, they say, would not contravene the School Code, section 5.711, because it is a discontinuation of "a particular kind of service", and the substitution of another. The fallacy of this contention lies in the fact that the School Code, section 1.110, authorizes the board to establish but one kind of service—that of health inspector. The six professions enumerated there are merely descriptive, and are in the nature of a limitation upon the employing powers of the school board. The subsequent employment of a physician by the board, this being their intention according to the undisputed evidence, would be a continuation of the services of health inspector, the identical position held by respondent. We agree with appellants' contention that a school board has wide discretion in the matter of selecting employees, but where, as here, that discretion has been once exercised, and the employee has acquired the status of a permanent employee, the law will not, under the theory of further discretionary power, permit the dismissal of that employee for the sole purpose of employing another whose qualifications may seem more desirable.

We have examined the cases cited by appellants. In none of them was it found that the position was discontinued for the sole purpose of employing another under the same designation. In Jones v. Board of Trustees, 8 Cal.App.2d 146, 47 P.2d 804, it was held that the school board had the right to discontinue the teaching of music by a permanent teacher, and to continue the teaching of that subject through other teachers already employed. There was no finding that the dismissal was made for the purpose of employing another under the same designation.

In effect, the court found that the dismissal of respondent was not made in good faith, but was made for the purpose of evading the tenure provisions of the School Code. The evidence supports the findings, and, in turn, the findings support the judgment. The judgment is therefore affirmed.

We concur: LEMMON, Justice pro tem.; THOMPSON, J.

38 Cal.App.2d 622

ZELLER v. REID et al.

Civ. 2291.

District Court of Appeal, Fourth District, California.

April 26, 1940, May 27, 1940.
As Modified June 13, 1940.

1. Death ⇐57, 89

In mother's action for death of 18 year old son, where father was dead, the mother could only recover such pecuniary loss to her as was established by evidence, and recoverable loss did not include damages for anguish caused by loss of son. Code Civ. Proc. § 376.

2. Death ⇐88, 89

In mother's action for death of 18 year old son, loss by reason of wounded feelings could not be considered by jury in assessing damages, but jury could consider pecuniary value of society, comfort, and protection which might reasonably have been expected by the mother had the son lived. Code Civ. Proc. § 376.

3. Death ⇐57

In mother's action for death of 18 year old son, where father was dead, amount of damages allowed for pecuniary value of society, comfort, and protection which might reasonably have been expected by mother had the son lived was required to be shown to be reasonably related to such pecuniary loss as was shown by evidence. Code Civ.Proc. § 376.

4. Death ⇐57, 86(1)

In mother's action for death of 18 year old son, mother was entitled to compensation for any pecuniary loss suffered by reason of having been deprived of any pecuniary benefit reasonably to be expected from son after his majority, had the son lived, and in fixing such pecuniary loss, the evidence was required to show some relation between amount awarded and amount which mother might have reasonably expected the son to have contributed to her support had he lived and reached majority. Code Civ.Proc. § 376.

5. Death ⇐87

In mother's action for death of 18 year old son, prospective value of son's services and earnings during his minority could not constitute an element of recoverable damage where the mother, under contract with a third party, had released to third party the care and control of son during his minority and the benefits from his services while a minor. Code Civ.Proc. § 376.

6. Death ⇐104(5)

In mother's action for death of 18 year old son, instructions that in considering mother's pecuniary injury jury should consider earning capacity of son after his majority as well as during his minority, and that mother was entitled to recover damages to extent that she had been deprived of son's earnings, were erroneous, where the mother had relinquished to a third party her son's earnings during his minority. Code Civ.Proc. § 376.

7. Death ⇐86(2)

In mother's action for death of 18 year old son, the only element of damage consisting of loss of support after son attained his majority which could be considered by jury was that loss which evidence showed might be reasonably expected. Code Civ. Proc. § 376.

8. Death ⇐99(3)

$3,280 awarded to mother for death of 18 year old son was excessive and would be reduced to $1,000, where mother had resided in Ohio and son lived with relatives in California, and the mother had relinquished to a third party the son's earnings during his minority, and son's contributions to mother's support had more sentimental than monetary value, and amount which son could have contributed to mother's support after he attained majority was left to speculation. Code Civ.Proc. § 376.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Myrtle Zeller against G. W. Reid and others for damages resulting from the death of plaintiff's son, who was injured in an automobile accident. From a judgment for $3,280 for plaintiff, defendants appeal.

Affirmed as modified.

Bronson, Bronson & McKinnon, of San Francisco, and Bradley & Bradley, of Visalia, for appellants.

Sherrill Halbert and Frederick E. Stone, both of Porterville, for respondent.

MARKS, Justice.

This is an appeal from a judgment for $3,280, entered on the verdict of a jury, for damages to plaintiff resulting from the death of Harold William Lamb, her son, who was injured in an automobile accident on November 9, 1934, and who died November 11, 1934, Harold was eighteen years and eight days old at the time of his death. At all times herein mentioned plaintiff was a resident of Ohio and Harold resided with his uncle and aunt in California.

This case has been here before. Zeller v. Reid, 26 Cal.App.2d 421, 79 P.2d 449, 451. The principal facts of the case are there set forth and need not be repeated. On the first trial the jury returned a verdict in plaintiff's favor in the sum of one thousand dollars. The trial court granted a motion for new trial on the question of damages only "on the grounds of the insufficiency of the evidence to sustain the verdict rendered herein". While the question of excessive damages was not before us on the former appeal, in discussing another question we observed: "When we compare the amount of the recovery in this case with the pecuniary loss suffered and proved by plaintiff, we cannot regard the award of $1000.00 as only nominal damages. Under the evidence it is a very substantial award. * * * it is obvious that a large award could not be supported by the evidence before us."

[1-4] This is an action brought under the provisions of section 376 of the Code of Civil Procedure, by a mother, to recover damages for the death of her minor child, the father being dead. Rules governing the measure of damages in cases of this kind are well established. A plaintiff can only recover such pecuniary loss to her as is established by the evidence. This does not include damages for anguish caused by the loss of a loved one. Nothing can be recovered by way of solatium for wounded feelings and such loss may not be considered by the jury in assessing damages. However, the jury may consider the pecuniary value of the society, comfort and protection which might reasonably be expected had the child lived. The amount allowed therefor must be shown to be reasonably related to such pecuniary loss as is shown by the evidence. Ordinarily (but not here) the parent is entitled to the pecuniary value of the services of the child during minority. She is also entitled to compensation for any pecuniary loss suffered by reason of having been deprived of any pecuniary benefit reasonably to be expected from the child after his majority had he lived. Again, in fixing such pecuniary loss, the evidence must show some relation between the amount awarded and the amount which the parent might have reasonably expected the child to have contributed to her support had he lived and reached his majority. This involves his prospective earning power. See Morgan v. Southern Pac. Co., 95 Cal. 510, 30 P. 603, 17 L.R.A. 71, 29 Am.St.Rep. 143; Sneed v. Marysville Gas & Elec. Co., 149 Cal. 704, 87 P. 376; Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520; Hale v. San Bernardino Valley T. Co., 156 Cal. 713, 106 P. 83; Bond v. United Railroads of San Francisco, 159 Cal. 270, 113 P. 366, 48 L.R.A., N.S., 687, Ann.Cas.1912C, 50; Dickinson v. Southern Pacific Co., 172 Cal. 727, 158 P. 183; Parsons v. Easton, 184 Cal. 764, 195 P. 419; Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 295 P. 41; Griffey v. Pacific Elec. Ry. Co., 58 Cal.App. 509, 209 P. 45; Ray v. Pacific Gas & Elec. Co., 3 Cal.App.2d 329, 39 P.2d 812; Ure v. Maggio Bros. Co., 24 Cal.App.2d 490, 75 P.2d 534; Zeller v. Reid, supra.

[5] We should again remark that in the contract entered into between Mrs. Zeller and Clarence R. Lamb, under date of August 30, 1928, the mother released to Mr. Lamb the care and control of Harold and his brother during their minority as well as the benefits from their services. As plaintiff had relinquished to another the right to the benefit of Harold's services, the prospective value of those services and his earnings during his minority could not constitute an element of damage for which the mother could recover. Mr. Lamb, not Mrs. Zeller, was entitled to the benefit of those services and earnings.

In the second trial plaintiff went into greater detail concerning her relationship with Harold than on the first trial. The evidence now shows that she visited her sons at the Lamb home in California for about eighteen months in 1925 and 1926. Mr. and Mrs. Lamb took Harold and his brother to visit Mrs. Zeller at her home in Ohio during 1928, 1930 and 1933. These visits lasted about three weeks, one month, and six weeks, respectively. Harold showed himself to be a kind, dutiful and affectionate son.

Harold gave his mother a dress and coat during his visit to her in 1930. The

value of these articles does not appear. In 1933 he gave her a brooch (value undisclosed) and five dollars. In August, 1934, he sent her twenty-five pounds of uncured olives. From 1928 to 1934 he sent her various presents which consisted principally of articles made by him in school. He wrote letters to her about three times a month. It is clear that Harold's contributions to his mother's support had much more sentimental than monetary value. There is no evidence that Harold would have possessed any particular earning power had he reached his majority. The amount he could have contributed to his mother's support after he became of age is left to speculation.

[6, 7] The trial court instructed the jury, at plaintiff's request, that: "In considering the plaintiff's pecuniary injury, you should consider the earning capacity of the plaintiff's deceased son, Harold William Lamb, after his majority as well as during his minority * * *," and also, "That the plaintiff, as mother of the deceased, is entitled to recover damages to the extent that she has been deprived of her son's earnings, regardless of whether or not the son had worked before the accident." The same errors were carried into other instructions. As we have observed, plaintiff had relinquished her son's earnings during his minority to another. Such earnings could constitute no element of her damage. The only element of damage consisting of loss of support after majority which could be considered by the jury was that loss which the evidence showed might be reasonably expected. As we have observed, there is practically no evidence on this question in the record.

[8] We regard the verdict as excessive and unsupported by the evidence. It is probable that the erroneous instructions to which we have referred contributed to the size of the verdict by permitting the jury to consider one unauthorized and one unproved element of damage.

As we intimated in our former opinion, we considered the former award of one thousand dollars damages then made by the jury as "a very substantial award" under the evidence then before us. There is nothing in the present record to justify an increase in that award.

It is ordered that: (1) If within thirty days after the filing of this opinion plaintiff files with the clerk of this court a written agreement to the reduction of the amount of the damages awarded her to the sum of $1,000 the judgment will be reduced to that amount and will be affirmed. (2) If no such written agreement be filed within such thirty days the judgment will be reversed and the cause remanded for a new trial on the question of damages alone.

We concur: BARNARD, P. J.; GRIFFIN, J.

PER CURIAM.

Plaintiff having filed her written consent to a reduction of the amount of the judgment awarded her, from $3,280 to $1,000, in accordance with our order of April 26, 1940:

It is ordered that the judgment for damages as rendered herein be reduced from the sum of $3,280 to the sum of $1,000, and as so reduced, that judgment is affirmed.

Neither party will recover costs on appeal.



SWEESY v. LOS ANGELES COUNTY PEACE OFFICERS' RETIREMENT BOARD et al.*

Civ. 12486.

District Court of Appeal, Second District, Division 2, California.

April 20, 1940.

Hearing Granted June 18, 1940.

1. Counties ⇐74(1)

The widow of a peace officer, retired from the service of a county at a time when the Retirement Act provided for a pension to such officer but made no provision for a pension to his widow in the event of his death, was not entitled to a pension under an amendment to such act adopted subsequent to the retirement of, and rendition of any services by, such officer but prior to his death, even though the amendment to the act attempted to make it retroactive "as to the past services of any member." Gen.Laws 1937, Act 5848, § 11.

2. Officers ⇐94

A "pension" is a "gratuity" when it is granted for services previously rendered and which at the time they are rendered gave rise to no legal obligation.

See Words and Phrases, Permanent Edition, for all other definitions of "Pension" and "Gratuity".

* Subsequent opinion 110 P.2d 37.

3. Municipal corporations ⇐67(5)
States ⇐119

The Legislature has no power to make any gift or authorize the making of any gift of any public money or thing of value to any individual, municipal or other corporation, and the Legislature cannot grant or authorize any court or municipal authority to grant any extra compensation or allowance to any public officer after services have been rendered by him. Const. art. 4, §§ 31, 32.

4. Counties ⇐74(1)

The provision of the Peace Officers' Retirement Act attempting to make the provisions of the act retroactive as to past services of any member who "shall be entitled to the benefits contained herein" was invalid in view of constitutional provision denying to the Legislature authority to grant or authorize any subdivision of state to grant any annuity, gift, or extra compensation to any public officer for services previously rendered. Gen.Laws 1937, Act 5848, § 11; Const. art. 4, §§ 31, 32.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Mary Estelle Sweesy, also known as Mrs. Norris M. Sweesy, against the Los Angeles County Peace Officers' Retirement Board, also known as the Board of Retirement Commissioners of the County of Los Angeles, State of California, and others, for a writ of mandate requiring respondents to make an order allowing petitioner a pension. From an adverse judgment, petitioner appeals.

Affirmed.

Francis A. Cochran and Carl B. Sturzenacker, both of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of respondents after the trial court sustained a demurrer without leave to amend to a petition for a writ of mandate requiring the Board of County Peace Officers' Retirement Commission of the County of Los Angeles to make an order allowing petitioner a pension, petitioner appeals.

The material facts alleged in the petition for a writ of mandate are:

Norris M. Sweesy was employed as a county peace officer from January 13, 1911, to and including May 31, 1935, at which time Mr. Sweesy was retired for service by action of the board of retirement. In 1931, while Mr. Sweesy was rendering services as a peace officer, the County Peace Officers' Retirement Law (Stats. 1931, chap. 268, p. 477, Act 5848, vol. 2, Deering's Gen.Laws [1937] p. 2774) was enacted, which at the time made no provision for a pension for a widow of an officer retired for service. In 1937, two years after Mr. Sweesy's retirement, section 11 of the Peace Officers' Retirement Act was amended to provide for a pension for widows of officers retired for service. The last paragraph of section 11 of the act as amended reads as follows: "Section retroactive. The provisions of this section shall be retroactive as to the past service of any member who shall be entitled to the benefits contained herein." Stats.1937, chap. 303, p. 665; vol. 2, Deering's Gen.Laws (1937), Act 5848, p. 2778.

Subsequent to the 1937 amendment Mr. Sweesy did not render any services as a peace officer. February 26, 1939, he died, leaving surviving the petitioner, who is his widow. She applied to the respondents for the pension provided for widows of officers retired for service, as set forth in paragraph 3 of section 11 of the County Peace Officers' Retirement Act. Stats. 1937, chap. 303, p. 665; vol. 2, Deering's Gen.Laws (1937), Act 5848, p. 2777. This application was denied.

This is the sole question necessary for us to determine:

Is the widow of a peace officer retired from the service of a county at a time when the retirement act provides for a pension to such officer but makes no provision for a pension to his widow in the event of his death entitled to a pension under an amendment to such act adopted subsequent to the retirement of, and rendition of any services by, such officer but prior to his death, when the amendment to the act attempts to make it retroactive "as to the past services of any member"?

[1, 2] This question must be answered in the negative. A pension is a gratuity when it is granted for services previously rendered and which at the time they are rendered gave rise to no legal obligation. Lamb v. Board of Peace Officers, etc., 29 Cal.App.2d 348, 350, 84 P.2d 183.

[3] The law is established that the legislature has no power to make any gift or authorize the making of any gift of any public money or thing of value to any individual, municipal, or other corporation. Sec. 31, art. IV, Const. of Cal. Nor does the legislature have power to grant or authorize any court or municipal authority to grant any extra compensation or allowance to any public officer after services have been rendered by him. Sec. 32, art. IV, Const. of Calif.; Robinson v. Dunn, 77 Cal. 473, 475, 19 P. 878, 11 Am.St.Rep. 297.

[4] Applying the above-stated rules to the instant case, it is evident that the pension which petitioner is endeavoring to collect is a gratuity, because it is conceded that her husband did not render any service to the state or any subdivision thereof subsequent to the enactment of the law authorizing the pension which she desires. Therefore, since it is a gratuity, the legislature was without authority to adopt the portion of section 11 of Act 5848 set forth, supra, which attempted to make the provisions of the pension act retroactive, for the reason that sections 31 and 32 of article IV of the Constitution of the State of California, the substance of which so far as applicable here is hereinabove set forth, denied to the legislature the authority to grant or authorize any subdivision of the state to grant an annuity, gift, or *extra compensation* to any public officer for services previously rendered.

In Lamb v. Board of Peace Officers, etc., supra, it was held that an officer who was totally and permanently disabled prior to the effective date of the County Peace Officers' Retirement Act, supra, and who did not render any service subsequent to the adoption of such act, could not collect retirement compensation for his injury. There is no logical distinction between a statute which authorizes payment of pensions to retired officers passed after the retirement of an officer and one granting a pension to the widow of an officer who has been retired and renders no services subsequent to the adoption of the act, if such payment was not authorized during the time the deceased officer rendered services to the state or some subdivision thereof.

Kavanagh v. Board of Police P. F. Comm'rs, 134 Cal. 50, 66 P. 36; Jones v. Cooney, 82 Cal.App. 265, 255 P. 536; Klench v. Board of Pension Fd. Com'rs, 79 Cal.App. 171, 249 P. 46; and Aitken v. Roche, 48 Cal.App. 753, 192 P. 463, are logically distinguishable from the instant case for the reason that in these cases the statute in effect when services were being rendered and which became a part of the contract of employment, provided that the employee should receive a certain percentage of the pay attached to the rank held by him at the time of his retirement. Thus the officer in each of the cases just mentioned rendered services at a time when the statute expressly stated the basis of his compensation upon retirement.

In O'Dea v. Cook, 176 Cal. 659, 169 P. 366, plaintiff was the widow of a former member of the police department who had been injured in line of duty and died as a result of his injuries more than two years thereafter. At the time of his injury the charter of the city of San Francisco provided that the widow of a policeman killed while in the performance of his duty should be paid a monthly pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death. There was no provision as to how soon the death should take place after the injuries in order to entitle the widow to a pension. After Mr. O'Dea sustained his injuries and prior to his death the charter was amended to provide that an injured policeman must have died within one year after the date of his injury in order to entitle his widow to a pension. The Supreme Court in deciding the case held that the charter amendment was not retroactive so as to deprive the officer's widow of the pension to which she was entitled under the pension provision of the charter at the time of his injury and that her rights were controlled by the provision of the charter in force at the time of the injury and not according to its terms as amended after her husband was injured and prior to his death. It is thus evident that O'Dea v. Cook, supra, is factually different from the instant case and, therefore, not in point in the case now before us.

Home v. Souden, 199 Cal. 508, 250 P. 162, relied upon by petitioner is contrary to the constitutional provisions above mentioned, as is pointed out in Lamb v. Board of Peace Officers, etc., supra, and was overruled by the decision in the latter case, when the decision in such case became final after the denial of a hearing by our Supreme Court.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

LACERTOSO v. TRIGG.

Civ. 12660.

District Court of Appeal, Second District, Division 2, California.

June 26, 1940.

1. Execution ⇐44

A widow, having failed to contest an action against her based on assigned claim for medical services rendered her deceased husband which widow allegedly agreed to pay and having permitted a valid judgment to be obtained in such action, was not in a position to claim that she held property which came to her by decree of distribution from estate of her deceased husband, exempt from execution, to secure payment of judgment, and free from the lien of purchaser at such execution sale.

2. Descent and distribution ⇐153

Where a lot had been distributed to a widow and had become her property, it was subject to the rights of her judgment creditors to the same extent as if the lot had not come to her by decree of distribution from the estate of her deceased husband.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Luigia Lacertoso against L. S. Trigg, to quiet title, wherein defendant filed a cross-complaint. From a judgment for the plaintiff, defendant appeals.

Reversed.

Robert L. Ferguson, of Los Angeles, for cross-defendant.

Herbert Gall and Edward Fitzpatrick, both of Los Angeles, for cross-complainant.

WOOD, Justice.

In this action plaintiff seeks to quiet title to a parcel of real estate and defendant seeks by his cross-complaint to have title quieted in himself. The appeal is by defendant and cross-complainant from a judgment in plaintiff's favor. No brief has been filed herein on behalf of plaintiff.

From the evidence and the admissions contained in the pleadings it appears that the lot in question was deeded by Albert and Helen Beck to John Lacertoso. Upon the death of John Lacertoso probate proceedings were commenced and the lot was inventoried as part of his estate. Thereafter the probate court made its decree of distribution on October 15, 1929, by which the lot was distributed to plaintiff, the widow of John Lacertoso. Stanley Boller, a physician, presented his claim for services rendered to the administratrix of the estate of John Lacertoso but the claim was rejected and notice of its rejection was served on the claimant. Dr. Boller did not file suit against the representative of the estate after rejection of the claim.

The defendant and cross-complainant herein filed an action on July 16, 1931, in the municipal court of Los Angeles as assignee of Dr. Boller, in which action he sought and recovered judgment for the sum of $280 for medical services which had been rendered to John Lacertoso. In that action one of the defendants named was the plaintiff in the present action. The complaint contained several common counts, including an allegation that the defendant in said action, plaintiff herein, had agreed to pay the amount claimed to be due. No answer was filed in the action in the municipal court and a default judgment was entered in favor of the plaintiff therein. Thereafter the plaintiff in said municipal court action, defendant herein, became purchaser of the lot in question at a sale held pursuant to a writ of execution which had been issued.

[1, 2] The trial court erred in ruling that the title of cross-complainant was invalid. So far as can be discerned from the record cross-complainant obtained a valid judgment which has become final and upon which execution was regularly issued. If plaintiff and cross-defendant herein, the defendant in the municipal court action, desired to contest the action based on the assigned claim of the physician she should have filed an answer in the municipal court. Having failed to do so and having permitted cross-complainant to obtain a valid judgment she is not now in position to claim that her real property is exempt from execution and free from the lien of the purchaser at the execution sale. Long before the action was commenced in the municipal court the lot in question had been distributed to plaintiff and had become her property and as such it was subject to the rights of judgment creditors to the same extent as if the property had not come to her by decree of distribution from the estate of her deceased husband.

The judgment is reversed.

We concur: MOORE, P. J.; McCOMB, J.

38 Cal.App.2d 486

DINEEN v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11105.

District Court of Appeal, First District, Division 1, California.

April 17, 1940.

Hearing Denied June 14, 1940.

1. Appeal and error ⇐854(5)

An order granting defendant's motion for nonsuit on grounds that complaint did not state cause of action and that there was no evidence on which a verdict of jury could be predicated must be affirmed on appeal, if either ground was proper.

2. Counties ⇐143

A city and county is not liable in its proprietary capacity for general negligence to one injured when chair, in which he was sitting as spectator, collapsed during trial in superior courtroom in city hall, which is also county building, as such court is a county court, as well as a state court.

3. Counties ⇐1

Counties are political subdivisions of state for purposes of government. Const. art. 11, § 1.

4. Counties ⇐1

The principal purpose in establishing counties was to make effectual state's political organization and civil administration requiring local direction, supervision, and control, including to large extent administration of public justice.

5. Counties ⇐1, 21½
Municipal corporations ⇐1, 57

A city and county government partakes of nature, has powers, and exercises functions, of both city and county. Const. art. 11, § 7.

6. Counties ⇐21½
Municipal corporations ⇐57

A city and county government acts as county, not as city, in operating superior court. Const. art. 11, § 7.

7. Counties ⇐143

A city and county acts as county in governmental capacity, performing duty expressly imposed on it by state, in so far as it maintains city hall for superior courts, and hence is liable, if at all, for injuries to spectator during trial in superior courtroom, under Public Liability Act only. Code Civ. Proc. § 144; Pol.Code, § 4041.18; Gen.Laws 1937, Act 5619.

8. Municipal corporations ⇐857

In action against municipal corporation under Public Liability Act for personal injuries, it is generally incumbent on plaintiff to plead and prove dangerous and defective condition of property causing injuries, knowledge thereof on part of some officer or agent of defendant having power to rectify condition, and neglect to repair within reasonable time after notice to defendant. Gen. Laws 1937, Act 5619.

9. Counties ⇐222, 223
Municipal corporations ⇐847

Actual notice to municipality of dangerous and defective condition of property, causing injuries to person suing municipality for damages under Public Liability Act, is implied only where defendant created such condition by negligently constructing or installing particular agency which caused injuries, so as to bar recovery from city and county for injuries caused by collapse of chair in superior courtroom of city hall, in absence of allegation of notice to defendant of dangerous condition of chair or evidence sustaining allegation of complaint that chair was negligently installed by defendant. Gen. Laws 1937, Act 5619.

10. Counties ⇐222, 223

In action against city and county for injuries to spectator at trial in superior courtroom of city hall when chair collapsed as result of nut on bolt supporting seat becoming unscrewed, plaintiff could not recover, where complaint did not allege notice to defendant of dangerous and defective condition of chair or that defect would have been discovered had defendant exercised reasonable care in inspecting seat, and there was no evidence warranting inference that such condition had existed long enough to give defendant opportunity to repair chair, or that reasonable inspection would have disclosed condition. Gen.Laws 1937, Act 5619.

11. Trial ⇐162

Generally, it is error to grant nonsuit before plaintiff closes his case, unless predicated on his counsel's opening statement.

12. Continuance ⇐40

The granting or denial of plaintiff's motion for continuance because of absence of certain witnesses after he called two wit-

nesses and jury was impaneled was within trial court's discretion.

13. Continuance ⇐40, 46(8)

Where plaintiff, knowing that certain witnesses as to facts were not available when he proceeded to trial, did not request continuance until after he called two witnesses and jury was impaneled, nor state who additional witnesses were, what their testimony would be, or that it would prove essential fact not shown, such request was not made with due diligence and denial thereof was not abuse of trial court's discretion.

14. Trial ⇐162

In personal injury suit, where plaintiff's request for continuance because of absence of certain witnesses was properly denied for lack of diligence, evidence before court on facts was insufficient as matter of law, and only other testimony available was medical testimony as to extent of plaintiff's injury, court did not err in granting nonsuit before hearing such testimony, though plaintiff had not rested his case.

15. Pleading ⇐236(1)

The granting of permission to file amended complaint and of relief under statute authorizing court to allow amendment of pleadings and postpone trial when rendered necessary by such amendment, lies largely within trial court's discretion. Code Civ. Proc. § 473.

16. Municipal corporations ⇐734

A governmental agency permitting use of part or whole of building belonging to it for other than governmental purposes is generally liable in tort to any person injured because of negligent maintenance or operation of such building while in portion used for nongovernmental purposes, but is not liable for injury to person while in or on portion used exclusively for governmental purpose, except where limited by statute. Gen.Laws 1937, Act 5619.

17. Municipal corporations ⇐848

While governmental agency's exemption from liability in tort to one injured in portion of such agency's building used exclusively for governmental purpose should be strictly construed, such agencies' liability, as fixed by Public Liability Act, should not be unduly extended by judicial construction. Gen.Laws 1937, Act 5619.

18. Pleading ⇐251

In action against city and county for injuries to spectator at trial in superior courtroom of city hall when chair collapsed, denial of permission to file amended complaint, alleging that such building was used partly for public and governmental purposes, and that parts thereof were rented by municipality in its proprietary capacity to various lessees, was not error, as proposed amendment did not state cause of action against defendant. Code Civ.Proc. § 473; Gen.Laws 1937, Act 5619.

19. Pleading ⇐245(2)

Inadvertence or excusable neglect of plaintiff's attorney in omitting essential allegation from complaint is not ground for relief under statute authorizing court to allow amendment of pleadings, where defects in pleading and proof were called to counsel's attention before granting of nonsuit, but no attempt was then made to remedy them. Code Civ.Proc. § 473.

20. New trial ⇐102(9)

In action against city and county for injuries to spectator at trial in superior courtroom of city hall when his chair collapsed, plaintiff's motion for permission to file amended complaint, supplying omitted allegations of requisite knowledge and notice of defective condition of chair, was in legal effect motion for new trial on ground of newly discovered evidence, so far as plaintiff had evidence supporting such allegations, so that denial of motion was not abuse of court's discretion, as failure of plaintiff's attorney to discover such facts because of his failure to realize their vital importance to plaintiff's case was not legal excuse for failure to allege them in original complaint. Gen.Laws 1937, Act 5619; Code Civ.Proc. § 473.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Daniel F. Dineen against the City and County of San Francisco to recover damages for personal injuries. From judgment granting a nonsuit, and orders denying plaintiff the right to file an amended complaint and other relief, plaintiff appeals.

Affirmed.

John J. Taheny, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit, and from orders denying him the right to file an amended complaint and denying relief under section 473 of the Code of Civil Procedure.

Plaintiff claims to have been injured on February 20, 1936. On that date he visited, as a spectator, one of the superior courtrooms in San Francisco to observe a trial then in progress. The particular courtroom is equipped with folding chairs for the use of spectators. After plaintiff had been seated in such a chair for about an hour and a quarter, the chair collapsed, precipitating him to the floor and causing the injuries for which damages are asked. It appears that a nut which holds the bolt that supports the seat of the chair had become unscrewed.

The complaint, so far as pertinent here, alleges that "because of the negligent operation, installation, maintenance and control of said chair" by the defendant, plaintiff was injured.

[1] The cause was tried before a jury on Wednesday, August 24, 1938. The plaintiff testified as to the facts and circumstances of the accident, and also called the court bailiff as his witness. On the afternoon of the first day of trial, shortly after court convened at two o'clock, it developed that plaintiff had no further witnesses available as to the facts of the accident, but that a medical witness had been subpoenaed for three o'clock. Plaintiff's counsel stated that he was not then able to produce other witnesses as to the facts; that he had "anticipated having here several witnesses that we have been unable to subpoena during the vacation period. I am informed they will be back Monday". He requested a continuance which the trial court denied, stating that plaintiff should have sought a continuance before the case came on for trial. Defendant thereupon moved for a nonsuit. The motion was granted on two grounds: First, that the complaint did not state a cause of action; and, second, that "there is no evidence upon which a verdict of this jury could be predicated". If either ground of nonsuit was proper, the action of the trial court must be affirmed. Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905.

Thereafter the plaintiff substituted his present counsel in place of the counsel who had represented him at the trial, and then moved for a new trial, for leave to file an amended complaint, and for relief under section 473 of the Code of Civil Procedure. These motions were denied, whereupon these appeals were perfected.

[2-7] The first question to be determined upon this appeal is whether the respondent is generally liable in tort for alleged injuries growing out of the use and operation of a superior courtroom, or whether the respondent's liability is predicated solely on the provisions of the Public Liability Act. Stats.1923, chap. 328, p. 675; Deering's Gen.Laws, Act No. 5619. If the respondent owned, maintained and operated the city hall and the courtrooms contained therein in its governmental capacity, its liability in tort, if any exists, must be predicated on the provisions of the Public Liability Act, supra. On the other hand, if the city hall and the courtrooms contained therein are owned, maintained and operated by respondent in its proprietary capacity, then respondent is generally liable in tort without reference to the limitations of the Public Liability Act. It is appellant's theory that at the time of the accident in question the courtroom was not being used by the respondent in its governmental capacity, but by the state of California in its governmental capacity; that in relation to that courtroom the respondent is a landlord and is acting in a proprietary capacity. Cases such as Boothby v. Town of Yreka City, 117 Cal.App. 643, 4 P.2d 589, and Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A. 1917E, 685, Ann.Cas.1918D, 106, are relied upon in support of this contention. None of the cited cases deals with the precise problem here presented. It is appellant's theory that the superior court is a state court, and that the city hall in which the courtroom is located is a city and county building, and that therefore the respondent was acting in a proprietary capacity in permitting the state court to occupy the courtroom, and in that capacity is liable for general negligence. The contention is unsound. The respondent is not only a city, but a city and county. While the superior court is, in one sense, a state court, it is also a county court. Counties are political

subdivisions of the state for purposes of government. Art. XI, sec. 1, of the Constitution; Hill v. Board of Supervisors, 176 Cal. 84, 167 P. 514; Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845. Counties are vested by the state with a variety of powers which the state itself may assume or resume and directly exercise. The principal purpose in establishing counties was to make effectual the political organization and civil administration of the state which require local direction, supervision and control, including, to a large extent, the administration of public justice. 7 Cal.Jur. p. 389, sec. 5. Consolidated city and county governments are provided for by article XI, section 7, of the Constitution. A city and county government partakes of the nature and has the powers and exercises the functions of both a city and a county. Keyes v. San Francisco, 177 Cal. 313, 173 P. 475; Nicholl v. Koster, 157 Cal. 416, 108 P. 302. Although such dual organization sometimes presents some ambiguous situations, it is quite clear that in operating a superior court it is acting as a county and not as a city. Kahn v. Sutro, 114 Cal 316, 46 P. 87, 33 L.R.A. 620; Crowley v. Freud, 132 Cal. 440, 64 P. 696. In so far as the building involved is maintained for the superior courts, the respondent is acting as a county, in a governmental capacity, performing a duty expressly imposed upon it by the state. Sec. 4041.18, Pol.Code; sec. 144, Code Civ.Proc. The doctrine contended for by appellant, therefore, has no application. If respondent is liable at all, such liability must be based on the provisions of the Public Liability Act.

[8, 9] Appellant next contends that the complaint was sufficient to state a cause of action under the Public Liability Act. The complaint alleges "that because of the negligent operation, installation, maintenance and control of said chair * * * plaintiff was thrown violently to the floor * * *". It is the general rule that in actions under the Public Liability Act it is incumbent upon the plaintiff to plead and prove the dangerous and defective condition of the property, knowledge on the part of some officer or agent of the defendant who possesses the power to rectify the condition, and neglect to repair within a reasonable time after notice. Schmidt v. City of Vallejo, 122 Cal.App. 5, 10 P.2d 107; Thor v. City and County of San Francisco, 140 Cal.App. 64, 34 P.2d 1056. In the instant case the complaint contains no allegation of notice. The evidence failed to show such notice. Appellant seeks to avoid the application of this rule by the contention that the complaint alleges negligent installation of the chair. It is contended that, where the defendant has itself created the dangerous condition, actual notice is necessarily implied. Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216. That rule applies to situations where the governmental agency has negligently constructed or installed the particular agency causing the injury. In the present case, although the complaint alleges that the chair was negligently installed, there was not a scintilla of evidence to sustain the allegation.

[10] Appellant next contends that constructive notice is sufficient under some circumstances to impose liability under the Public Liability Act. This is undoubtedly the law. Dawson v. Tulare Union High School, 98 Cal.App. 138, 276 P. 424; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118. Under these cases long-continued existence of a patent defective condition may establish constructive notice thereof. These cases go no further, however, than to hold that if the evidence shows that the dangerous condition is long continued and patent the governmental agency cannot successfully contend that it was not aware of it. In the present case it is contended that the defect is one which would have been discovered had the respondent exercised reasonable care in inspecting the seats. The cases do not support such an extension of the rule. Moreover, not only is this theory not pleaded, in the complaint upon which the action went to trial, but it was refuted by the evidence. The evidence produced by plaintiff demonstrated that the accident occurred by reason of the fact that a nut on the bolt that supports the seat of the chair had become unscrewed. There was not one word of testimony as to how long this condition had existed, nor that the nut and bolt were in such a position that a reasonable inspection would have disclosed the condition. There is no direct or indirect evidence from which the jury could have inferred that the condition had existed for a long enough period that defendant would have had an opportunity to repair it, or that a reasonable inspection would have disclosed it. The point is without merit.

[11-14] Appellant next contends that it was error to grant the nonsuit before he had closed his case. This contention is connected with the contention that it was error to have refused him a continuance. The circumstances under which the continuance was denied and the nonsuit granted have already been set forth. Generally speaking, it is error to grant a nonsuit, except when predicated upon the opening statement, before the plaintiff has closed his case. But that rule has its exceptions. Here the plaintiff proceeded to trial without objection. He produced two witnesses as to the facts of the accident, and then stated that he had no other witnesses then available who could testify as to the facts, but had a medical witness who could testify. He did state there were other witnesses as to the facts, but that they would not be available until the following Monday—the case having started to trial on Wednesday. Appellant knew these witnesses were not available when he proceeded to trial. In spite of this fact, he did not request a continuance until after the jury had been impaneled and after two witnesses had been called. Even then he did not state who the additional witnesses were, nor what their testimony would be. He did not claim that their testimony on the facts would prove knowledge on the part of the respondent. Under such circumstances the request for the continuance was not made with due diligence. The granting or denial of the motion was within the discretion of the trial court, and no abuse of that discretion has been shown. Spadoni v. Maggenti, 121 Cal.App. 147, 8 P.2d 874; Hoffman v. Guy M. Rush Co., 27 Cal.App. 167, 149 P. 177. This being so, when the nonsuit was granted all the evidence on the facts was before the court. That evidence was insufficient as a matter of law. Even though appellant had not rested his case, it affirmatively appears that the only other testimony then available was as to the extent of the injury. Under such circumstances it was not error to grant the nonsuit before hearing the medical testimony. Skelton v. Schacht Motor Car Co., 22 Cal.App. 144, 133 P. 504.

[15-18] The only other contentions of appellant necessary to consider are that it was error to deny him permission to file the amended complaint, and to deny him relief under section 473 of the Code of Civil Procedure. The granting of such relief lies largely within the discretion of the trial court. In the proposed amended complaint two major changes are made in the allegations. It is first alleged that at the time of the accident the building in which the courtroom is located "was used partly for public and governmental purposes and parts thereof were rented by the municipality, in its proprietary capacity, to various lessees, title insurance companies, the United States Post Office, various concessionaires and various quasi-governmental bureaus". Appellant claims to find authority in other jurisdictions for the proposition that if a governmental agency chooses to permit any part of a building to be used for other than governmental purposes its liability as a proprietor extends to the entire premises. 43 Cor.Jur. 1166; Lowe v. Salt Lake City, 13 Utah 91, 44 P. 1050, 57 Am.St.Rep. 708; Buchanan v. Barre, 66 Vt. 129, 28 A. 878, 23 L.R.A. 488, 44 Am.St. Rep. 829; Little v. City of Holyoke, 177 Mass. 114, 58 N.E. 170, 52 L.R.A. 417. The cases cited do not establish the broad rule contended for by appellant. They establish the rule that if a governmental agency permits part or whole of a building to be used for other than governmental purposes, then the agency is generally liable in tort to any person who is injured by reason of the negligent maintenance or operation of the building, if such injury occurs in the common hallways, passages, or yard of such building or in the portion used for nongovernmental purposes. This is a sound and salutary rule. However, if the person is injured while in or on a portion of the building used exclusively for a governmental purpose, the governmental agency is exempt from liability, except where limited by statute. While no doubt the exemption from liability should be strictly construed (Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685, Ann.Cas.1918D, 106, decided before the passage of the Public Liability Act) by the passage of the Public Liability Act, the legislature has properly determined the extent of the liability of governmental agencies. The liability so fixed should not be unduly extended by judicial construction. This proposed amendment, therefore, does not state a cause of action against respondent.

[19, 20] In an attempt to state a cause of action under the Public Liability Act, the proposed amended complaint changed the allegation of negligence, quoted supra, to allege "that said chair was in a danger-

ous and defective condition for such a period of time that said defendant would have discovered said dangerous and defective condition if reasonable care had been exercised in the inspection of said chair and if reasonable care had been exercised in the maintenance and control of said chair by said defendant; that said defendant had knowledge and notice of such dangerous and defective condition and negligently failed and neglected for a reasonable time after acquiring such knowledge and receiving such notice to repair said chair or to take action for the purpose of protecting the public against injury by reason of said dangerous and defective condition". The proposed amended complaint alleges the requisite knowledge and notice required under the Public Liability Act. However, neither in his motion for relief under section 473 of the Code of Civil Procedure, nor in his motion for permission to file the amended complaint, did appellant allege or set forth by affidavit that witnesses were available who would testify as to actual or constructive knowledge of the respondent. In his notice of motion made under section 473 of the Code of Civil Procedure, and for leave to file the amended complaint, appellant averred that through mistake, inadvertence and excusable neglect on the part of plaintiff and his former counsel, an allegation with reference to notice or knowledge on the part of defendant of the defective condition had been omitted from the complaint. Plaintiff's supporting affidavit is to the same effect. It is true that an attorney's inadvertence or excusable neglect, including mistake of law, is, under some circumstances, a ground for relief under section 473 of the Code of Civil Procedure. 14 Cal.Jur., pp. 1041, 1044; 7 Cal.Jur. (10 Yr.Supp.) 286. That rule has no application here. In this case the defects in pleading and proof were called to the attention of counsel before the nonsuit was granted, but no attempt was then made to remedy these defects. Moreover, in so far as appellant may have testimony to support the new allegations of the proposed complaint by evidence, his motion, in legal effect, is for a new trial on the ground of newly discovered evidence. As to such a motion the Supreme Court has recently held that the failure of a plaintiff's attorney to discover certain evidence because of his failure to realize its vital importance to plaintiff's case, did not constitute legal excuse for failure to present the evidence at the trial. Slemons v. Paterson, 96 P.2d 125. In that case an order granting a new trial on that ground was reversed. The same principle is applicable here. The trial court, acting well within its discretion, denied the motions. No abuse is shown, and this court has no power to disturb the rulings.

The judgment and orders appealed from are affirmed.

We concur: KNIGHT, J.; WARD, J.



38 Cal.App.2d 526

In re HATHWAY'S ESTATE.

Civ. 12609.

District Court of Appeal, Second District, Division 2, California.

April 19, 1940.

1. Wills ⇐302(6)

Evidence justified finding that letter written by decedent to sister was not intended to be decedent's will, although letter stated that if anything happened to decedent he had saved a little money for sister and that whatever was left decedent wished it to go to his four sisters, and hence judgment refusing to admit letter to probate as a "holographic will" was proper.

See Words and Phrases, Permanent Edition, for all other definitions of "Holographic Will".

2. Wills ⇐289

Before a paper will be admitted to probate as last will of a decedent, there must be proof that decedent intended the writing to be his last will.

3. Appeal and error ⇐996

Where from evidence either of two inferences reasonably may be drawn, inference accepted by trial court to support a finding of fact will not be disturbed by an appellate court.

Appeal from Superior Court, San Luis Obispo County; H. G. Jorgensen, Judge.

Proceeding in the matter of the estate of Amos Riley Hathway, sometimes also

known as Amos R. Hathway, A. R. Hathway, Amos R. Hathaway, A. R. Hathaway, and Bun Hathway, deceased. From a judgment denying a purported holographic will admission to probate, Ella Hathway, as petitioner for letters of administration with will annexed, and legatee and devisee, and Kate Hathway and others, as legatees and devisees, the heirs of Amos Riley Hathway, alias, deceased, and all other persons interested in the will of said decedent, appeal opposed by Henry C. Hathway and others, contestants.

Affirmed.

W. P. Butcher, of Santa Barbara, for appellants.

A. V. Muller, of San Luis Obispo, for respondents.

McCOMB, Justice.

This is an appeal from a judgment denying a purported holographic will admission to probate.

The essential facts are:

Ella Hathway, a sister of decedent, offered the following document for probate as his last will and testament:

"Huasna 7.13.08.

"Dear Sis

"I received yours yesterday and it was a welcome visitor. Ed Newsom was over Sun and staid a few days with me. I sold him seven head of horses and helped him to start them after we reached Avenal they were no more trouble so I came home again as I am all alone and have all kinds of pets cant stay away long at a time. have two setting hens one should hatch today also four half grown kittens. They meet me half way when they see me coming with a bucket of milk.

"I got kicked by a horse the other day which send me flying but no damages done picked myself up and went on parting horses but concluded I could do better on horse back so I straddled old rock. I have him here now he is looking fine for such an old horse & would you believe it he knows me as of old. Will have to begin doctoring soon as the horses are getting ticks in their ears it will be quite a job to doctor wild horses where there are so many and it seems the more careful one tries to be the more accidents.

"I will try and be careful but should anything happen to me at any time I got a little money Ive saved for you and besides whatever is left I wish it to go to my four sisters as I suppose will go the rest of my life in single harness I dont owe a dollar in the world and never expect to I have been thinking to sell out & go where I could do better but will wait a little while & see how the oil turns out they may strike oil on the Huasna. If so land will advance I was trying to make a trade with a party but suppose it is all off. Well I have my pinto horse tied down at the barn & he wants water so will close hoping this finds you all well. I will take a run down if I can get some one to stay here for a few days. Bill P. is working also John Gonzales is at the Chimenies Ranch dont know either will show up.

"Good By,

"Bun"

The testimony disclosed that deceased lived on a ranch where he was engaged in the cattle business; that the above document was written in response to a letter which he had received from his sister, and that she had placed it with other letters which she kept. Some period after her brother's death, when she was reading letters he had written her, she came across the one set forth above, which her attorney advised her was a will.

The trial court found with reference to the document in question as follows: "* * * the Court specifically finds that said letter dated 7-13-08, offered for probate by Ella Hathway, was and is not the decedent's Last Will and Testament, nor was it at the time of its writing, or ever, intended by the decedent to be his Will * * *"

This is the question for us to determine:

Was there substantial evidence to sustain the finding of the trial court supra?

[1, 2] This question must be answered in the affirmative. The law is established in California that before a paper will be admitted to probate as the last will and testament of a decedent there must be proof that the deceased intended the writing to be his last will and testament. (Estate of Meade, 118 Cal. 428, 430, 50 P. 541, 62 Am. St.Rep. 244.) Applying the above law to the facts of the instant case, it is evident from a reading of the foregoing document that the inference reasonably may be drawn that decedent was merely writing a letter to his sister and did not intend the document to be his last will and testament, thus supporting the finding of the trial court.

[3] It needs no citation of authority to support the proposition that, where from the evidence either of two inferences reasonably may be drawn, the one accepted by the trial court to support a finding of fact will not be disturbed by an appellate court.

For the foregoing reasons the judgment is affirmed.

I concur: MOORE, P. J.



38 Cal.App.2d 413

BARSOOM v. CITY OF REEDLEY.

Civ. 2287.

District Court of Appeal, Fourth District, California.

April 11, 1940.

Hearing Denied June 6, 1940.

1. Municipal corporations ⇐791(3)

Where some members of city council had actual knowledge of the position of water pipe in street, the city must be held to have had notice of condition on the street which was created by the water pipe.

2. Municipal corporations ⇐733(4)

A city would be liable for negligence in the operation of municipal water works in proprietary, as distinguished from governmental, capacity of the city.

3. Municipal corporations ⇐733(2)

Recovery for alleged negligence in permitting water pipe to remain against curb for an unreasonable time, without taking sufficient precautions to protect the public, is limited by statutes governing public liability, since maintenance of a public street is a "governmental function." St.1919, p. 756; St.1923, p. 675.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Function".

4. Appeal and error ⇐930(1)

Under rule that on appeal, conflicts in evidence must be resolved in favor of a verdict and judgment, reviewing court must accept plaintiff's evidence as true on appeal from judgment for plaintiff.

5. Municipal corporations ⇐821(14, 19, 20)

Evidence *held* to make jury questions on issues of city's negligent failure to give warning of dangerous condition on street resulting from presence of water pipes, of pedestrian's contributory negligence in stepping off curb, and of whether pipe in gutter was proximate cause of injury when pedestrian fell. St.1919, p. 756; St.1923, p. 675.

6. Appeal and error ⇐996

On appeal, where opposing inferences may reasonably be drawn from the evidence, appellate court must draw that inference which supports the judgment.

7. Master and servant ⇐333

Where recovery of damages is sought against principal and agent for injury caused by agent's negligence, and principal's liability is solely by reason of the doctrine of respondeat superior, a verdict releasing agent from liability releases the principal.

8. Master and servant ⇐333

The rule that verdict releasing agent from liability for negligence releases principal who is sought to be held under doctrine of respondeat superior was not applicable in action against city, councilmen, superintendent of streets, and city engineer, for injuries to pedestrian resulting from fall from curb, since liabilities of city and of individual defendants were separately created by separate statutes, not involving doctrine of respondeat superior, and different proof was required. St.1919, p. 756; St.1923, p. 675.

9. Municipal corporations ⇐742(4)

Under Public Officers Liability Act, allegations of complaint and proof in addition to those required to state cause of action against city under Public Liability Act are required as against city councilmen and officers. St.1919, p. 756; St.1923, p. 675.

10. Master and servant ⇐333

Where there is primary liability of principal to plaintiff, and principal owes a duty directly to plaintiff, not depending on the doctrine of respondeat superior, a verdict for agents is not inconsistent with verdict against principal and will not render verdict against principal void.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Sophie Barsoom against the City of Reedley and others, to recover for

injuries suffered by fall from curb. From a judgment against named defendant, but in favor of other defendants, named defendant appeals.

Affirmed.

C. W. Tackaberry, of Reedley, and Bronson, Bronson & McKinnon, of San Francisco, for appellant.

W. H. Stammer and Galen McKnight, both of Fresno, for respondent.

MARKS, Justice.

This is an action to recover damages for injuries received by plaintiff when she fell from a curb into a public street of the city of Reedley. A verdict was returned in favor of all the individual defendants and against the city. This appeal from the judgment followed.

The city of Reedley is a municipal corporation of the sixth class organized and existing under the Municipal Corporation Act. (Stats. 1883, p. 93, as amended.) Defendants Carlisle, Smith, Neufeld and Cree were members of the city council. L. C. Gregg was superintendent of streets and C. E. Skidmore was city engineer and superintendent of the municipal water works.

Tenth street is a public street in the city of Reedley. It runs easterly and westerly and has curbs on both sides which rise seven inches above the gutters. It is intersected at right angles by "G" and "F" streets, the former forming the westerly and the latter the easterly boundaries of a block. An alley parallels these streets and bisects the block. A moving picture theatre occupies the northerly side of Tenth street, extending from the alley to "F" street, with its entrance on Tenth street at the corner of "F" street. There are electroliers on the southerly side of Tenth street at the intersections with the alley and "F" street.

[1] During the summer of 1937 the city of Reedley planned to extend its municipal water system, receiving aid in the project from the Works Progress Administration. Black ten-inch cast iron water pipe in eighteen-foot sections was purchased and strung out, end to end, along the southerly curb line of Tenth street. The pipe had an outside diameter of over eleven inches with a bell on one end which had an outside diameter of over twelve inches. Thus the top of the pipe, as it rested against the curb, rose between four and five inches above it. The pipe was placed along the curb by employees of the city under the direction of Skidmore who was in charge of the work. At least some, if not all, of the members of the city council had actual knowledge of the position of the pipe in the street shortly after September 1, 1937. Thus the city must be held to have had notice of the condition on the public street which was created by the water pipe along the curb. Boyce v. San Diego H. S. Dist., 215 Cal. 293, 10 P.2d 62.

About September 10, 1937, the Works Progress Administration temporarily withdrew its support from the project and the water pipe lay along the curbing on Tenth street until about March 30, 1938.

During the evening of November 22, 1937, plaintiff, her husband, their daughter and two of her girl friends, decided to attend the picture theatre at the corner of Tenth and "F" streets. The night was clear but dark. They left their home in the family automobile with Mr. Barsoom driving, Mrs. Barsoom on the front seat at his right and the three girls on the rear seat. They first drove easterly on Tenth street where they made a "U" turn at "F" street, then back past the theatre westerly on Tenth street but found no vacant parking place. They made another "U" turn at "G" street, returning easterly on the southerly side of Tenth street to a point on the southerly side of that street about midway between the alley and "F" street where there was a vacant parking place. Mr. Barsoom parked the car diagonally to the curb with its right front wheel against the water pipe and turned off the lights. There was an automobile already parked diagonally to the curb at his left. Mrs. Barsoom did not see the water pipe along the curb and no one called her attention to it. She had no prior knowledge that there was water pipe resting against the curb on any street in the city.

Mr. Barsoom alighted through the left door of the car and Mrs. Barsoom through the right. Just as she reached the pavement another automobile came up and parked diagonally to the curb to the right of the Barsoom car. Its headlights were illuminated and she then saw the water pipe lying against the curb to the right of her husband's automobile. She slammed the door of the car shut and hurried to the sidewalk to avoid the automobile which was being parked, stepping on the pipe dur-

ing her progress. The headlights of this car were then turned off leaving that portion of the curb line in darkness.

Mrs. Barsoom described her subsequent movements and the accident as follows:

"Q. Now, after you got up on the sidewalk there, what did you do? A. Well, I forgot my coat. I walked around the other side of the car. While I was stepping down something caught my feet and I fell down very bad. * * *

"Q. When you started to step down. A. While I was stepping down my feet caught and I fell down.

"Q. Now, did you just step right down off the curb? A. Well, it happened so quick I do not know. While I was stepping, something caught my feet and I fell down. * * *

"Q. Have you any recollection of where they were, what they were doing when you got up onto the sidewalk? A. No sir. As soon as I got down from the sidewalk—as soon as I stepped down, another car came to park next to our car and I shut the door quickly and I saw the pipe was there because that light, that I saw the pipe was there. I stepped on the pipe and got on the sidewalk. * * *

"Q. Mrs. Barsoom, when you went to step down off the sidewalk at the time that you had your fall, did you intend then to step on the pipe or to step over it? A. I did not know. I did not know whether—it was dark, see, while I was stepping down something caught my feet and I fell down. * * *

"Q. Let me ask you this, Mrs. Barsoom: Before you went to step down did you look to see if the pipe was there, if it extended that far? A. No. I just walked around to get down. While I was stepping down something caught my feet and I fell down. It was dark. You can not see it.

"Q. Let me ask you this: Before you left the curb to step on the street did you try and look to see if the pipe was there, or if it extended that far? A. No, I did not stop. I just—I came to step down to get my car, and get my coat. * * *

"Q. Before you stepped down to get your coat, did you look? A. Look? It is dark. You can not see anything. What am I going to look? I am trying to get down. * * *

"Q. Well, it was dark there, was it, where the pipe was in the gutter? A. Yes, sir.

"Q. But did you try to see if the pipe was there? Did you look there for the purpose of determining in your own mind if the pipe extended that far or not? A. No. No."

The city presents three grounds on which it relies for a reversal of the judgment: (1) That plaintiff was guilty of contributory negligence as a matter of law; (2) that the evidence is insufficient to support the verdict and judgment because it was not shown that the water pipes along the curb proximately caused plaintiff to fall into the street; (3) that the verdict in favor of the individual defendants is inconsistent with the verdict against the city. A proper consideration of some of these questions requires a brief summary of the pleadings.

[2, 3] The complaint contains two causes of action. It is admitted that the first is based on the alleged negligence of all of the defendants which occurred in connection with the operation of the municipal water works in the proprietary, as distinguished from the governmental capacity of the city, under which circumstances there would be a liability for negligence. Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760, 5 L.R.A.,N.S., 536, 9 Ann.Cas. 847; South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 P. 490; Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685, Ann.Cas.1918D, 106. The city maintains, and plaintiff does not deny, that the second cause of action, where plaintiff seeks recovery against the individual defendants, is brought under what we will call the Public Officers Liability Act (Stats.1919, p. 756) and where it seeks recovery against the city it is brought under the Public Liability Act (Stats. 1923, p. 675). It is clear that the second cause of action is based on an alleged dangerous condition of Tenth street caused by permitting the water pipe to remain against the curb for an unreasonable time and without taking any sufficient precautions to protect the public against the danger. As the maintenance of a public street is a governmental function of a city, recovery under the second cause of action is limited by the two statutes we have just cited.

[4] On the question of the warning given of the danger caused by the water pipe, the evidence discloses that the electric lights on Tenth street were illuminated.

Witnesses for defendants testified that at the time of the accident there were four red lanterns burning along the south side of Tenth street in the block in question. Mr. Barsoom testified there was only one of these lanterns burning, the one at the corner of Tenth and "F" streets. Plaintiff produced evidence to the effect that the light from the two electroliers was so shadowed by obstructions that it was dark at the point of the accident and the black water pipes could not be seen. In accordance with the time-honored rule that, on appeal, conflicts in the evidence must be resolved in favor of the support of the verdict and judgment, we must accept, as true, the evidence offered by plaintiff on these questions.

[5] The argument that plaintiff was guilty of contributory negligence as a matter of law is based on her testimony that she saw the water pipe along the curb on the right side of her family car in the headlights of the car which was being parked there; that this was a sufficient warning of a danger along the curb so that she should not have stepped off the curb on the left side of her car without ascertaining if a similar danger existed there. Under the circumstances here disclosed, the question of contributory negligence is one of fact to be decided by the jury. Zibbell v. Southern Pac. Co., 160 Cal. 237, 116 P. 513; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Castro v. Sutter Creek Union H. S. Dist., 25 Cal.App.2d 372, 77 P.2d 509. As the verdict of the jury impliedly found plaintiff free from contributory negligence, we cannot disturb that finding here.

[6] The city argues that as plaintiff did not testify in so many words that her feet caught on the water pipe there was no sufficient evidence to show that the pipe in the gutter was the proximate cause of her injury. We cannot agree with this argument. Plaintiff testified that her feet caught on something. The water pipe was lying against the curb and protruded more than four inches above its top at the point of the accident. There was no other obstruction there upon which her feet could have caught. The inference drawn by the jury, that she tripped over the water pipe, is reasonable. On appeal, where opposing inferences may reasonably be drawn from the evidence, it is the duty of an appellate court to draw that inference which supports the judgment. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123. Therefore, we must agree with the reasonable inferences drawn by the jury, that the water pipe along the curb created a dangerous condition in the public street, and that such dangerous condition was the proximate cause of the injuries suffered by plaintiff.

It is admitted that defendants gave some warning of the dangerous condition existing on Tenth street. Whether or not the warning given was such "as may be reasonably necessary to protect the public against such dangerous or defective condition" (Stats.1923, p. 675) was a question of fact addressed to the jury. Bigelow v. City of Ontario, Cal.App., 99 P.2d 298. Under the rules just considered we cannot disturb the implied finding of the jury on that question.

[7-9] The city contends that the verdict finding in favor of the individual defendants and against the city operates to free the city from liability under the well-settled rule that where recovery of damages is sought against a principal and an agent, and where the negligence of the agent is the cause of the injury, and the liability of the principal is solely by reason of the doctrine of respondeat superior, a verdict releasing the agent from liability releases the principal. See Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171; Fimple v. Southern Pacific Co., 38 Cal. App. 727, 177 P. 871; Tolley v. Engert, 71 Cal.App. 439, 235 P. 651. The foregoing rule is firmly established and may not be questioned. Under the allegations of the second cause of action and the evidence, this rule is not applicable here for the following reasons: The liabilities of the individual defendants and the city are separately created by separate statutes. They are primary liabilities, and the liability of the city is not based on the doctrine of respondeat superior. Under the Public Officers Liability Act additional allegations of a complaint are required to state a cause of action against the individual defendants than are required to state a cause of action against the city under the Public Liability Act. Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083; Shannon v. Fleishhacker, 116 Cal.App. 258, 2 P.2d 835. There is also a difference in the proof required of a plaintiff to make out a prima facie case of liability against the individual defendants and against the city.

[10] Where, as here, there is a primary liability on the part of a principal, and the principal owes a duty directly to the plaintiff, and the principal's liability does not depend on the doctrine of respondeat superior, a verdict in favor of the agents is not inconsistent with a verdict against the principal and will not render the latter void. Waltemath v. Western States Realty Co., 9 Cal.App.2d 583, 50 P.2d 451; McCullough v. Langer, 23 Cal. App.2d 510, 73 P.2d 649.

The precise question we are considering was decided in the case of Adams v. Southern Pacific Co. of County of San Bernardino, 4 Cal.2d 731, 53 P.2d 121. In that case recovery of damages resulting from a death on a dangerous street was sought against certain officers of San Bernardino County and also against the county. Judgment went in favor of the officers and against the county. These judgments were affirmed on appeal. Adams v. Southern Pacific Co., 109 Cal.App. 728, 293 P. 681; Adams v. Southern Pacific Co., 4 Cal.2d 731, 53 P.2d 121. In the second case it was held that the judgment in favor of the officers was not a bar to the judgment against the county.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



38 Cal.App.2d 545

KOLBURN v. P. J. WALKER CO. et al.

Civ. 12391.

District Court of Appeal, Second District, Division 2, California.

April 20, 1940.

Rehearing Denied May 10, 1940.

Hearing Denied June 17, 1940.

1. Appeal and error ⇐927(7)

On plaintiff's appeal from judgment for defendants predicated upon granting of defendants' motion for directed verdict, District Court of Appeal was bound to view evidence most favorably to plaintiff in reviewing judgment.

2. Appeal and error ⇐917(1)

On plaintiff's appeal from judgment for defendant predicated upon the sustaining, without leave to amend, of defendant's general demurrer to plaintiff's complaint as amended, District Court of Appeal was bound to consider as true all issuable facts well pleaded, legally provable, and not inconsistent with other allegations in complaint as amended.

3. Negligence ⇐44

Where structural steel worker employed by subcontractor performing structural steel work on old and new buildings was injured when metal sheet on roof of old building gave way under worker's weight precipitating worker to concrete floor, owner of building and contractor with which owner had contracted for the making of alterations on old building and erection of new building were not liable to worker on theory that owner and contractor were negligent with respect to manner in which roof was maintained.

4. Negligence ⇐32(1)

An invitee to an incompleted building in process of construction is invited to use such building in its then condition.

5. Negligence ⇐55

Where the work of an independent contractor is completed, turned over to, and accepted by, owner, contractor is not liable to a third person for damages or injury subsequently suffered by reason of negligent manner in which contractor performed contract.

6. Negligence ⇐55

Where structural steel worker employed by subcontractor performing structural steel work on old and new buildings was injured when metal sheet on roof of old building gave way under worker's weight precipitating worker to concrete floor, and old building had been erected and accepted by property owner more than 10 years before accident, original contractor which erected old building was not liable to worker, even if building was defectively constructed with respect to manner in which roofing was fastened near place where steel worker stepped on roof.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Ruben S. Schmidt, and J. O. Moncur, Judges.

Action by Bert Kolburn against the P. J. Walker Company and others, to recover damages for personal injuries. From a judgment in favor of defendants P. J. Walker Company and Owens-Illinois

Pacific Coast Company and a judgment in favor of defendant William P. Neil Company, Limited, plaintiff appeals.

Judgments affirmed.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

Burdette J. Daniels and Cyril A. Walton, both of Los Angeles, for appellant.

Reginald I. Bauder, of Los Angeles, for respondent P. J. Walker Co.

Jennings & Belcher, of Los Angeles, (Louis E. Kearney, of Los Angeles, of counsel), for respondent Owens-Illinois Pacific Coast Co.

Geo. M. Breslin, of Los Angeles, for respondent Wm. P. Neil Co., Ltd.

McCOMB, Justice.

Plaintiff appeals from (1) a judgment in favor of defendants P. J. Walker Company and Owens-Illinois Pacific Coast Company predicated upon the granting of said defendants' motion for a directed verdict in their favor, and (2) a judgment in favor of defendant William P. Neil Company, Ltd., predicated upon the sustaining without leave to amend of a general demurrer by said defendants to plaintiff's complaint as amended. This is an action to recover damages for personal injuries.

[1, 2] Viewing the evidence most favorable to plaintiff (appellant), as we must in reviewing a judgment predicated upon the granting of a motion for a directed verdict (Peckham v. Warner Bros. Pictures, Inc., 36 Cal.App.2d 214, 97 P.2d 472), and considering as true all issuable facts well pleaded, legally provable, and not inconsistent with other allegations in the complaint as amended, as we must in reviewing a judgment predicated upon the sustaining of a general demurrer to a complaint without leave to amend (Katenkamp v. Union Realty Co., 6 Cal.2d 765, 769, 59 P.2d 473), the material facts alleged and proven are:

In 1927 defendant Wm. P. Neil Company, Ltd., as contractor constructed a building for the Illinois Pacific Glass Corporation. In 1932 defendant Owens-Illinois Pacific Coast Company acquired the property from the Illinois Pacific Coast Company (the latter having formerly been known as the Illinois Pacific Glass Corporation). In 1937 defendant Owens-Illinois Pacific Coast Company entered into a contract with defendant P. J. Walker Company to make alterations in the building and to erect a new building. Defendant P. J. Walker Company let a subcontract to Joe Gerrick & Company for the performance of the structural steel work on both buildings.

Plaintiff, a structural steel worker for thirty-one years, was an employee of the subcontractor. The original building, hereinafter designated as the old building, was of steel construction with roof and sides covered with corrugated metal sheets approximately 9 feet in length and 32 inches in width. At the top of the building there was a monitor which ran the entire length of the building, the roof sloping from said monitor to the north and to the south. On the south slope the roof was covered by metal sheets running in a northerly and southerly direction. Between the first row of corrugated iron sheets adjacent to the monitor of the building and the second row of corrugated metal sheets was a row of corrugated glass sheets of similar dimensions running the full length of the building forming a skylight. The steel framework upon which the corrugated metal and glass sheets were placed consisted of steel purlins about 4 feet apart. The corrugated metal sheets, being about 9 feet in length, spanned two purlins and had an approximate overlap at the end of some four to six inches. At the end of the overlap the sheets were secured to the steel purlins by straw-nails. This was the general construction of the roof portion of the building, except at the purlin at the lower end of the glass skylight and the upper end of the metal sheets adjacent thereto where the upper end of the metal sheets just below the skylight had approximately three-fourths to one inch bearing upon the steel channel, which was not secured nor fastened in any manner. The corrugated glass sheets overlapped the purlin at this point approximately three inches, thus covering the upper end of the corrugated metal sheets, so that one standing upon the roof could not see whether or not the upper end of the corrugated metal sheets was fastened to the purlin. However, one standing on the inside of the building and looking up could see that the metal sheets at this point were not fastened.

September 29, 1937, defendant P. J. Walker Company in making its alterations on the old building had removed the front portion of the building and the metal roof for some distance toward the rear.

On the date just mentioned plaintiff was working with several other men employed by the subcontractor on the monitor portion of the building. Their work consisted in reinforcing the monitor preparatory to placing in position certain steel purlins. In order to align a steel girder a rope was fastened to one end of the girder and the other end to a form on an adjoining building then under construction. Plaintiff was instructed to fasten this rope on a form of the adjoining building. In doing so he walked from the monitor down a truss to the eaves of the old building, then proceeded across the roof in an easterly direction for about ten feet and there fastened the rope on the adjacent building. He then walked back across the roof to the truss which he had traversed in descending to the eaves of the building to a point about four feet below the lower end of the corrugated glass skylight. At this point he was handed a two-by-four and walked upon the roof to a place where he could place it between the ropes which he had previously fastened to the adjacent building. He then retraced his steps to the truss and started walking up it toward the monitor of the building. As he approached the monitor he was instructed by the foreman that there was not enough tension on the rope and ordered to go back and take up the slack. Plaintiff then walked down the truss to a position just about one foot below the lower end of the glass skylight and stepped upon the corrugated metal sheet, which gave way and precipitated plaintiff to the concrete floor within the building, as a result of which he suffered serious personal injuries.

(1)

Plaintiff relies for reversal of the judgment in favor of defendant P. J. Walker Company and Owens-Illinois Pacific Coast Company upon the proposition that *the foregoing facts disclose that said defendants were negligent in maintaining the roof on the building above described, in that the corrugated iron roofing adjacent to and below the corrugated glass roofing which formed the skylight was not fastened at its upper end in any manner and that as a result thereof when plaintiff stepped upon it it pulled away from the purlin and permitted him to fall to the floor of the building.*

[3, 4] This proposition is untenable. The rule is established in California that an invitee to an incompleted building in process of construction is invited to use such building in its then condition. In Ambrose v. Allen, 113 Cal.App. 107, 298 P. 169, 171, a case where the facts were analogous to those in the present case, after an exhaustive review of the authorities from other jurisdictions Mr. Justice Sturtevant at page 113 quoting from Cole v. L. D. Willcutt & Sons Co., 218 Mass. 71, 105 N.E. 461, 462, thus states the rule: "* * * But the plaintiff contends that the defendant had invited him to use the stairs, and so owed him a duty to keep them in safe condition for his use. If there was such an invitation, it was merely to use them in the condition in which they were with whatever work was openly and plainly being done upon them."

Since the authorities supporting the rule just mentioned and the reasons therefore are fully set forth in Ambrose v. Allen, supra, it is unnecessary for us to further discuss this subject. Suffice it to say that under the rule above stated plaintiff has failed to show any actionable negligence upon the part of defendants P. J. Walker and Owens-Illinois Pacific Coast Company.

(2)

Plaintiff relies for reversal of the judgment in favor of defendant Wm. P. Neil Company, Ltd. on the proposition that *a contractor is liable for personal injuries resulting from defective construction of a building which he has erected, even though the injuries occur after acceptance of the building by the owner.*

[5] This proposition is likewise untenable. The law is established in California that, where the work of an independent contractor is completed, turned over to, and accepted by the owner, the contractor is not liable to a third person for damages or injury subsequently suffered by reason of the negligent manner in which he has performed his contract. (Boswell v. Laird, 8 Cal. 469, 498, 68 Am.Dec. 345; Fanjoy v. Seales, 29 Cal. 243, 244, 249; 45 Cor.Jur. [1928] § 320, p. 884; 9 Cor.Jur. [1916] § 85, p. 751; Thornton v. Dow, 60 Wash. 622, 111 P. 899, 32 L.R.A.,N.S., 968, 969; Williams v. Edward Gillen Dock, Dredge & Const. Co., 6 Cir., 258 F. 591, 594.)

The statement in Restatement of the Law of Torts (1934) Negligence, volume 2, paragraph 385, page 1030, is inapplicable to the present case for the reason that rules announced in the Restatement of the Law do not have the force of statutory enactment or supersede judicial decisions. They are intended to preserve the common law system of developing law through the judicial determination of cases. (See, The Restatement in the Courts, fourth edition, November 1939, page 9.)

[6] Applying the rule of law above stated to the facts in the instant case, it appears that the building upon which plaintiff was injured had been erected and accepted by the owner of the property more than ten years before the unfortunate accident which resulted in the present action. Therefore, the original contractor was not liable to plaintiff, even though we assume that the building was defectively constructed in the particulars relied upon by plaintiff.

For the foregoing reasons the judgments are and each is affirmed.

I concur: MOORE, P. J.



38 Cal.App.2d 598

PEOPLE v. RATTERMAN.

Cr. 529.

District Court of Appeal, Fourth District, California.

April 24, 1940.

Rehearing Denied May 8, 1940.

1. Criminal law ⇐444

Admission of photographs portraying scene of crime and a garage which had been rented by defendant, where articles of his clothing were found which were similar to those worn by guilty party, was not error, where complaining witness testified that each photograph correctly represented objects in it and also scene of the crime, and defendant did not produce any evidence to indicate that photographs did not correctly portray that which they purported to represent.

2. Criminal law ⇐785(11)

Where defendant produced a number of witnesses who testified that general reputation of complaining witness for truth in community in which he lived was bad, refusal to instruct jury that a witness may be so impeached was error. Code Civ.Proc. § 2051.

3. Criminal law ⇐782(8)

Generally, a defendant is entitled to have jury instructed that, if evidence points equally strongly to guilt and to innocence of defendant, it is duty of jury to adopt that view of the evidence pointing to his innocence and to acquit him.

4. Criminal law ⇐1167(6)

Failure of district attorney to charge, in each count of information charging defendant with robbery and kidnapping for purpose of robbery, that defendant was armed with a deadly weapon at time of alleged commission of crimes, and to require jury to find by special verdicts whether defendant was so armed, was not prejudicial to defendant, where defendant was found guilty of grand theft and sentenced to one year. Pen.Code, §§ 489, 969c, 1158a, 1168(2) (a).

5. Criminal law ⇐1186(4)

Where, upon review of evidence, District Court of Appeal was left with opinion that defendant was proven guilty of robbery beyond any reasonable doubt, and that jury was lenient in finding defendant guilty of lesser crime of grand theft, court would not reverse conviction, notwithstanding errors of law in the record which occurred during the trial. Const. art. 6, § 4½.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

George Henry Ratterman was convicted of grand theft, and he appeals.

Affirmed.

J. O. Reavis and T. H. Werdel, both of Bakersfield, and John Preston King, of Lindsay, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from a judgment pronounced on defendant after he had been found guilty of grand theft, and from the order denying his motion for new trial. He

was charged with robbery, and kidnaping for the purpose of robbery.

[1] Defendant complains of the admission in evidence, over his objections, of several photographs, on the ground that no proper foundation had been laid for their admission. These photographs portrayed the scene of the crime and a garage which had been rented by defendant, where articles of his clothing were found which were similar to those worn by the guilty party.

The complaining witness testified in effect that each photograph correctly represented the objects in it and also the scene of the crime. Defendant did not ask to examine the witness on voir dire. He did not cross-examine the witness on this subject, nor did he during the trial produce any evidence to indicate that the photographs did not correctly portray that which they purported to represent. Under these circumstances error cannot be predicated on the admission of this evidence. Diller v. Northern California Power Co., 162 Cal. 531, 123 P. 359, Ann.Cas.1913D, 908; People v. Crandall, 125 Cal. 129, 57 P. 785; People v. Mahatch, 148 Cal. 200, 82 P. 779; People v. Sambrano, 33 Cal.App.2d 200, 91 P.2d 221.

Defendant further complains of the refusal of the trial court to give two instructions which he had requested. We have found no other instructions on the same subject.

[2] Defendant produced a number of witnesses who testified that the general reputation of the complaining witness for truth, honesty and integrity in the community in which he lived was bad. One of the refused instructions informed the jury that a witness may be so impeached. Sec. 2051, Code Civ.Proc. It was error to refuse this instruction or to fail to give one of similar import. People v. Corey, 8 Cal.App. 720, 97 P. 907.

[3] Defendant also proposed an instruction to the effect that if the evidence pointed equally strongly to the guilt and to the innocence of the defendant it was the duty of the jury to adopt that view of the evidence pointing to his innocence and to acquit him. Generally speaking, and under proper circumstances, a defendant is entitled to have the jury so instructed. People v. Dolan, 96 Cal. 315, 31 P. 107; People v. Corey, supra.

[4] Lastly, defendant urges that it was error for the district attorney to fail to charge in each count of the information that defendant was armed with a deadly weapon at the time of the alleged commission of the crimes, and that it was error to fail to require the jury to find by special verdicts whether or not he was so armed. Sec. 969c, Pen.Code; sec. 1158a, Pen.Code.

The first cited section makes it the duty of the prosecutor to charge that a defendant was so armed, if such were the fact. The second cited section requires a special verdict on that question where the indictment or information contains such an allegation.

Sub-section "a" of paragraph "2" of section 1168 of the Penal Code discloses the reason for such procedure. It is there provided that the minimum penalty shall be "For a person not previously convicted of a felony, but armed with a deadly weapon either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, five years".

It is, therefore, clear that had the district attorney charged that defendant was armed with a deadly weapon at the time of the commission of the crime, and had the jury found that he was so armed, his minimum term of imprisonment would have been five years instead of one year, as is now the case. Sec. 489, Penal Code. We fail to see how the defendant suffered any prejudice by the procedure followed in this case.

[5] Defendant admits that the evidence is sufficient to support the verdict and judgment. Perhaps this might be construed as an admission that there has been no miscarriage of justice so that we could not reverse the judgment. However, as we have found errors of law in the record which occurred during the trial, we have reviewed all of the evidence. We are left with the opinion that defendant was proven guilty of robbery beyond any reasonable doubt, and that the jury was very lenient in finding him guilty of the lesser crime of grand theft. Under such circumstances we cannot reverse the judgment. (Sec. 4½, Art. VI, Constitution.)

The judgment and order are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

38 Cal.App.2d 627

HILL v. NEW YORK LIFE INS. CO.

Civ. 2541.

District Court of Appeal, Fourth District, California.

April 27, 1940.

Hearing Denied June 24, 1940.

1. Insurance ⇐665(3)

In action to recover total and permanent disability benefits under two life insurance policies, evidence justified jury in reaching conclusion that even though there might have been certain physical conditions existing at birth of insured which contributed to his disability, the disability itself did not appear until after the issuance of the policies.

2. Insurance ⇐516

Under life insurance policy providing that if insured performs any work or follows any occupation or is able to engage in any occupation for remuneration or profit, no further income payments shall be made, total and permanent disability provisions should be regarded as designed to provide a substitute for earnings when the insured is deprived of his capacity to earn by bodily injury or disease.

3. Insurance ⇐516

Under life insurance policies providing total and permanent disability benefits whenever insured is disabled from "performing any work", the quoted words mean engaging in any gainful occupation or employment in the customary manner as a workman.

See Words and Phrases, Permanent Edition, for all other definitions of "Performing Any Work".

4. Insurance ⇐665(5)

In action for total and permanent disability benefits under life insurance policies, evidence authorized finding that while insured could do a number of things, chiefly petty, he could not work or conduct a business for compensation or profit.

5. Insurance ⇐665(5)

In action to recover total and permanent disability benefits under life insurance policies, evidence sustained jury's finding that insured was not able to engage in any occupation for remuneration or profit or to perform any work or follow any occupation or engage in any business for remuneration or profit.

6. Appeal and error ⇐1001(1)

Where evidence sustained jury's finding that insured was not able to engage in any occupation for remuneration or profit, or to perform any work or follow any occupation or engage in any business for remuneration or profit, the findings could not be disturbed on appeal.

7. Trial ⇐260(9)

In action to recover total and permanent disability benefits under life insurance policies, refusal to read to jury provisions of statute relating to chauffeur's licenses and refusal to give instructions regarding extent of disability necessary to entitle insured to recover was not prejudicial error, in view of fact that court gave instruction offered by insurer which adequately covered the instructions offered and refused. Vehicle Code, St.1935, p. 93 et seq.

8. Trial ⇐228(3), 296(2)

In action for total and permanent disability benefits under life policies, instruction that provisions were to be construed as meaning such disability as rendered insured unable to perform the substantial and material acts of "his" business or occupation in the usual and customary way was erroneous when considered alone, because of the use of the word "his" instead of "any", but it was not prejudicial when considered together with other instructions.

9. Insurance ⇐670

In action to recover total and permanent disability benefits, where complaint prayed for judgment in sum of $2,489.30 with interest on monthly payments remaining due and unpaid, but did not seek interest on sums paid as premiums and insurer claimed that a calculation including all monthly payments alleged to be due with interest thereon and an addition of all sums paid as premiums amounted to $2,904.77 whereas general verdict of $2,933.64 was returned, the amount of verdict was sufficiently supported by the evidence, the court being unable to determine what proportion of general verdict was for interest, for payments due, or for recovery of premiums paid. Code Civ.Proc. § 580.

10. Interest ⇐66

In a contested case, interest may be awarded, if the plaintiff is entitled thereto, notwithstanding the complaint contains no prayer for interest. Code Civ.Proc. § 580.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Frank L. Hill against the New York Life Insurance Company to recover total and permanent disability benefits under two life insurance policies. From an adverse judgment, defendant appeals.

Affirmed.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellant.

David E. Peckinpah, Harold M. Child, and L. N. Barber, all of Fresno, for respondent.

GRIFFIN, Justice.

This is an action to recover total and permanent disability benefits under two life insurance policies. Plaintiff and respondent alleged in his first cause of action the writing of a $5,000 policy on March 13, 1928; that on March 11, 1932, he became permanently and totally disabled; that the defendant and appellant paid him the sum of $50 per month from March 11, 1932, to June 11, 1935, and waived payments of premiums during that period; that he continued and remained so disabled to the date of the filing of the complaint (January 18, 1938); that defendant has not paid the total and permanent disability benefits from the 11th day of June, 1935, to the commencement of the action ($50 per month to March 11, 1937, then $75 per month); that he had paid premiums on this policy from the 11th day of June, 1935, to the commencement of the action, totaling $246.40. In the second cause of action he alleged the issuance of the policy for $1,000 on June 3, 1925, and sought recovery of total disability benefits at the rate of $10 per month from June 11, 1935, to the date of the commencement of the action, together with the sum of $132.90, paid in premiums after June 11, 1935.

Appellant's answer, admitted the writing of the policies and the payment of the premiums referred to, but denied that respondent suffered "total and permanent disability" during the period in question, and that any payments became, or are, due or payable, or that the premiums should be repaid. The $5,000 policy contains the following provisions in reference to total and permanent disability:

"Disability shall be considered total whenever the Insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this policy took effect * *

"(a) Waiver of Premium.—The Company will waive the payment of any premium falling due during the period of continuous total disability, * * * if the Insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived."

The $1,000 policy provides: "1. Total Disability.—Disability shall be deemed to be total whenever the Insured is wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit. * * * if at any time it shall appear to the Company that the Insured is able to engage in any occupation for remuneration or profit, no further income payments shall be made nor premiums waived."

Appellant now contends (1) that the record shows that during the period in question respondent was not totally and permanently disabled within the meaning of the policy provisions; (2) that the disability from which plaintiff is suffering is congenital and antedated the writing of the policies and did not arise after the issuance of the policies, and that therefore no recovery is allowable; (3) that the court erred in giving and refusing certain instructions; and (4) that the amount of the recovery exceeds the amount prayed for in plaintiff's complaint.

An examination of the record discloses that the stepfather of Frank L. Hill, the repondent, and the insured, took out the policies of insurance and paid the premiums thereon while the respondent was working as a truck driver for him. A physical examination was then made by the appellant's doctor. The insured was accepted as a proper risk. His health became impaired and in March, 1932, his physician diagnosed his trouble as "hypothyroidism, meaning a lowered activity of the thyroid gland, and hypopituitarism, which means lowered activity of the pituitary gland in the brain; and then certain other conditions which would naturally be associated with a glandular disturbance, because all glands more or less work in harmony with one another, or are interdependent upon one another. * * * He had been complaining of men-

tal apathy, physical fatigue, slowness of his actions, excessive nervousness, sleeplessness, obesity, that is, gaining weight, headaches, vomiting spells, and dizziness on occasions." He testified that he had seen respondent on a great many dozen occasions; that at the time he saw him in March, 1932, respondent was, in his opinion, totally disabled; and that it was his opinion that he "could not have engaged in any occupation, sustained himself at it for any time for profit or gain"; that he examined him on several occasions in 1935, and that on each of those occasions the symptoms were essentially the same as they had been on the first visit. In response to the following question: "Dr. Staniford, will you state when in your opinion the hypothyroid condition you found in Frank Hill when you examined him in 1932, began to develop, from your study of this case?" the doctor replied: "From the history I received, I would be of the opinion that it started approximately two years prior to March, 1932, when I first saw him. The history was that these symptoms had been becoming prominent and disturbing over a period of two years." This evidence was corroborated by the mother of the respondent. She testified that "he (respondent) complains of a tight band around his head, he calls it, and most any time in the night he will get sick, * * * he will get me up and he will be dizzy and break out in a sweat and turn kind of blue and vomit". She further testified that she did not observe any of those conditions before 1932.

Respondent filed a disability claim and on June 21, 1932, a Dr. Boyd, who made the original examination, reexamined respondent and reported his blood pressure as "systolic pressure, was 146 and diastolic pressure was 80", making a difference of 66 millimeters of mercury which he testified "was out of line with good health", and he then reported that the insured was "wholly, continuously prevented from performing all gainful occupations". Although the insured reported his glandular trouble, he testified that there were no symptoms that showed the thyroid or pituitary gland defective in any way. Respondent was then classified as permanently disabled. Dr. Boyd examined respondent again in 1935 and reported that he "was physically fit to work". Thereupon the appellant notified respondent of the cessation of the total disability benefits and thereafter demanded payment of premiums, which were paid as heretofore stated.

[1] It is quite apparent from the evidence that even though there may have been a conflict as to whether certain physical conditions, which contributed to the disability, may have existed from birth, nevertheless the disability itself, as described, apparently did not appear until after the issuance of the policies. The jury was fully justified in reaching this conclusion.

It appears from the record that respondent, although 34 years of age, had a mental classification of a 12-year-old child; that there was a mental deficiency and a retarded development. He was unable to perform any particular employment due to his dizzy spells and general condition. It is now claimed by appellant that by reason of certain temporary employment hereinafter described, it was fully justified in claiming that respondent violated the conditions of the policies, viz., "if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit", or "if at any time it shall appear to the Company that the Insured is able to engage in any occupation for remuneration or profit, no further income payments shall be made nor premiums waived".

The respondent worked for J. B. Hill Company as a truck driver until 1932, when he became ill. He lived at home with his mother. He tried to find work but was unable to hold any position. He would have spells and come home. He described his illness as follows: "Well, I just get cold sweats and feel like I was going to go out, and fall up against a wall and turn—things turn black in front of me and I just have to—somebody just has to help me in: I have to lay down for an hour until I get so I could get up and walk again." In 1936 he tried to work for a dairy company. He remained at home three or four weeks, soliciting and calling friends of the family on the phone in an endeavor to influence them to purchase products from the dairy company, for which he was to receive a commission on the business obtained for it. The evidence discloses that he only worked a day or two a week. He received about $15 in commissions. Due to illness he quit his work. In the same year he worked eight or ten days in a combination oil station and grocery store. He worked two or three hours in one day and would be off on account of his spells for a day or a week. He received 25 cents, and sometimes 50

cents, per day as wages. He wrecked the proprietor's truck when a dizzy spell came over him. He drove his mother's car for her on several trips. This is about the extent of his claimed employment and ability to work since 1932.

Appellant argues that the evidence shows that the plaintiff is well able to engage in several occupations for remuneration and that under the provisions of the policy, this fact worked a termination of his right to disability benefit payments, citing Job v. Equitable Life Insurance Co., 133 Cal.App. Supp. 791, 22 P.2d 607; Metropolitan Life Ins. Co. v. Wann,Tex.Civ.App., 28 S.W.2d 196; Buckner v. Jefferson Standard Life Ins. Co., 172 N.C. 762, 90 S.E. 897; Dietlin v. General American Life Insurance Company, 4 Cal.2d 336, 345, 49 P.2d 590, and Dietlin v. Missouri State Life Ins. Co., 126 Cal.App. 15, 23, 14 P.2d 331, 15 P.2d 188.

In answer to appellant's argument respondent contends that in the present case the evidence shows that respondent is unable to perform the duties of any remunerative employment or conduct any business for profit; that under the terms of the policy he is entitled to the monthly payments unless he is able to perform substantially all of the duties of some employment or business for remuneration or profit.

In Wright v. Prudential Insurance Company, etc., 27 Cal.App.2d 195, 205, 80 P.2d 752, 761, this court, after an exhaustive review of the decisions, which is unnecessary to repeat here, held that although plaintiff Wright continued to follow his employment for a limited time after the policy ceased to be in effect and performed limited services and received compensation therefor during that period, a finding that he became totally and permamently disabled while the policy was in force had sufficient evidentiary support and was conclusive, where it appeared that during the life of the policy plaintiff was suffering from a severe ailment which prevented him from performing the substantial duties of his occupation in the usual way, and that such ailment had then reached a stage where, in the exercise of ordinary care for his own health, he ought to have ceased work, not temporarily only, but permanently and entirely. In support of our decision, Fitzgerald v. Globe Indemnity Company of New York, 84 Cal.App. 689, 258 P. 458, was quoted as follows: "'The weight of authority supports the view that provisions in accident policies for indemnity in the event the insured is totally or wholly disabled do not require that the accident shall render the insured absolutely helpless, but such provisions are construed as meaning such a disability as renders him unable to perform the substantial and material acts of his business or occupation in the usual and customary way.' [Citing authorities.] An examination of the cases cited herein shows that the same rule applies in cases of disability caused by disease."

[2-4] We therefore believe that we should regard the policy as one designed to provide a substitute for earnings when the insured is deprived of his capacity to earn by bodily injury or disease. He must be prevented from performing work and conducting business for compensation or profit. Interpreting the policy in the light of its purpose, the words "performing any work" mean engaging in any gainful occupation or employment in the customary manner as a workman. The definitions contemplate the substantial doing of those things which are generally regarded as constituting performance of work and conduct of business, and not simply the sporadic doing of simple tasks, or the giving of attention to simple details, incident to performance of work or conduct of business. The definitions also contemplate that compensation shall be in a fair sense remunerative, and not merely nominal. The subject of what respondent herein was and will be able to do was fully investigated at the trial. There was no substantial evidence that he could perform work for compensation or profit in any department of labor or industry, as workmen are employed to perform work and as workmen are remunerated for doing work. This court has fully considered the authorities cited by counsel. If the court were to review them adequately it would be necessary to discriminate between classes of insurance and between policy provisions, to state the essential facts of cases and then to state and appraise the decisions. Such a review would require more time than the court can devote to it. In this instance the court has not recognized the so-called strict and liberal methods of interpreting indemnity policies. We have taken the words of the policy as we find them, and as persons would usually and ordinarily understand them, and as used to express the purpose for which they were employed. So considered, the evidence authorized the

jury to say that, while this man can do a number of things, chiefly petty, he cannot work or conduct a business for compensation or profit.

[5, 6] The jury, as well as the trial judge, had the opportunity to observe the physical and mental condition of the respondent, and were fully justified in reaching the conclusion that he was not "able to engage in any occupation for remuneration or profit" or to "perform any work or follow any occupation or engage in any business for remuneration or profit". The jury's finding on the two subjects discussed cannot be disturbed on appeal.

[7] Appellant claims that the trial court committed prejudicial error in refusing to read to the jury the provisions of the Vehicle Code, St.1935, p. 93 et seq., relating to chauffeur's licenses and in refusing to give its instructions reading in part as follows:

"The policies here in question are not accident insurance policies, or health insurance policies or occupational insurance policies; * * * Mere proof of the fact that plaintiff is diseased, or ill or even partially disabled would not entitle him to a judgment in his favor. * * *"

"* * * Even if by reason of ill health plaintiff could not do all of the work which he performed before his ill health, you cannot find a verdict in his favor, if you believe from the evidence that he was, during the period in question, physically and mentally able to engage in some other occupation for remuneration or profit. * * *"

"* * * You would not be justified in bringing in a verdict for the plaintiff under the policies here in question merely because he has shown that he has suffered, or now suffers, from disease or ill health, or that he is not now able to carry on all of the work which he did before the onset of his disease or ill health. * * *"

A specific instruction to the same effect and as to each policy was offered and refused. The trial court, however, did read, as a part of the instructions offered by appellant, the terms of the policy, followed by a general instruction offered by appellant which adequately and properly covered the instructions offered and refused. It reads: "The plaintiff in this action is not entitled to recover any sum whatsoever unless you shall find by a preponderance of evidence that plaintiff was, during the period for which recovery is sought, totally and permanently disabled by bodily injury or disease, so that he was prevented thereby from engaging in any occupation whatsoever for remuneration or profit. Proof that the plaintiff was only partially disabled, during such period, from engaging in an occupation for remuneration or profit, would not entitle him to recover. In order to recover in this action, plaintiff must prove by a preponderance of the evidence that during a specific period of time, he was both totally and permanently disabled by bodily injury or disease, so that he was prevented from engaging in any occupation whatsoever for remuneration or profit. If plaintiff has not made such proof, it is your duty to bring in a verdict in favor of the defendant."

In addition, the trial court, at the request of respondent, gave an instruction on the subject to the same effect as the rule laid down in Wright v. Prudential Insurance Company, etc., supra; Fitzgerald v. Globe Indemnity Company of New York, supra, and Maresh v. Peoria Life Insurance Co., 133 Kan. 191, 299 P. 934. We therefore conclude that the jury was properly instructed on that subject and the refusal to give the proffered instructions was justified.

[8] Appellant takes exception to the use of the word *his* instead of *any* in another instruction offered by respondent and given by the court. It reads in part: "The court instructs you that provisions in insurance policies for the payment of benefits for total disability do not require that the insured shall be absolutely helpless, but such provisions are construed as meaning such a disability as renders him unable to perform the substantial and material acts of *his* business or occupation in the usual and customary way." (Italics ours.)

It is argued that by this instruction the court has told the jury that any disability rendering the insured unable to perform the substantial and material acts of *his* business or occupation would permit him to recover. The instruction, although erroneous when considered alone, was correct when considered together with the other instructions given. The court read the provisions of the policy in which it was recited that if the insured "is able to engage in any occupation * * *, no further income payments shall be made", etc. The cited instance appears to be the only time the expression "*his* business or

occupation" was used. In all of the other instructions the words *"any* business or occupation" were repeatedly used. In Wright v. Prudential Insurance Company, etc., supra, the court quotes from Prudential Insurance Co., etc. v. South, 179 Ga. 653, 177 S.E. 499, 98 A.L.R. 781, where it was said that the expressions "any occupation" and "any work", "should be construed to mean the ordinary employment of the particular person insured, or such other employment, if any, approximating the same livelihood, as the insured might fairly be expected to follow, in view of his station, circumstances, and physical and mental capabilities. * * * If the insured is so incapacitated that substantially all of the material activities of any such employment are reasonably closed to him, he is totally disabled within the meaning of the policy."

The apparent wording might have been confusing to the jury if respondent had any trade or profession which his ailment prevented him from pursuing, while, at the same time it left him able to follow some other occupation. But there was no evidence that any such condition existed. The evidence shows without any conflict that the respondent was lacking in mental capacity to follow a skilled trade or profession, or to engage in anything but unskilled labor. The evidence showed that he tried, without success, to engage in several other kinds of work, and in general, tended to show lack of capacity for sustained effort of any kind. Considering the instructions as a whole, we are convinced that the jury was not prejudiced by the giving of the objectionable instruction.

[9, 10] The complaint prays for judgment in the sum of $2,489.30 "with interest on the monthly payments remaining due and unpaid from the date of the maturity of said payments at the rate of 7 per cent per annum * * *". The prayer does not seek interest on the sums paid as premiums on the two policies. The amount of the recovery was a general verdict of $2,933.64. Appellant claims that a calculation including all monthly payments alleged to be due, with interest thereon to the date of the verdict, and an addition of all sums paid as premiums during that period, amounts to $2,904.77. The difference as thus calculated, is $28.87. We are unable to determine what proportion of the general verdict was for interest, for payments due, or for recovery of premiums paid. The amount of the verdict is sufficiently supported by the evidence. In a contested case, interest may be awarded, if the plaintiff is entitled thereto, notwithstanding the complaint contains no prayer for interest. Durbin v. Hillman, 50 Cal.App. 377, 382, 195 P. 274. See, also, sec. 580, Code Civ. Proc.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.



38 Cal.App.2d 567

BOYE v. BOERNER et al.

Civ. 11287.

District Court of Appeal, First District, Division 1, California.

April 23, 1940.

Rehearing Denied May 23, 1940.

Hearing Denied June 20, 1940.

1. Mortgages ⇐145, 151(4)

The lien of unrecorded mortgage securing loan is created by mere execution and delivery of mortgage and takes precedence over subsequent attachment lien, as attaching creditor is not deemed bona fide purchaser for value and takes only what interest debtor has at time of attachment. Civ.Code, § 1214.

2. Attachment ⇐178

An attaching creditor's lien does not attach to mere naked title, but only to debtor's interest in attached property at time of levy, so that creditor gets nothing, if all title and interest passed from debtor to third person before such time.

3. Attachment ⇐180

An unrecorded deed takes precedence over subsequent attachment lien, which is not "instrument first duly recorded" within statute declaring every grant of estate in realty conclusive against grantor and persons subsequently claiming under him, except purchaser or encumbrancer acquiring title or lien in good faith and for valuable consideration by instrument first duly recorded. Civ. Code, § 1107.

See Words and Phrases, Permanent Edition, for all other definitions of "Instrument First Duly Recorded".

4. Mortgages ⇐138

A trust deed, executed for purpose of securing debt, conveys title to described realty so far as necessary to execution of trust.

5. Attachment ⇐180
Mortgages ⇐151(4)

Before party claiming under unrecorded mortgage or deed is entitled to benefit of doctrine of priority of such instrument to subsequent attachment lien, valid delivery of instrument before attachment levy must appear.

6. Mortgages ⇐186(5)

In action to quiet title to lot, conveyed to plaintiff by sheriff after sale thereof under execution in attachment proceeding against previous owner, who gave unrecorded trust deed thereon to another before levy of attachment writ, evidence that mortgagor executed such deed and delivered it unconditionally to notary public for mortgagee, with instructions to file it for record, pursuant to agreement that mortgagor would give and mortgagee accept security for payment of debt, and with intention that deed should operate as present transfer of mortgaged realty, established as matter of law mortgagee's assent to such delivery or at least raised presumption thereof, so that deed was thereby constructively delivered to mortgagee and lien thereof was prior to that of attachment subsequently levied, though deed was not received by mortgagee from notary until after such levy. Civ.Code, § 1059.

7. Mortgages ⇐69

The fact that trust deed is given for grantee's benefit, pursuant to and in consummation of parties' previous agreement and in consideration of bona fide indebtedness of grantor to grantee, establishes as matter of law grantee's assent to grantor's delivery of deed to stranger for recording and delivery to grantee within statutory provision that grant is deemed constructively delivered, where grantee's assent to its delivery to stranger for grantee's benefit is shown or may be presumed. Civ.Code, § 1059.

Appeal from Superior Court, Los Angeles County; Frank B. Belcher, Judge.

Action to quiet title by John C. Boye against Ralph V. Boerner, Hedwig Backus, and others, in which defendant Backus filed a cross-complaint to foreclose a trust deed. Judgment for plaintiff, and cross-complainant appeals.

Reversed, with directions.

Marshall Stimson and Noel Edwards, both of Los Angeles, for appellant.

Kryne Vanden Akker, of Los Angeles, for respondent.

KNIGHT, Justice.

This is an action to quiet title to a lot in Los Angeles county. The plaintiff, John C. Boye, was given judgment, and Hedwig Backus, a party defendant and cross-complainant, appeals. The question at issue was whether the rights acquired by respondent through the medium of a sheriff's deed, issued after sale under execution, in an attachment proceeding brought against the owner of the lot, took precedence over appellant's unrecorded trust deed given by said owner several months prior to the levy of the writ of attachment.

The appeal was taken, on the judgment roll alone, and the facts as they appear from the trial court's findings are these: During the times hereinafter mentioned the appellant was a resident of Wisconsin. Ralph V. Boerner, the owner of the lot and a party defendant herein, formerly lived in that state, and while living there became indebted to appellant in the sum of $850. In July, 1934, he delivered to appellant a promissory note for said amount and at that time it was agreed that he would give her security for its payment. Shortly afterwards he moved to California; and on October 1, 1934, he executed a new note for the amount of the indebtedness together with a deed of trust in her favor covering the lot in question, and naming Southern Title Guaranty Company as trustee. On October 3, 1934, Boerner acknowledged the execution of the trust deed before a notary public named Chester Schofield and thereupon delivered the note and trust deed to Schofield with instructions to record the trust deed and mail the promissory note to appellant. Schofield neglected to do either; and on January 24, 1935, Earl J. Rose brought an action against Boerner and levied an attachment on said lot. Summons was served on Boerner on January 26, 1935, and on February 4, 1935, Schofield mailed the note to appellant and filed the trust deed for record with instructions to the recorder to forward the same to appellant upon its recordation; and this was done. Until appellant received the trust deed and the note through the mail she was unaware that either had been executed. On February 13, 1935, a default judgment was entered against Boerner in the Rose action, and on March 18, 1935, the property

was sold by the sheriff at execution sale to Rose to satisfy his judgment against Boerner. Thereafter and on March 28, 1935, Rose assigned the certificate of sale to respondent John C. Boye, who brought the present action against Boerner and appellant to quiet title. Boerner defaulted, but appellant, besides answering, filed a cross-complaint to foreclose the deed of trust, and the cause was tried upon the issues raised thereby. The trial court's finding with respect to the purpose of giving the new note and the deed of trust was as follows: "that Ralph Boerner, in July of 1934, delivered a note in the sum of $850.00 to Hedwig Backus of Cedarburg, Wisconsin, and at that time it was orally agreed between Ralph Boerner and Hedwig Backus that he would give to Hedwig Backus security for the indebtedness mentioned in said note *and that the note and deed of trust mentioned in the cross-complaint of Hedwig Backus was intended by Ralph V. Boerner to be security for the then existing indebtedness.*" (Italics ours.) From the facts found the trial court concluded that the rights acquired by respondent through the sheriff's deed took precedence over appellant's unrecorded trust deed.

[1-4] As pointed out by appellant, it has been held in numerous cases, among them being Bank of Ukiah v. Petaluma Savings Bank, 100 Cal. 590, 35 P. 170, that the lien of an unrecorded mortgage given to secure a loan is created by the mere execution and delivery of the mortgage, and takes precedence over a subsequent attachment lien; that in such case the attaching creditor is not deemed to be a bona fide purchaser for value within the meaning of section 1214 of the Civil Code, and that he takes only what interest the debtor has at the time of the attachment, and is entitled to nothing more. A more recent case holding to the same effect is Burns v. Peters, 5 Cal.2d 619, 55 P.2d 1182, 1185, wherein the court stated: "An attaching creditor is not a bona fide purchaser and when attaching property subject to a mortgage, *whether recorded or not,* he takes only the interest the mortgagor had at the time of the levy. Motor Acceptance Co. v. Finn, 124 Cal.App. 766, 13 P.(2d) 761; Ahern v. Tulare Lake Canal Co., 115 Cal.App. 93, 1 P. (2d) 490; Iknoian v. Winter, 94 Cal.App. 223, 270 P. 999; Richman v. Bank of Perris, 102 Cal. App. 71, 282 P. 801; Eichler v. Gray, [9 Cir.], 27 F.(2d) 328; Farmers' Exchange Bank v. Purdy, 130 Cal. 455, 62 P. 738." (Italics ours.) In other words, the well-settled rule is that there must be an interest to which a creditor's lien can attach; that such lien does not attach to a mere naked title, but only to the debtor's interest in the property at the time of the levy, and that therefore if at that time all title and interest has passed from him to a third person, the creditor gets nothing. Iknoian v. Winter, 94 Cal.App. 223, 270 P. 999. Furthermore, it is held that an attachment lien is not "an instrument first duly recorded" within the meaning of section 1107 of the Civil Code; hence that under the provisions of that code section an unrecorded deed takes precedence over a subsequent attachment lien (Davis v. Perry, 120 Cal.App. 670, 8 P.2d 514); and with respect to the legal effect of a deed of trust it has been definitely determined that where as here it is executed for the purpose of securing a debt, it conveys title so far as may be necessary to the execution of the trust. Wasco Creamery, etc., Co. v. Coffee, 117 Cal.App. 298, 3 P.2d 588.

[5, 6] Respondent does not challenge the soundness of the foregoing legal doctrines. Quite to the contrary he "concedes the law to be well settled that an attaching creditor takes subject to the lien of a delivered but unrecorded deed of trust"; but, as pointed out by him, before a party claiming under an unrecorded mortgage or deed is entitled to the benefit of the priority doctrine it must appear that there has been a valid delivery of the instrument prior to the attachment levy (Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am.Rep. 726); and respondent contends that for want of assent on the part of appellant the delivery of the trust deed in the present case, as against the attaching creditor, did not become effectual as claimed by appellant on October 3, 1934, at the time the instrument was delivered to Schofield with instructions to record the same, but, as found by the trial court, was complete only on or about February 4, 1935, when appellant received the instrument through the mail, which was subsequent to the date of the attachment levy; and that consequently the rights of appellant under the unrecorded trust deed were subordinate to those acquired by the attachment lien. We are unable to sustain respondent's contention.

Civil Code, section 1059, relating to constructive deliveries of grants reads as follows: "Though a grant be not actually delivered into the possession of the grantee,

it is yet to be deemed constructively delivered in the following cases: 1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or, 2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed." And here the facts show that at the time of the execution of the trust deed and at the time of its delivery to Schofield there was a bona fide, existing understanding and agreement between Boerner and appellant to the effect that Boerner would give to appellant and that she would accept security for the payment of the outstanding debt; that it was pursuant to and in consummation of such understanding and agreement that Boerner executed the deed of trust and delivered the same unconditionally to Schofield for appellant with instructions to file the same for record; that when Boerner thus delivered the trust deed to Schofield for appellant he did so with the intention that it should operate as a present transfer; and the instrument was admittedly for the benefit of appellant. Assuming, therefore, that, as respondent claims, the case falls properly within the scope of the second subdivision of said code section, it is our conclusion that the facts above narrated, as a matter of law, establish an assent on the part of appellant to the transaction involving the execution of the trust deed by Boerner and the unconditional delivery thereof to Schofield sufficient to satisfy the requirement of said code section; at least they were such, when considered in connection with the additional fact that the instrument was in fact beneficial to appellant, to call for the application, as a matter of law, of the presumption of assent afforded by said code section.

The trial court's decision, so respondent states in his brief, was based solely on the case of Hibberd v. Smith, supra, which was later followed in deciding the case of Green v. Skinner, 185 Cal. 435, 197 P. 60. The factual situations in those cases, however, were essentially different from the one here presented in these vital respects: In neither of those cases was the conveyance executed by the grantor and delivered by him to a third party in performance of a prior existing agreement between the parties to the conveyance; furthermore, there was an entire absence of any facts or circumstances from which it could be inferred that the grantee had the slightest intimation of the grantor's intention to make the conveyance; and admittedly there was no moral, legal or financial obligation on the part of the grantor, as there was here, to make the conveyance. In each of those cases the execution of the conveyance and the delivery thereof by the grantor to a third party, was purely a voluntary, gratuitous act on the part of the grantor. In short, there was not in either of those cases a single fact or circumstance tending to show, or from which it might be fairly presumed, that the grantee ever assented to the execution and delivery of the conveyance, prior to the time the rights of third parties intervened. Moreover, in the Hibberd case, the nature of the transaction was such as to justify the court in saying that it did not feel assured that the deed in question was for the benefit of the grantee. For the foregoing reasons we are unable to agree with respondent that the cases relied upon by him are here controlling.

[7] As said in the Hibberd case, if presumptive assent be indulged, there is no rule of law fixing the time when such assent must be held to have been given. It may properly be held, therefore, in cases of this kind, that where there is a bona fide indebtedness existing between the parties, the fact that the conveyance in question is given for the benefit of the grantee, pursuant to and in consummation of an agreement previously entered into between them and in consideration of such indebtedness, in itself, as a matter of law, establishes that the grantee assented thereto. Moreover, as pointed out in the Hibberd case, the rule requiring the assent of a grantee to a grant has its origin in the principle that the law does not force a person to take an estate against his will (Townson v. Tickell, 3 Barn. & Ald. 36; Thompson v. Leach, 2 Vent. 198); and obviously where the conveyance is executed and delivered pursuant to and in consummation of a previous agreement between the parties the legal principle mentioned does not enter into the case.

It is our conclusion, therefore, that under the facts found respondent's rights under the sheriff's deed are subordinate to those of appellant under the unrecorded trust deed; accordingly the judgment is reversed with directions to revise the conclusions of law to conform to the views herein expressed and thereupon to enter judgment in appellant's favor on the cross-complaint.

We concur: PETERS, P. J.; WARD, J.

In re DAVIS' ESTATE. DAVIS v. DAVIS.

Civ. 11348.

District Court of Appeal, First Appellate District, Division 2, California.

April 24, 1940.

Rehearing Denied May 21, 1940.

See 102 P.2d 545.

1. Divorce ⇐327

A foreign divorce obtained through assumed residence is not in good faith and is open to attack in state of true matrimonial domicile, and parties sought to be bound by it may always impeach its validity by showing that courts which rendered it had no jurisdiction over parties or subject matter of action.

2. Divorce ⇐327

A foreign divorce decree obtained through assumed residence may be attacked collaterally on proof that the court granting it had no jurisdiction because of want of domicile of plaintiff.

3. Courts ⇐24, 37(1)

An act of parties in nature of waiver, stipulation, appearance, consent or estoppel cannot confer upon a foreign court a jurisdiction which it does not possess when subject matter of controversy is beyond its limitations.

4. Divorce ⇐327

A foreign divorce decree entered upon a simulated and fraudulent residence may be open to attack irrespective of form of appearance made in the divorce court.

5. Judgment ⇐514

When a judgment is open to attack, rights of party attacking it rest upon equitable principles so that the granting or denial of relief sought is largely in trial court's discretion, and hence the right of an innocent party to be relieved from effects of a fraudulent decree is stronger in a court of equity than the right of one who has to some extent participated in the fraud.

6. Divorce ⇐172, 330

The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital relations, either by a spouse who has obtained such decree from a court which had no jurisdiction, or by a spouse who takes advantage of the decree by remarrying.

7. Estoppel ⇐54

Ignorance of the truth is a primary essential on part of one pleading an "estoppel in pais".

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel in Pais".

8. Courts ⇐37(3)

Under doctrine of "quasi estoppel", which is based upon principle that one with full knowledge of facts shall not be permitted to act in a manner inconsistent with his former position or conduct to injury of another, one who has invoked the exercise of a jurisdiction within the general powers of the court is "estopped" from seeking to reverse its orders upon the ground of lack of jurisdiction. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped" and "Quasi Estoppel".

9. Divorce ⇐330

Where deceased actively participated in urging respondent to establish residence in Nevada for sole purpose of obtaining a divorce, and deceased married respondent on day that divorce was granted by Nevada court, under doctrine of "quasi estoppel" deceased, if he had lived, would have been "estopped" from denying validity of divorce or subsequent marriage, and deceased's heir or grantee was also "estopped" from attacking the decree, in a proceeding to determine heirship, on ground that decree was procured by fraud by deceased. Code Civ.Proc. § 1962, subd. 3.

10. Estoppel ⇐98(3)

Generally, an heir, being in privity with the ancestor, is bound by an estoppel which was binding upon the ancestor.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Proceeding in the matter of the estate of James R. Davis, deceased, by John B. Davis, against Christina Elizabeth Davis, to determine heirship. From an adverse judgment, John B. Davis appeals.

Affirmed.

Daniel M. Potter and George S. Hupp, both of Los Angeles, for appellant.

Rea, Free & Jacka and Irvin A. Frasse, all of San Jose, for respondent.

NOURSE, Presiding Justice.

The petitioner in a proceeding to determine heirship appeals from an adverse judgment. The petitioner is a surviving son of James R. Davis, deceased. The respondent is the reputed wife of deceased, claiming under a second marriage contracted in Reno, Nevada, February 27, 1936.

The three questions stated by appellant present but one legal inquiry: is a decree of divorce entered in a foreign state upon a simulated and fraudulent residence open to attack by an interested party who was not a party to the fraud?

[1-3] This issue is controlled by these accepted legal principles: (1) "A foreign divorce obtained through assumed residence is not in good faith, and is open to attack in the state of the true matrimonial domicile, and the parties sought to be bound by it may always impeach its validity and escape its effect by showing that the courts which rendered it had no jurisdiction over the parties or the subject matter of the action, and its jurisdiction may be controverted by extraneous evidence." Kegley v. Kegley, 16 Cal.App.2d 216, 221, 60 P.2d 482, 484; 17 Am.Jur., sec. 742 et seq. (2) Such a decree may be attacked collaterally on proof that the court granting it had no jurisdiction because of want of domicile of the plaintiff. Kegley v. Kegley, supra, 16 Cal.App.2d at page 220, 60 P.2d at page 482. (3) No act of the parties in the nature of waiver, stipulation, appearance, consent or estoppel can confer upon a foreign court a jurisdiction which it does not possess when the subject matter of the controversy is beyond its limitations. Idem., 16 Cal.App.2d at page 220, 60 P.2d at page 482. Estate of Bruneman, 32 Cal.App.2d 606, 608, 90 P.2d 323; Estate of McNutt, Cal.App., 98 P.2d 253.

The last principle is stated in the purity of its acceptance as a rule of law distinguishing jurisdiction of the res from that of the person, and before its corruption by rules of convenience, necessity and public policy. The decisions uniformly recognize the true principle, but many and varied exceptions have been established by applying the rule of estoppel, acquiescence or consent. Bruguiere v. Bruguiere, 172 Cal. 199, 204, 155 P. 988, Ann.Cas.1917E, 122, held a wife, divorced by her husband in a court of a state other than that of his residence, was estopped from attacking the decree because of her subsequent marriage to another. This exception is reaffirmed in Kelsey v. Miller, 203 Cal. 61, 87, 263 P. 200, and is followed in many other jurisdictions. But we find no authority for the contention of respondent that the mere appearance or consent of the defendant is sufficient to confer jurisdiction upon the court which otherwise would have no jurisdiction of the subject matter. The leading case to the contrary is Andrews v. Andrews, 188 U.S. 14, at page 41, 23 S.Ct. 237, at page 243, 47 L.Ed. 366, where the Supreme Court said: "But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject-matter not resting on consent includes, necessarily, the want of power of both parties to endow the court with jurisdiction over a subject-matter, which appearance or consent could not give." 17 Am.Jur., sec. 759; Langewald v. Langewald, 234 Mass. 269, 125 N.E. 566.

[4] Respondent concedes the rule of Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069; Kegley v. Kegley, 16 Cal. App.2d 216, 60 P.2d 482; People v. Harlow, 9 Cal.App.2d 643, 50 P.2d 1052; Bruguiere v. Bruguiere, supra; Delanoy v. Delanoy, 216 Cal. 27, 34, 13 P.2d 719, 86 A.L.R. 1321, and similar cases holding that a foreign decree of divorce may be attacked collaterally upon showing that the court granting it had no jurisdiction because of want of domicile of the plaintiff. But respondent says these authorities are not applicable here because they all involved foreign divorces granted upon substituted service of process. This is not a fair distinction of either the Ryder or the Kegley case, as the defendant in each case gave consent to the entry of the foreign decree. In Estate of Bruneman, 32 Cal.App.2d 606, 90 P.2d 323, and Estate of McNutt, Cal. App., 98 P.2d 253, the wife executed a written document consenting to the entry of the foreign decree and made a property settlement. This fact was stressed in the dissenting opinion in the latter case, but the majority held, nevertheless, that she was without power to confer jurisdiction on the foreign court and was entitled to attack that decree as void

for want of jurisdiction. The Supreme Court denied a hearing in that case and the rule may now be deemed settled that such decrees may be open to attack irrespective of the form of appearance made in the divorce court.

[5, 6] Respondent argues that appellant is estopped from attacking the divorce because his father persuaded respondent to go to Reno and procure a divorce; agreed to pay her expenses there, and the cost of the divorce; persuaded her to marry him immediately after the decree was entered, and thereby led her to believe that the divorce was valid. Respondent says that such conduct would estop the father, hence that it should estop the son who succeeds to his property rights. Appellant does not answer the argument, but rests upon the broad assertion that a divorce obtained under these circumstances is always open to attack. It will be taken for granted that when a judgment is open to attack the rights of the party attacking it rest upon equitable principles so that the granting or denial of the relief sought is largely in the discretion of the trial court. Hence, the right of an innocent party to be relieved from the effects of a fraudulent decree is stronger in a court of equity than the right of one who has to some extent participated in the fraud. In the Bruneman case and in the McNutt case the "offended" wife was held not estopped to question a fraudulent decree procured by her husband with her consent. The rulings seem to have been influenced by the charitable view that the wife in each case was not altogether free from domination by the husband who procured her consent to the proceedings. This view was frankly accepted without equivocation by the Mississippi court in Hopkins v. Hopkins, 174 Miss. 643, 165 So. 414. The accepted rule, free from emotionalism, is found in "Restatement of the Law of Conflict of Laws", Sec. 112, as follows: "The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarrying."

[7, 8] The California doctrine is based upon subdivision 3 of section 1962 of the Code of Civil Procedure, which prohibits a party from denying an act which he has deliberately led another to believe and act upon as true. Though ignorance of the truth is a primary essential on the part of the one pleading an estoppel in pais, our courts have recognized another species of estoppel, called "quasi-estoppel," which is based upon the principle that one cannot blow both hot and cold, or that one "with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another". 10 Cal.Jur., p. 645. McDanels v. General Ins. Co., 1 Cal.App.2d 454, 459, 36 P.2d 829. Another way of stating the same general principle (applicable directly to the instant case) is that one who has invoked the exercise of a jurisdiction within the general powers of the court cannot seek to reverse its orders upon the ground of lack of jurisdiction. "The principle opposing such action is one of estoppel in the interest of a sound administration of the laws whereby the regularity or even validity of an act procured by one himself cannot be raised—not that the act is valid, for it may not be, and estoppel does not make valid the thing complained of but merely closes the mouth of the complainant. Spence v. State Nat. Bank (Tex. Com.App.) 5 S.W.2d 754. The principle is known as the doctrine of acquiescence, often referred to as quasi estoppel." Spohn Co. v. Bender, 18 Cal.App.2d 447, 451, 64 P.2d 152, 154.

[9] Here the undisputed facts are that the deceased urged the respondent herein to go to Nevada, establish a residence for the sole purpose of securing a divorce, and then to marry him. He promised her that he would pay her expenses and the costs of the divorce. He went to Reno and took active part in the preparation of the case and married her on the day the divorce was granted. He then returned with respondent to California, where he made a home for her and held himself out as her lawful husband until the time of his death. These facts present a typical case where the one party—the deceased—having been the prime mover in the fraud upon the Nevada court, and upon the state, would have been foreclosed from denying the validity of the divorce or the subsequent marriage under the doctrine of quasi-estoppel above noted. There remains for con-

sideration the question whether such estoppel should be applied to his son and heir.

[10] As a general rule, an heir, being in privity with the ancestor, is bound by an estoppel which was binding upon the ancestor. 19 Am.Jur., p. 811. In Elliott v. Wohlfrom, 55 Cal. 384, 388, our Supreme Court held that, since a former husband could not attack a judgment of divorce upon the ground that it was obtained by his own fraud, the grantees of the husband were in no better position than he, and they would be estopped from attacking the judgment. The case does not appear to have been cited subsequently. Respondent rests the point on two other cases, which are of no value. Kaufman v. Kaufman, 177 App.Div. 162, 163 N.Y.S. 566, does not touch the question. Curry v. Curry, 65 App.D.C. 47, 79 F. 2d 172, 174, contains the statement that the principle denying a party participant the right to attack a decree which he has obtained through fraud is "not confined to the active parties in matters of divorce". No authorities are cited in support of the statement, which was voluntary, as the question was not involved in that litigation. The appellant herein relies entirely upon a quotation from 15 Ruling Case Law, page 841, reading: "On the other hand, it is generally held that where the rights of persons not parties or privies to a proceeding are adversely affected by the judgment rendered therein such persons are allowed to impeach it whenever it is attempted to be enforced against them, or whenever in any suit its validity is drawn in question, since they have no remedy against the judgment, by appeal or otherwise, in the case itself." The learned authors of restatement on "Conflict of Laws" decline to pass on the question with the "caveat" appearing on page 170, reading: "Nor is any opinion expressed as to whether the children of a prior marriage, or a third person, may be precluded from questioning the validity of a divorce decree under the circumstances described in this section."

With this scarcity of authority we are inclined to the view so briefly stated in Elliott v. Wohlform, supra, that the grantees of the principal who perpetrated the fraud are in no better position than he, and that, upon reason and principle, the same rule should apply to his heirs. A different rule might apply where the judgment under attack is void on its face, but where, as here, the attack on the judgment or decree is based solely upon the fraud of the ancestor in procuring it, the heir or grantee of such party should not be premitted to profit by such fraud in an attack upon the decree based entirely on the ground that the decree was procured by such fraud.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



38 Cal.App.2d 615

WATTS et ux. v. CURRIE et al.

Civ. 11285.

District Court of Appeal, First District, Division 1, California.

April 26, 1940.

1. Mortgages ⇐424

Where complaint to foreclose mortgage and recover personal judgment against purchasers of mortgaged realty was not filed until March 10, 1937, although time for commencing action had expired July 25, 1935, the Mortgage Moratorium Act extending limitation of time for instituting actions but providing that act should not apply to mortgage in default at time owners acquired title by purchase subsequent to effective date of act, did not take case out of operation of statute of limitations where complaint contained no allegations showing when purchasers acquired the encumbered property or whether at time it was acquired, the mortgage was in default. Code Civ.Proc. § 337, subd. 1; St.1935, p. 1214, §§ 19, 20.

2. Appeal and error ⇐236(2)
Pleading ⇐225(1)

Where a defective complaint could be cured by amendment, the fact that demurrer was sustained without leave to amend does not constitute reversible error in the absence of a request or application by a plaintiff for permission to amend.

3. Limitation of actions ⇐177(2)

Where mortgagees, seeking personal judgment against purchasers of encumbered property who had allegedly assumed encumbrance, claimed that case was taken out of operation of statute of limitations by Moratorium Act extending limitation of time fixed by the statute of limitations but providing that the act should not be applicable to any mortgage in default at time owners acquired title by purchase subsequent to effective date of act, mortgagees were required to plead facts to bring the purchasers within the terms of the act. Code Civ.Proc. § 337, subd. 1; St.1935, p. 1214, §§ 19, 20.

4. Pleading ⇐63

If a plaintiff seeks to fasten a liability upon a defendant through the medium of a particular statute, plaintiff must allege sufficient facts in his complaint to bring the defendant within the scope of the statute, and until he does so the defendant is not called upon to plead facts to take him out of the operation of the statute.

5. Mortgages ⇐424

The Moratorium Act providing that whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage would expire by virtue of limitation statute during certain period commencing with effective date of the act, such time "is hereby extended so as not to expire" until July 1, 1937, does not create a new statute of limitations, but merely extends the limitation of time fixed by the statute of limitations. Code Civ. Proc. § 337, subd. 1; St.1935, p. 1214, § 19.

6. Limitation of actions ⇐177(2)

Under Moratorium Act extending limitation of time for bringing action on obligation secured by mortgage, unless complaint contains allegations of fact to bring case within the extension period, the provisions of statute of limitations are controlling. Code Civ.Proc. § 337, subd. 1; St.1935, p. 1214, § 19.

7. Limitation of actions ⇐180(2)

Where complaint in action to foreclose mortgage and to recover personal judgment against purchasers of encumbered property disclosed on its face that the cause of action as to the purchasers was barred by statute of limitations, a general demurrer was sufficient to raise the point. Code Civ.Proc. § 337, subd. 1.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Alfred C. Watts and wife against Jay E. Currie and wife and A. H. Laursen and wife to foreclose a mortgage on real property and to recover a personal judgment against A. H. Laursen and wife. A. H. Laursen and wife interposed a demurrer which was sustained and from a judgment of dismissal based on the order sustaining the demurrer, the plaintiffs appeal.

Affirmed.

George L. Hampton, of Burbank, for appellants.

Henry O. Wackerbarth, of Los Angeles, for respondents.

KNIGHT, Justice.

The plaintiffs, Alfred C. and Louisa Watts, appeal from a judgment of dismissal based on an order sustaining a demurrer to the complaint without leave to amend.

[1, 2] The action was to foreclose a mortgage on real property given to secure the payment of a promissory note for $10,000. The parties defendant were Jay E. and Helen N. Currie, the makers of the note and mortgage, and the respondents A. H. and Mettie C. Laursen who subsequently acquired the encumbered property and against whom appellants sought to recover a personal judgment for the full amount of the note and interest. The demurrer, which was sustained, was interposed by the respondents. The grounds thereof were that as to them the complaint did not state facts sufficient to constitute a cause of action, and that the cause of action was barred by subdivision 1 of section 337 of the Code of Civil Procedure. It appears from the complaint that the promissory note was dated July 25, 1928, and made payable three years after date. Consequently it fell due on July 25, 1931, and under the provisions of said code section the period of time to commence an action thereon expired on July 25, 1935; but the complaint was not filed until March 10, 1937. Appellants concede, therefore, "that the cause of action declared upon in the complaint would be barred by the code section just referred to, unless the time within which to file suit thereon has been extended by some other provision of law"; and in this regard appellants contend that

the case is taken out of the operation of said code section by section 19 of the Moratorium Act of 1935 relating to debtors and guarantors (Stats.1935, p. 1208; Act 5104a, Deering's General Laws, 1935 Supp.), which provides that "Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage, * * * would expire by virtue of section 337 of the Code of Civil Procedure * * * or any other provision of law, during the period commencing with the effective date of this act [June 21, 1935] and ending on February 1, 1937, such time is hereby extended so as not to expire until the first day of July, 1937." However, section 20 of the same act declares "Nothing contained in this act shall apply to or be deemed to affect: * * * (d) any mortgage or deed of trust securing an obligation in default at the time the owner or owners acquired title by purchase subsequent to the effective date of this act"; and here the complaint contained no allegations whatever showing when respondents acquired the encumbered property, or whether or not at the time it was acquired by them the mortgage was in default. The only allegation in the entire complaint tending to connect respondents at all with the ownership was the following: "X. That the plaintiffs are informed and believe and therefore allege that at the time the defendants A. H. Laursen and Mettie C. Laursen acquired title to the property described in said mortgage, they assumed and agreed to pay the indebtedness represented by the aforesaid promissory note and mortgage." Therefore, since it affirmatively appeared from the face of the complaint that as to respondents the cause of action sued upon was barred by the provisions of said section 337 of the Code of Civil Procedure, and no facts whatever were alleged to take the case out of the operation of that code section, the trial court's ruling sustaining respondents' demurrer was obviously proper. If the facts warranted, the complaint doubtless could have been amended so as to obtain the benefit of the extension of time afforded by the Moratorium Act. But no claim is made by appellants that they asked or made any attempt to amend after the court ruled on the demurrer; and the law was well settled at the time this action was pending that where a defective complaint could be cured by amendment, the fact that the demurrer was sustained without leave to amend does not constitute reversible error in the absence of a request or application by a plaintiff for such permission. Haddad v. McDowell, 213 Cal. 690, 3 P.2d 550.

[3, 4] Appellants contend that as plaintiffs they were not required to plead facts to bring respondents within the terms of the act; but rather that it was incumbent on respondents to plead facts by way of answer, as matters of defense, showing that their status did not fall within the terms of said act. It is fundamental, however, that if a plaintiff seeks to fasten a liability upon a defendant through the medium of a particular statute, he must allege sufficient facts in his complaint to bring the defendant within the scope of the statute; and that until he does so the defendant is not called upon to plead facts to take him out of the operation of the statute.

[5, 6] Appellants make the further contention, that the Moratorium Act created a new statute of limitations, and that if the action here was barred at all it was barred by the provisions of that act and not by those of section 337 of the Code of Civil Procedure. It is argued therefore that since the demurrer herein was based on the code section and no mention made of said act, the demurrer was improperly sustained. As will be seen, however, from the wording of said section 19, the act does not purport to create a new statute of limitations, but by express terms merely extends the limitation of time fixed by said code section 337, in certain cases. It follows, therefore, that unless the complaint contains allegations of fact to bring the case within the extension period thus granted by said act, the provisions of the code section are controlling.

[7] It is also urged that the complaint was invulnerable against attack by general demurrer. In this regard appellants state in their reply brief that "while it is, no doubt, true that a special demurrer would have been proper, we feel confident that the matter could not be reached by a general demurrer". As already shown, however, it affirmatively appeared from the face of the complaint, without qualification, that the cause of action, as to these respondents, was barred by the provisions of said code section 337. The form of demurrer interposed was therefore legally sufficient to raise the point.

The conclusion reached on the matters above discussed makes it unnecessary to inquire into the remaining points relied upon by respondents in support of the trial court's ruling.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.



38 Cal.App.2d 539

COLLANI et al. v. WHITE et al.

Civ. 2521.

District Court of Appeal, Fourth District, California.

April 19, 1940.

1. Covenants ⇐79(3)

Under a deed providing that building restrictions should operate as covenants running with the land as to owners of lots which front on the same street and are not more than 500 feet distant from property subject to deed, lot owner within the class described in deed could enforce building restrictions, even though the subdivider and common grantor did not impose similar building restrictions on all the lots in the subdivision for the benefit of the entire tract.

2. Covenants ⇐79(3)

Under deed providing that building restrictions should operate as covenants running with the land as to owners of lots fronting or abutting on the same street and within 500 feet of the property subject to the deed, a lot owner whose property did not front or abut on the same street as property subject to deed could not enforce building restrictions.

3. Injunction ⇐192

In injunction suit to enforce building restriction that house erected on lot must cost $10,000, no judgment could be rendered against a party who had no interest in the lot and who was merely living on it and assisting his son in the work of building the house.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Fred G. Collani, Zadah G. de Lihus, and others to enjoin Ronald Arthur White and Arthur E. White from proceeding with the erection of a building and to compel its removal. From a judgment in favor of named plaintiffs, defendants appeal.

Reversed in part, and affirmed in part.

William A. Page, of Los Angeles, for appellants.

Arthur C. Webb and Robert A. Neeb, Jr., both of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment enjoining defendants from proceeding with the erection of, and requiring them to remove a partly completed building on the east one-half of lot 15 in tract number 7737 which is a part of the Hollywood estates in Los Angeles. No effort was made to forfeit the title to the property.

This action was instituted by Fred G. Collani, Zadah G. de Lihus, R. W. Reed and O. W. March who owned property in tract number 7737. The action was dismissed as to March and a nonsuit granted as to Reed. Judgment was rendered in favor of plaintiffs Collani and de Lihus and against Ronald Arthur White, the owner of the east half of lot 15, and Arthur E. White, his father, who had no interest in the property. We will hereafter refer to Ronald Arthur White as the defendant.

Defendant's property fronted and abutted on Queen's road and the de Lihus property on Queen's way, another street in the subdivision. The Collani property fronted on Queen's road and was within five hundred feet of defendant's property.

Defendant acquired his property in January, 1936. A few months later he secured a building permit to erect a private dwelling upon it at a cost of three thousand dollars. He was an architect and his father had been a building contractor. The two, with some assistance from others, started the erection of a structure on the property. The work proceeded slowly, and when this action was started on August 12, 1936, the building was far from completed. The lot upon which the house was being built slopes to the east. Apparently one room had been completed on its lower level. Another and larger portion of the house

was being erected which was attached to the rear of the room on the lower level. The floor of this larger addition was about on a level with the roof of the former. Both parts of the building were one story. Practically no work was done on the building after the suit was filed, although defendant secured another building permit for $7,000, before the trial.

Defendant testified that the portion of the building we have described was a first unit in the residence which he proposed to erect at a cost and value in excess of $10,000. He produced drawings of two elevations of the proposed structure which showed a two-story dwelling with tile roof and stucco finish.

Plaintiffs offered evidence to the effect that the completed dwelling shown by the drawings would cost about $6,300. While there is no finding on this question, there is a finding, supported by evidence, that the building which was being erected "does not cost in excess of seventeen hundred ($1,700.00) dollars".

The Hellman Commercial Trust & Savings Bank was the common grantor of the owners of property in tract number 7737. The deeds contained building restrictions. We briefly summarize those of interest here as follows: The property was to be used exclusively for single, private, one-family, two-story residences, each of which was to cost and be worth not less than $10,000. The construction of a dwelling once commenced was to be prosecuted with reasonable diligence until its completion. The "conditions" in each deed were to apply to and bind only the property therein described and the owner thereof with the right reserved "to create, make and/or apply similar or varying or different conditions, or to omit the same entirely, in sales and conveyances of other lots in said Tract and/or other property owned by grantor. Provided, also, that by the mutual written agreement of the owner of said property and the grantor herein, or its successors in interest, as the owner of the reversionary rights herein provided for as to said property, any or all of the conditions contained in paragraphs numbered 2, 3 and 4 may be terminated, changed, modified or amended, which agreement to be effective, shall be duly and legally executed and recorded in the office of the County Recorder of said County."

The deeds also contained the following: "Provided, Further, That a Breach of Any of the foregoing conditions shall cause said property to revert to the grantor herein, its successors or assigns, each of whom, respectively, shall have the right of immediate reentry upon said property in the event of such breach, and as to the owner or owners of any other lot or lots in said Tract and which front or abut on the same street, and are not more than 500 feet distant from said property, the foregoing conditions shall operate as covenants running with the land, and the breach of any such covenants, or the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by the grantor herein, its successors, or assigns, or by any such owners, their heirs, devisees, executors, administrators, successors, or assigns, but by no other person."

The rules of law governing the legal effect of building restrictions under varying circumstances are set forth in a number of cases of which we cite the following: Los Angeles, etc., Co. v. Muir, 136 Cal. 36, 68 P. 308; Firth v. Marovich, 160 Cal. 257, 116 P. 729, Ann.Cas.1912D, 1190; Alderson v. Cutting, 163 Cal. 503, 126 P. 157, AnnCas. 1914A, 1; Bresee v. Dunn, 178 Cal. 96, 172 P. 387; Werner v. Graham, 181 Cal. 174, 183 P. 945; McBride v. Freeman, 191 Cal. 152, 215 P. 678; Martin v. Holm, 197 Cal. 733, 242 P. 718; Sharp v. Quinn, 214 Cal. 194, 4 P.2d 942, 78 A.L.R. 501; Gamble v. Fierman, 82 Cal.App. 180, 255 P. 269.

A restriction in a deed, copied in the opinion in Joyce v. Krupp, 83 Cal.App. 391, at page 394, 257 P. 124, 125, is so similar to the one contained in the last-quoted paragraph from the deeds before us here as to suggest it was used as a model by the scrivener who drew the deeds conveying the property in tract number 7737.

The restrictions quoted from the Joyce opinion contained the following; that "as to the owner of any other lot in said tract fronting upon the same street and in the same block with the said premises, the foregoing restrictions and conditions shall operate as covenants running with the land, and the breach of any such covenant or the continuance of any such breach may be enjoined, abated, or remedied by appropriate proceedings by such grantor, its successors or assigns, or by any such owners, their heirs, devisees, executors, administrators, successors or assigns, but by no other person". It was held that the building restrictions might be enforced by

an owner having property in the same block and fronting on the same street as that of an offending owner.

The Joyce case, when read in connection with Wayt v. Patee, 205 Cal. 46, 269 P. 660, 662, seems decisive of the question presented here. In the Wayt case it appears that restrictions against occupation by any persons other than those of the Caucasian race had been placed in the deeds to all lots in a tract and had expired by lapse of time. The owners of sixty of the lots in the tract extended the restrictions as to their lots for a period of twenty-five years and the agreement was duly recorded. One owner, who was a signer of the contract, proposed to sell and deliver possession of his property to persons of African descent. Another owner, who was also a signer, brought suit to enjoin the transfer of possession. The injunction was denied by the trial court. The judgment was reversed on appeal on the theory that even though the contract might not have been signed by all of the owners of the lots in the tract, its covenants could be enforced by an owner, who had signed the contract, against another who had signed it and persons taking from him with notice. The Supreme Court said: "It is contended, however, by the respondents, that the covenant in question is merely a personal covenant, that it does not run with the land, notwithstanding the language thereof indicating a contrary intention, and therefore a court of equity will not enjoin the violation thereof. There are authorities to the effect that a court of equity will grant injunctive relief against the violation of covenants restricting the free use of land, not only as against the parties to such covenants but as against an assignee taking with notice of such covenant, even if the covenant is merely personal and does not run with the land. In 7 Cal.Jur. p. 743, the subject is treated as follows: 'Although covenants restricting the free use of one lot or parcel of land for the benefit of another may not meet the requirements of covenants running with the land, they may, nevertheless, constitute personal covenants, enforceable not only against the original covenantor, but against subsequent holders with notice. The principle upon which such covenants are enforced in the last-named instance is found in the general rule of equity that a party taking with notice of an equity takes subject to that equity. Liability on the covenants results not from his being the assignee of the party who made the agreement but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform.' * * * These authorities were before this court in the case of Hunt v. Jones, 149 Cal. 297, 301, 86 P. 686, and were expressly approved in the opinion in said case. In that case, among other things, the court said (page 300 [of 149 Cal.], 86 P. 688): 'We do not discuss the point as to whether the covenant here in question was one running with the land so as to bind the assignee of the water company as grantee of plaintiff's covenantor, the Thermalito Colony Company, association, because we think that, treated simply as a personal covenant or agreement under the allegations of the complaint, a court of equity would be warranted in enforcing it against the defendant. There can be no doubt of the proposition that personal covenants or agreements bestowing benefits and imposing restrictions upon the use of land may be enforced in equity, where a subsequent purchaser from the covenantor takes with notice of an existing equitable claim or interest in favor of another.' Hunt v. Jones, supra, has been expressly approved by this court in the two recent cases of McBride v. Freeman, 191 Cal. 152, 155, 215 P. 678, and Martin v. Holm, 197 Cal. 733, 747, 242 P. 718."

The cases of Title Ins. & Trust Co. v. Fette, 90 Cal.App. 606, 266 P. 570, and Childs v. Newfield, 136 Cal.App. 217, 28 P.2d 924, also follow the same rules.

[1] These cases require us to affirm portions of the judgment even though the subdivider and common grantor did not impose similar building restrictions on all of the lots in the subdivision for the benefit of the entire tract. The owners of lots fronting or abutting on the same street and within five hundred feet of the property of an owner who violated the restrictions could enforce them against such offending owner.

[2] It is clear that Zadah G. de Lihus did not own property fronting or abutting on the same street as did the property of defendant. She could not enforce the restrictions against defendant.

[3] Arthur E. White had no interest in defendant's property. He was merely liv-

ing on it and assisting his son in the work of building the house. No judgment should have been rendered against him.

The portion of the judgment in favor of Zadah G. de Lihus is reversed. The portion of the judgment against Arthur E. White is reversed. The portion of the judgment in favor of Fred G. Collani and against Ronald Arthur White is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



38 Cal.App.2d 588

In re YOUNG'S ESTATE.
JEFFERIES v. CALIFORNIA TRUST CO. et al.

Civ. 12439–S.

District Court of Appeal, Second District, Division 1, California.

April 24, 1940.

1. Trial ⇐235(7)

An instruction that jury may consider expert testimony "together with the reasons, if any, given by the expert witness for his opinion," and that jury is not bound by opinion of witness, but "may reject it if in your opinion the reasons given for it are unsound," was not erroneous as limiting jury's consideration of expert testimony to reasons given by witness.

2. Wills ⇐52(1, 4)

In will contest, the law presumes that decedent was sane, and prior adjudication of mental disorder bordering on insanity was merely evidence to rebut such presumption.

3. Wills ⇐55(1)

A judgment in proceedings for the purpose of adjudicating the mental status of a person may be valid, but is not conclusive on the question of such person's incompetency for the purpose of testamentary disposition.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding in the matter of the estate of Fred Jack Young, deceased, wherein the California Trust Company was appointed executor and Elizabeth Jefferies filed contest to the will. From a judgment disallowing the claim of contestant, contestant appeals.

Affirmed.

James W. Bell, of Los Angeles, and W. A. Brandenburger, of Sacramento, for appellant.

James S. Howie and Philbrick McCoy, both of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment declaring that the will of Fred Jack Young, deceased, executed on November 16, 1936, and theretofore admitted to probate, "is the valid, subsisting and legally sufficient last will and testament of said named decedent", and disallowing in its entirety the claim of the contestant and appellant, Elizabeth Jefferies, a first cousin of the decedent. The will in question nominated the California Trust Company as executor, and directed that the whole of the estate be distributed to the decedent's "good old friends Tom Bonetto and his wife Josephine Bonetto".

Mr. Young was an unmarried man, and, at the time of the execution of the will, was 82 years of age. He had left England at the age of fourteen years, and apparently had never returned. Appellant Elizabeth Jefferies, who resided permanently in England, had not known the decedent during his lifetime, and had at no time been in communication with him.

Mr. Young died on November 20, 1937, at the Mountain View Rest Home in Monrovia, California. The will was admitted to probate on December 17, 1937, and the California Trust Company was appointed the executor.

On May 31, 1938, said Elizabeth Jefferies filed a contest to the will, after probate. The case came on for trial and the sole question submitted to the jury for its verdict was: "Q. Was the decedent, Fred Young, also known as Fred Jack Young, of sound mind on November 16, 1936, at the time he signed the will here in contest?" This the jury answered in the affirmative.

The record reveals that in June of 1936, the decedent had been under ob-

servation at the psychopathic ward of the Los Angeles County General Hospital; that on June 16, 1936, the superior court of Los Angeles county had found, after a proper hearing, that the decedent was "mentally disordered and bordering on insanity, but not dangerously insane". He was thereupon committed to the care and custody of the Rancho Los Amigos, an institution maintained for psychopathic cases in Los Angeles county. On September 11, 1936, in proceedings had for that purpose, the California Trust Company was appointed the guardian of Mr. Young's estate. Some time during the month of September, 1936, Mr. Young was placed in the Kimball Sanitarium at La Crescenta, California.

On September 15, 1936, Mr. Allen M. Williams, an attorney at law representing the California Trust Company, the guardian, and a Mr. W. H. Light, an administrative officer of the company, visited Mr. Young at the Kimball Sanitarium. The decedent's hearing was impaired and the conversation was conducted by means of questions written on paper, which questions were answered orally by Mr. Young. Decedent was able to and did then and there give a clear and correct account of his property. Thereafter decedent, who for some reason was dissatisfied with the Kimball Sanitarium, was returned to the general hospital. He was visited there by Mr. Williams on November 9, 1936, upon which occasion he was asked if he had made a will and to whom he would like to leave his property. Decedent replied, "Tom Bonetto and his wife". It appears that the Bonettos had purchased their property from Mr. Young, and that they were neighbors and friends. Mr. Williams later prepared a will which, on November 16, 1936, was brought to the hospital for signature. The execution of the will was witnessed by a Mr. Louis T. Fletcher, who accompanied Mr. Williams, and also by Mr. Raymond A. Yelton, an attendant in decedent's ward. Mr. Williams, and the witnesses Yelton and Fletcher all testified that in their respective opinions Mr. Young was of sound mind on that occasion. The detailed testimony of these witnesses supports and justifies their opinions.

According to the testimony of Mr. Charles L. Overshiner, an investigator in the psychopathic probation department, who was present at two hearings, one in July, 1936, and one in September, 1936, Mr. Young appeared to know what was being asked of him and gave intelligent answers; that he looked neatly dressed, well set and in good health, and that at the September hearing his health appeared much improved.

Two physicians, who were in attendance at the general hospital while decedent was under observation there, appeared for contestant and testified to their opinions that the decedent was insane.

Appellant contends that "the trial court erred in instructing the jury relating to the opinion of expert witnesses on the question of decedent's sanity, by limiting the jury's consideration of the testimony to the reasons given by the expert witness"; and, that "the trial court erred in instructing the jury that the law presumed the decedent sane, and that prior adjudication of mental disorder bordering on insanity was but evidence to rebut such presumption".

[1] The first mentioned instruction complained of is as follows: "Ordinarily the opinions of witnesses are not admitted in evidence, but as an exception to that rule the law allows as evidence the opinions of expert witnesses respecting the soundness or unsoundness of mind of a testator, the reasons for the opinion being given by the witness. A person who by education, study and experience has become an expert in any profession may give his opinion as such expert as to any matter material to the case in which he is called as a witness. The jury may consider such expert testimony together with the reasons, if any given by the expert witness for his opinion to which he testifies. You are not bound by the opinion of any witness, expert or otherwise, but may give the weight you deem it entitled to and may reject it if in your opinion the reasons given for it are unsound."

The construction placed thereon by appellant is unwarranted.

[2, 3] The second mentioned instruction correctly stated the law. It should be emphasized that at the hearing on June 16, 1936, the court had concluded merely that decedent was "mentally disordered and bordering on insanity". Moreover, proceedings for the purpose of adjudicating the mental status, although satisfactory to all parties concerned, are

frequently uncontested and therefore no more comprehensive or extensive than the particular circumstances require. A judgment based upon such a proceeding may be valid but it is not conclusive on the question of decedent's incompetency for the purpose of testamentary disposition. There is little, if any, merit to the appeal.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.



38 Cal.App.2d 592

RORABACK v. RORABACK.

Civ. 6375.

District Court of Appeal, Third District, California.

April 24, 1940.

1. Divorce ⇐146

An order, granting a new trial "to the following extent only", setting aside findings of fact in divorce proceeding, and reopening case for taking of further testimony for both sides, did not grant a "new trial", but came within the provisions of statute authorizing opening of case for further proceeding and introduction of additional evidence with same effect as if the case had been reopened after submission and before findings had been filed. Code Civ.Proc. § 662.

See Words and Phrases, Permanent Edition, for all other definitions of "New Trial".

2. Motions ⇐62

The true measure of a court order is, not an isolated phrase appearing therein, but its effect when considered as a whole, and the same rules of interpretation apply as in ascertaining the meaning of any other writing.

3. Motions ⇐62

If the language of a court order is uncertain, references may be had to the circumstances surrounding and the court's intention in the making of the order.

4. Trial ⇐377(2)

The statutory provision for reopening proceeding for the introduction of additional evidence has the same effect as if the case had been reopened after submission thereof before findings had been filed or judgment rendered, and enlarges power of trial court for purpose of minimizing both expense and delay to litigants in those cases wherein trial court may entertain a doubt in any particular cause as to propriety of judgment entered by it. Code Civ.Proc. § 662.

5. Trial ⇐377(2)

The provisions authorizing the opening of proceedings for the introduction of additional evidence with same effect as if the case had been reopened after submission thereof and before findings had been filed or judgment rendered must be liberally construed to achieve the purpose it was designated to accomplish. Code Civ.Proc. § 662.

6. Divorce ⇐146

Under statute authorizing setting aside of judgment and opening of case for introduction of "additional evidence", where testimony of wife and daughters in husband's divorce suit was so general as to be of little value, court properly vacated decree to permit daughters to give more specific testimony, since such testimony constituted "additional evidence" within the statute. Code Civ.Proc. § 662.

See Words and Phrases, Permanent Edition, for all other definitions of "Additional Evidence".

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Suit for divorce by Charles H. Roraback against Delilah R. Roraback, wherein defendant filed cross-complaint. From a decree for the plaintiff, defendant appeals.

Affirmed.

Milton M. Cohen and Solomon Rosenbaum, both of Los Angeles, for appellant.

W. I. Gilbert and John H. Pelletier, both of Los Angeles, for respondent.

GEARY, Justice pro tem., delivered the opinion of the court.

On January 7, 1936, plaintiff and respondent, hereinafter termed respondent, filed his complaint for divorce from defendant and appellant, hereinafter termed appellant, upon the ground of extreme cruelty, and prayed for a division of community prop-

erty of the parties. Thereafter, appellant duly filed her answer to the complaint, denying the allegations of cruelty. By a separate cross-complaint she alleged cruelty and desertion upon the part of respondent, and also prayed for a division of the community property, for separate maintenance, for counsel fees and costs. By answer to the cross-complaint respondent specifically denied the allegations of cruelty, and further alleged that by reason of the conduct of the appellant herein he was forced to leave the home of the parties. Upon the issues thus framed, trial was had on April 1, 1936, at which the daughters of respondent testified in his behalf and various witnesses appeared for appellant.

The evidence shows that the parties intermarried in 1903 in the state of Idaho, and that for several years difficulties of an apparently irreconcilable nature have existed between them. In 1928 appellant herein instituted an action for divorce, but thereafter the parties became reconciled and lived together as husband and wife until March 11, 1931, at which time a final separation occurred. While the testimony at the original hearing herein, in support of the complaint for divorce, was rather general in nature, viewed as a whole it clearly reveals a long-smoldering domestic situation with intermittent flare-ups that appear to wholly preclude hopes of reconciliation. Upon the conclusion of the hearing the trial judge declared that plaintiff had failed to make out a case, and thereafter, findings of fact and conclusions of law were prepared, signed and filed herein, in which the court expressly found against the respondent's allegations of cruelty; found that he had deserted and persisted in his desertion of the appellant, against her will, since about March 11, 1931, and that on numerous occasions respondent had been guilty of cruelty toward appellant. The court, on June 15, 1936, filed its judgment, wherein it denied respondent a decree of divorce, awarded appellant the sum of $125 per month as separate maintenance, a further specified sum for attorney's fees and costs, and divided the community property of the parties.

Thereafter, on June 20, 1936, respondent filed his motion for new trial, based on the records, files and minutes of the court, upon the grounds: 1. That the evidence is insufficient to justify the decision. 2. That the decision is against law. 3. Errors of law occurring at the trial and excepted to by plaintiff. 4. Newly discovered evidence, material for plaintiff, which he could not, with reasonable diligence, discover and produce at the trial. No affidavits were filed at any time in support of the motion. The motion was argued on August 10, 1936, and on August 13, 1936, the court made its order, which is the basis of contention here, as follows: "Plaintiff's motion for a new trial, continued from August 10, 1936, comes on for hearing, and the court makes the following order: A new trial in this case is granted to the following extent only, to-wit: the findings of fact herein are hereby vacated and set aside, and the decree heretofore entered herein is hereby vacated and set aside, and the case is reopened for the taking of further testimony by both sides. Date of hearing is to be set by counsel or order of court."

On September 23, 1936, defendant and appellant filed an "Exception and Objection to the Order Re-opening the Proceedings and Vacating Orders", on the ground that defendant had not had an opportunity or a day in court to oppose plaintiff's motion for new trial; that plaintiff did not at any time present affidavits "in support of any newly discovered evidence, as required by Section 658, Code of Civil Procedure"; and that the court's order of August 13, 1936, was in excess of the court's jurisdiction, and hence void. On November 9, 1936, the matter came on for the taking of further testimony pursuant to the above order of the court, at which time counsel for defendant and appellant entered strenuous objections thereto, on the grounds that the evidence sought was incompetent, irrelevant and immaterial, and that the court was without jurisdiction to thus proceed. By stipulation such objections were deemed duly made, and the court's ruling thereon reserved to all testimony thereafter taken in the matter. Thereupon, on November 9th and November 10th, two new witnesses and several former witnesses were called and testified on behalf of the respondent. Appellant offered no additional testimony. Upon the conclusion of the respondent's case appellant moved to strike the testimony thus taken over her objection upon the grounds above mentioned. Thereafter, on November 23, 1936, the court filed its order denying appellant's motion to strike the testimony so taken upon the authority of Treat, Petitioner v. Superior Court, 7 Cal.2d 636, 62 P.2d 147, and decided that respondent was entitled to a di-

vorce. The court thereupon directed that findings be prepared accordingly, and that the divorce be granted upon the stipulation that the property settlement agreement be carried out and the property divided in the manner provided in the former decree. Subsequently, on December 2, 1936, findings were signed and filed herein in which the trial court found that appellant had without provocation committed certain enumerated acts, causing respondent great expense, humiliation, embarrassment and mental suffering, resulting in mental and physical pain, nervous shock and financial injury, by reason of which respondent was forced to live separate and apart from the defendant and appellant; and that each of the allegations of desertion and cruelty set forth in defendant's and appellant's cross-complaint were untrue.

As conclusions of law the court found that the respondent was entitled to a decree of divorce by reason of appellant's desertion and abandonment, and that the community property should be divided and payments made to appellant for maintenance as provided in the former decree. Judgment was thereupon filed and entered accordingly.

Appellant contends that the order of August 13, 1936, is null and void and in excess of the jurisdiction of the trial court. That none of the grounds urged by respondent in support of the motion for new trial were well taken; that no affidavits of newly discovered evidence were ever filed herein, and that the order of August 13th granted a new trial in the total absence of sufficient legal grounds therefor.

[1-6] Despite its language, we are of the opinion that the order of August 13, 1936, did not grant a new trial; that construed as a whole, it comes clearly within the provisions of the last clause of section 662, Code of Civil Procedure, which provides: "or, in lieu of granting a new trial, [the court] may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered". In so construing the order in question, we are not unmindful that it reads in part: "a new trial in this case is granted to the following extent only * * *." The true measure of an order, however, is not an isolated phrase appearing therein, but its effect when considered as a whole. Pierce v. City of Los Angeles, 159 Cal. 516, 518, 114 P. 818; Lippitt & Lippitt v. Smallman, 20 Cal.App. 595, 597, 129 P. 956; Bureau of Welfare, etc. v. Drapeau, 21 Cal.App. 2d 138, 150, 68 P.2d 998. In construing orders they must always be considered in their entirety, and the same rules of interpretation will apply in ascertaining the meaning of a court's order as in ascertaining the meaning of any other writing. If the language of the order be in any degree uncertain, then reference may be had to the circumstances surrounding, and the court's intention in the making of the same. Ex parte Ambrose, 72 Cal. 398, 401, 14 P. 33; Security-First Nat. Bank v. Superior Court, 132 Cal.App. 683, 697, 23 P.2d 1055. It is apparent from a reading of the entire transcript that the trial court neither intended to, nor did it grant a new trial in general terms as that term is used and understood, in that the order did not seek nor permit a "'re-examination of an issue of fact' (Code Civ.Proc. § 656), *as though no trial had been previously had*". Bureau of Welfare, etc. v. Drapeau, supra [21 Cal. App.2d 138, 68 P.2d 1004]. At the first hearing respondent, in addition to the testimony of himself and appellant (called under sec. 2055, Code Civ.Proc.) relied primarily upon that of the daughters of the parties. Their position as witnesses was most difficult, and their examination and testimony so general in character as to be of little value. That fact was commented upon by the trial judge at the conclusion of the hearing. Indeed, a reading of the testimony at the first trial reproduces an impression eloquently voiced by the judge who presided thereat. Under these circumstances the trial judge doubtless questioned that his disposition of all aspects of the case was proper, and determined to grant the alternative relief as provided in the code section; to "reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof". At the second hearing the daughters of the parties were again called as witnesses. Their testimony at this hearing was so specific and of such a detailed nature as to certainly constitute "additional evidence". This testimony, when considered with that taken at the former hearing and with that of the other two witnesses called, establishes ample evidence to support the judgment of the trial court. Under the broad powers conferred by sec-

tion 662, Code of Civil Procedure, we have no doubt the court had the right to so act herein. That section by its terms enlarges greatly the power of the trial court in the particulars mentioned therein, for the obvious purpose of minimizing both expense and delay to litigants in those cases wherein the trial court may entertain a doubt in any particular cause as to the propriety of the judgment entered by it. The section in question, it is true, presents an innovation in court procedure, yet its purposes are so well recognized that it has been held the provisions of the section are to be liberally construed to achieve the purposes it was designated to accomplish. Shimpones v. Stickney, 219 Cal. 637, 642, 28 P.2d 673; Spier v. Lang, 4 Cal.2d 711–714, 53 P.2d 138.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



PEOPLE v. AGNEW.*

Cr. 3299.

District Court of Appeal, Second District, Division 2, California.

April 25, 1940.

Rehearing Denied May 10, 1940.

Hearing Granted May 25, 1940.

1. False Imprisonment ⇐43

As regards liability for false imprisonment, where a person has the intention and the power to arrest, and makes such purpose known to his subject, who submits, the "arrest" is complete. Pen.Code, § 236.

See Words and Phrases, Permanent Edition, for all other definitions of "Arrest".

2. False Imprisonment ⇐43

To constitute "false imprisonment", it is not necessary that there be actual use of force, but it is sufficient if words are said or acts are done calculated to induce a reasonable apprehension that force will be used if person does not submit. Pen.Code, § 236.

See Words and Phrases, Permanent Edition, for all other definitions of "False Imprisonment".

3. False Imprisonment ⇐43

As regards whether defendant caused false imprisonment of another, an "arrest" is effected when the arrestor indicates an intention to take the arrestee into custody and subject him to the actual control or will of the arrestor. Pen.Code, § 236.

4. False Imprisonment ⇐43

Where defendant made a citizen's arrest of another under Penal Code, it then became defendant's duty by appropriate judicial proceeding to establish that such person had committed a felony. Pen.Code, §§ 236, 837.

5. False Imprisonment ⇐44

Evidence supported conviction of false imprisonment, arising out of defendant's making a citizen's arrest of another under Penal Code, charging such person with perjury. Pen.Code, §§ 236, 837.

6. Criminal law ⇐1130(2)

The giving of instructions by trial court and refusal of others requested by defendant afforded no basis for reversal, where defendant neglected to set out in his brief any of instructions complained of, as required by court rule. District Court of Appeal Rules, rule 8.

7. False Imprisonment ⇐44

In prosecution for false imprisonment by a private person, the state is required to prove only the fact of the arrest and after proof of such arrest, the burden shifts to the defendant to prove that the imprisonment was lawful. Pen.Code, § 236.

8. Criminal law ⇐814(3)

In prosecution for false imprisonment, refusal of defendant's requested instructions with regard to denial of defendant's constitutional right of equal protection and enforcement of public law as result of failure to prosecute others who have in fact violated identical law, was proper, where defendant pointed to no evidence showing any deliberate discriminatory intent on part of law enforcement officer to allow others to escape prosecution after violating the law.

9. Criminal law ⇐778(3)

In prosecution for false imprisonment, requested instruction that defendant was clothed with presumption of innocence and that he was entitled to full benefit of such presumption until, after hearing of all the evidence, the jury was convinced beyond reasonable doubt that he was guilty, was properly refused, since an arrest by a private

* Subsequent opinion 107 P.2d 601.

person without a warrant is presumptively unlawful. Pen.Code, § 236.

10. Criminal law ⇐829(1)

Refusal of trial court to give requested instructions afforded no basis for reversal, where it was not made certain that requested instructions were not covered by those that were given.

11. Criminal law ⇐1037(1), 1128(2), 1129(1)

Alleged misconduct of district attorney during course of trial afforded no basis for reversal, where defendant made no objection at time of alleged misconduct, or no assignment of error by reason of such misconduct, but merely filed an affidavit stating alleged misconduct four days after judgment had been pronounced against him, notwithstanding defendant was acting as his own advocate without aid of counsel.

12. Criminal law ⇐1030(1)

Where defendant feels that he is prejudiced by anything said or done in course of trial, it is his duty to bring it promptly to attention of trial court in order that it might be rectified and recorded while court still has jurisdiction of the matter.

13. Criminal law ⇐1091(1), 1092(10)

If defendant desires to enlarge record of trial with matters omitted by the reporter, he must proceed to do so by framing a memorandum of the event, known to the law as an "exception" or a "bill of exceptions", and by asking trial judge to settle and engross it, and if judge refuses the bill, defendant may petition the district court of appeal to certify the exception. Code Civ. Proc. § 652.

See Words and Phrases, Permanent Edition, for all other definitions of "Bill of Exceptions" and "Exception".

14. Criminal law ⇐1037(1, 2)

If defendant had objections to questions asked by district attorney in course of trial, which he deemed to be prejudicial, it was defendant's duty to assign the conduct as error, and ask trial court to instruct jury to disregard it.

15. Criminal law ⇐1039

On appeal, the misconduct of jury or error of trial court cannot be reviewed unless the act of which complaint is made, was committed over the objection or protest of the defendant or unless trial court has refused to attempt to correct the alleged error at the time.

16. Criminal law ⇐1144(15, 16)

The jury is presumed to have disregarded evidence which trial court has stricken, and it is presumed to have obeyed the direction of the court not to be controlled by prejudice or sympathy or other impulses governed by the emotions, and, unless specific and novel behavior on part of jury is pointed out to show that it was not guided by orderly process, it must be assumed that their verdict was the result of reason and not of impulse.

17. Criminal law ⇐1159(2)

Evidence failed to show that verdict finding defendant guilty of causing false imprisonment of another was the result of passion and prejudice. Pen.Code, § 236.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

R. W. Agnew was convicted of causing the false imprisonment of another, and he appeals.

Affirmed.

R. W. Agnew, in pro. per.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant was accused by information in three counts, namely: (1) assault with a deadly weapon with intent to commit murder; (2) with violation of section 236 of the Penal Code, in causing the false imprisonment of H. J. Henderson; and (3) with violation of said section 236 for causing the false imprisonment of Willis O. Prouty. He was acquitted on counts 1 and 2, was found guilty on count 3 and was sentenced to six months' imprisonment in the county jail.

He presents his appeal in propria persona. It is difficult to determine what he intends by most of what he has said, but we have gathered that the points upon which he relies are as follows: (1) insufficiency of the evidence to support the verdict; (2) errors of law committed by the court in giving and refusing to give certain instructions; (3) misconduct of the district attorney in the course of the trial; and (4) the verdict was the result of passion and prejudice.

In the month of August, 1938, said Willis O. Prouty was president of the

Metlox Manufacturing Company at Manhattan Beach. On the 18th day of said month defendant called at said plant and purchased from said Prouty a number of second-hand transformers and a number of signs, all located in a definite portion of the yard. On a later date defendant called and paid the sum of $15 for the goods purchased and later received a receipt signed by a young lady employee for the $15 "for miscellaneous Neon signs and transformers". About September 13 said Prouty refused defendant permission to enter the grounds because of information he had theretofore received from his foreman that defendant had already removed from the premises a large number of articles that had not been purchased by defendant, it having been reported to him that the defendant had made about eighteen visits to said plant and had removed various signs, transformers, a metal cabinet and two wooden horses. Thereafter defendant brought an action against Prouty for detaining some of the property which he claimed to have purchased. In the trial subsequently had he testified that the reasonable market value of said property was $1,515. On a cross-complaint in the same action Prouty recovered judgment against Agnew in the sum of $566 as the value of the signs and transformers already taken, in addition to those he had paid for and removed.

On July 7, 1939, defendant entered the police station in the city of Manhattan Beach about 10:15 a. m. and inquired for Prouty. Upon advice from the desk sergeant, Patmore, that Prouty was not present, defendant stated that he had telephoned to have Prouty held at said station; that he was going to arrest him for perjury. Having no knowledge of the matters inquired of, Patmore so advised defendant, whereupon defendant stated that he was going over to the Metlox plant to arrest Prouty and asked for an officer to go along to keep the peace. After defendant had departed from the police station, Patmore by broadcast instructed the patrol car under the direction of Officer Smith to meet the "plain-clothes officer" (referring to defendant) who was arresting Prouty and to stand by. Chief of Police Sights arrived at 10:30 as did also Prouty, immediately followed by defendant. Advancing toward Prouty, defendant stated that he was making a citizen's arrest under section 837 of the Penal Code and that the charge was perjury and that he wanted Prouty delivered to the municipal court in Los Angeles immediately. To this Prouty replied: "Mr. Agnew, I arrest you on the same charge." Thereupon Chief Sights, observing that both men were arrested, instructed his officers to book and fingerprint them. During the booking proceedings defendant stated to the chief of police that he was to deliver Prouty to the district attorney's office on Wednesday, July 7th, when "they wanted to put him in custody"; that he had definite proof in his brief-case that he could show where Prouty was to be delivered to the district attorney's office. After Prouty had been discharged following a preliminary hearing he swore out a complaint before the district attorney accusing this defendant with false imprisonment, as subsequently set forth in said count 3 of the information. From his conviction on said count defendant prosecutes this appeal.

[1-3] I. Defendant contends that there is not sufficient evidence to justify a conviction for false imprisonment of Prouty; that no menace, violence, force or deceit was exercised by him at the time of said arrest; that he did not restrain Prouty or instruct anyone else to do so. But he admits that he "intended to take Prouty to court", although he had no proof of his guilt of perjury. Inasmuch as the law specifically authorized a citizen to make an arrest of one who has committed a felony, it would be a cause of needless disturbance and conflict if every person arrested in the name of the law were to resist because the arrestor did not carry a warrant or other badge of authority. Where a person has the intention and the power to arrest and makes such purpose known to his subject, who submits, the arrest is complete. 5 Cor.Jur. 386. To constitute false imprisonment it is not necessary that there be actual use of force; it is sufficient if words are said or acts are done calculated to induce a reasonable apprehension that force will be used if the person does not submit. 25 Cor.Jur. 454. "Words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the party is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used." Martin v. Houck, 141 N.C. 317, 54 S.E. 291, 293; 7 L.R.A., N.S., 576.

If a person submit to apparent legal authority he has been imprisoned. Limbeck v. Gerry, 15 Misc. 663, 39 N.Y.S. 95; Harness v. Steele, 159 Ind. 286, 64 N.E. 875. An arrest is effected when the arrestor indicates an intention to take the arrestee into custody and to subject him to the actual control or will of the arrestor. State v. District Court, 70 Mont. 378, 225 P. 1000. An "arrest" may be effected without the application of actual force; it is sufficient if the arrestee is within the power of the arrestor and submits to verbal commands. Central of Georgia R. Co. v. Carlock, 196 Ala. 659, 72 So. 261.

[4] From the foregoing authorities and many others said Prouty was placed under arrest by defendant and was thereby imprisoned. It then became his duty by appropriate judicial proceedings to establish that Prouty had committed a felony. The burden was upon him to show that a felony had been committed by Prouty. Maxwell v. Maxwell, 189 Iowa 7, 177 N.W. 541, 10 A.L.R. 482. "It is not every idle and unreasonable charge which will justify an arrest. An arrest without a warrant is illegal when it is made upon mere suspicion or belief, unsupported by facts, circumstances, or credible information calculated to produce such suspicion or belief * * *, and the authority of a private person to arrest without a warrant is more limited than that of an officer." State v. District Court, supra [70 Mont. 378, 225 P. 1002].

[5] Defendant's contention now that he never intended to take Prouty to court is gratuitous and is no argument upon the facts as presented to the trial court. Under the testimony of said officers and of Prouty the jury was warranted in finding that at the time of defendant's arrest of Prouty he had no other intention than at once to deliver him to the municipal court or to the district attorney in Los Angeles. Also they were warranted in believing that unless Prouty submitted then to defendant's arrest serious consequences might have followed.

[6, 7] II. Defendant is aggrieved by reason of certain instructions given and other instructions refused by the court. But he has neglected to set out in his brief any one of the instructions complained of, as required by rule VIII of this court. He contends that the court erred in instructing the jury in effect that where a person, not an officer, assumes to make an arrest without a warrant, the law presumes the arrest to be unlawful and places the burden upon the party making the arrest to show its lawful character. In a prosecution for false imprisonment by a private person the state is required to prove only the fact of the arrest. After proof of such arrest the burden shifts to the defendant to prove that the imprisonment was lawful; that is, "to prove that he was justified in what he did". People v. McGrew, 77 Cal. 570, 20 P. 92, 93; 2 R.C.L. 449; Peters v. Bigelow, 137 Cal.App. 135, 137, 30 P.2d 450.

[8] Defendant contends that he was denied his constitutional right of "equal protection and enforcement of the public laws" by the refusal of his proposed instruction to the effect that if the jury find "that other persons or classes of persons have in fact violated the identical law in question and have not been prosecuted therefor, that would be a good defense if you also find that the law enforcement officers deliberately discriminated against the defendant in this case". The instruction as proposed is a fair statement of the law, but defendant points to no evidence showing any deliberate discriminatory intent on the part of the law enforcement officers to allow others to escape prosecution after violating the law against false imprisonment. And for the same reason the court was warranted in refusing to read defendant's proposed instruction "that the defendant is entitled to the equal protection and equal enforcement of the public laws, and if you find from the evidence here adduced that the law here concerned has been unequally enforced by the authorities and that the defendant by reason of such unequal enforcement was not equally protected under the said law as other persons standing in the same relationship under the said law as the defendant, then your verdict must be for an acquittal".

[9, 10] Defendant offered an instruction to the effect that he was clothed with the presumption of innocence of the offense charged against him and that he is entitled to the full benefit of that presumption until after hearing all of the evidence the jury is convinced beyond a reasonable

doubt that he is guilty. But this instruction was refused under the authorities above cited holding that an arrest by a private person without a warrant is presumptively unlawful. In addition to the foregoing, defendant refers to four other instructions, offered by him and refused by the court, as constituting error. But he neither makes an argument nor cites authority to show why the court's action was not correct. Furthermore, it is not made certain that said instructions are not covered by those that were given.

[11-13] III. There is no evidence in the record of misconduct on the part of the district attorney. Defendant states in his brief that the prosecutor, while sitting within four feet of the jury, held a police photograph of defendant in his hand and turned it so that the jury might see. But no objection was made at the time. Neither was there any assignment of error by reason of the act of the district attorney. The only basis for defendant's contention is an affidavit which he filed four days after judgment had been pronounced against him. This affidavit appears to defendant to be an important document. But legally it is no part of the record The function of this court is merely to determine whether the trial judge has committed error in the conduct of the trial. We do not try cases. The transcript of the reporter's notes and the transcript prepared by the clerk are the sources available to us from which we may ascertain errors of the trial judge. Where the defendant feels that he is prejudiced by anything said or done in the course of the trial, it is his duty to bring it promptly to the attention of the court in order that it might be rectified and recorded while the court still has jurisdiction of the matter. If he desires to enlarge the record with matters omitted by the reporter, he must proceed to do so by framing a memorandum of the event, known to the law as an "exception" or a "bill of exceptions", and by asking the judge to settle and engross it. If the trial judge refuse the bill, the defendant may petition this court to certify the exception. Code Civ.Proc., sec. 652. These devices are instruments employed by courts and they cannot be dispensed with because a defendant prefers to act as his own advocate.

[14] It is likewise true that if the defendant had objections to questions asked by the district attorney in the course of the trial, which he deemed to be prejudicial, it was his duty then and there to assign the conduct as error and ask the court to instruct the jury to disregard it. People v. Hanks, Cal.App., 95 P.2d 478; People v. King, 13 Cal.2d 521, 90 P.2d 291; People v. Mundt, 31 Cal.App.2d 685, 88 P.2d 767. No rule is better established than that if misconduct occur in the course of a trial, no notice of it can be taken on appeal unless at the time of the occurrence the defendant assign it as prejudicial error and request the court to instruct the jury to disregard it. People v. Dozier, Cal.App., 94 P.2d 598; People v. Payton, Cal.App., 96 P.2d 991.

[15-17] IV. Defendant contends that the verdict was the result of passion and prejudice. We find no support for this claim. It is true that men err judicially as well as in extrajudicial behavior. But on appeal the misconduct of the jury or the error of the court cannot be reviewed unless the act, of which complaint is made, was committed over the objection or protest of the appellant or unless the trial court has refused to attempt to correct the alleged error at the time. A jury is presumed to have disregarded evidence which the court has stricken, and it is presumed to have obeyed the direction of the court not to be controlled by prejudice or sympathy or other impulses governed by the emotions. Unless specific and novel behavior on the part of the jury is pointed out to show that it was not guided by orderly processes, it must be assumed that their verdict was the result of reason and not of impulse. This defendant, without a warrant, arrested and thereby imprisoned a citizen on the claim that the latter had committed a heinous felony. A court of competent jurisdiction exonerated that citizen. No act is designated as having been prompted by passion or prejudice on the part of the jury who convicted defendant.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

38 Cal.App.2d 554

BOX v. VAN SLOOTEN.

Civ. 12450.

District Court of Appeal, Second District, Division 2, California.

April 20, 1940.

Hearing Denied June 17, 1940.

1. Trial ⇐140(1)

Conflicts in testimony and question of how far a witness' testimony has been discredited on cross-examination are for the jury.

2. Automobiles ⇐227(3)

In action by pedestrian who was struck at a marked crosswalk, by a motorist who saw pedestrian in time to stop automobile and who noticed that she was unaware of his approach, the "last clear chance" doctrine was applicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

3. Negligence ⇐141(9)

An instruction that "last clear chance" doctrine could not be invoked unless the defendant knew, or in the exercise of ordinary care should have known, that plaintiff could not escape from the situation of danger by his own efforts, spent in the use of ordinary care, was proper.

4. Trial ⇐260(8)

Trial court did not err in refusing to give requested instruction on last clear chance doctrine, where such instruction was covered by trial court's instruction.

5. Automobiles ⇐246(24)
Trial ⇐296(4)

Giving of an instruction that pedestrian while proceeding with ordinary care to cross street in a marked crosswalk was justified in assuming, in absence of reasonable warning of danger, that her right of way would be respected by motorist, was error, but was cured by instructions that pedestrian could not recover if contributorily negligent at time of accident.

6. Automobiles ⇐245(72)

Evidence that pedestrian was approaching center of highway at marked crosswalk and was observing southbound automobiles at time she was struck by defendant's northbound automobile presented jury question as to pedestrian's contributory negligence. Vehicle Code, § 560(a), St.1935, p. 188.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge pro tem.

Action by Mary A. Box against J. F. Van Slooten to recover for injuries suffered when struck by an automobile. From an adverse judgment, defendant appeals.

Affirmed.

Cryer & Jones and George E. Cryer, all of Los Angeles, for appellant.

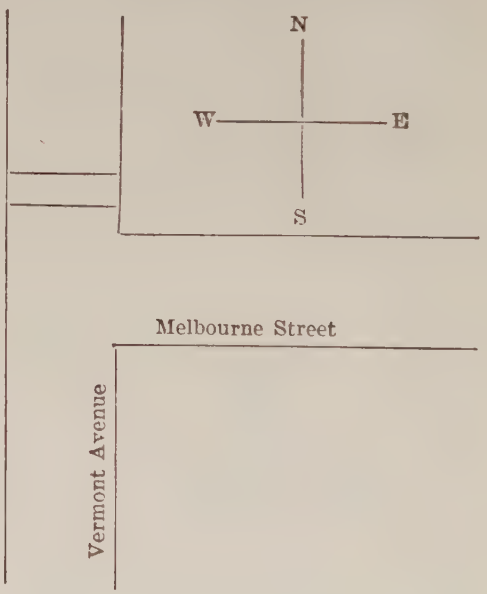
Arthur L. Erb and Richard C. Waltz, both of Beverly Hills, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries defendant appeals.

Viewing the evidence most favorable to respondent, the essential facts are:

Diagram of the Scene of the Accident Hereinafter Described



October 17, 1938, about 7:30 p. m. plaintiff, a woman seventy-five years of age, was standing on the curb at the northeast corner of Vermont avenue and Melbourne street in the city of Los Angeles. She looked north and south on Vermont avenue and did not see any automobiles approaching the intersection. She then started to walk from the east to the west side of the avenue in the northerly half of a marked pedestrian walk. She did not again look in a southerly direction on the avenue.

About the same time defendant, traveling on Vermont avenue, was approaching the intersection in a northerly direction in his automobile about fifteen miles per hour. When he reached a point approximately thirty-five feet south of the crosswalk, he noticed plaintiff in it three or four feet from the east curb line of Vermont avenue. He saw that her head was turned slightly to the north and that she apparently did not see him. Plaintiff continued to traverse the pedestrian walk in a westerly direction, and, as she approached the middle of Vermont avenue, turned her head slightly to the right watching two southbound cars which were approaching the intersection. Defendant without giving any warning signal continued on his course, gradually lessening his speed. As he approached plaintiff he swerved to the west of the center line of Vermont avenue and then swerved to the east, the right running board and the stanchion back of the front door of his automobile striking plaintiff and causing her personal injuries.

Defendant relies for reversal of the judgment on these propositions:

First: The court committed prejudicial error in instructing the jury as follows:

"There has grown up in our law a certain reasoning process that we sometimes call to our aid in analyzing the facts of an accident case, and which is known as the Doctrine of Last Clear Chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question, both the plaintiff and defendant were negligent.

"The Doctrine of Last Clear Chance may be invoked if, and only if, you find from the evidence that these six facts existed:

"First: That plaintiff, by his own negligence, got himself into a position of danger.

"Second: That thereupon, either it was physically impossible for him through the exercise of ordinary care to escape from the danger or he was totally unaware of his dangerous position.

"Third: That the defendant had actual knowledge of plaintiff's perilous situation.

"Fourth: That the defendant knew, or in the exercise of ordinary care should have known, that plaintiff could not escape from the situation by his own efforts, spent in the use of ordinary care.

"Fifth: That the defendant had a clear opportunity to avoid the accident and could have done so by exercising ordinary care.

"Sixth: That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.

"If the conditions I have mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the plaintiff."

for these reasons:

(a) Under the facts above stated it was not a proper case for the doctrine of last clear chance;

(b) Plaintiff had the last clear chance to avoid the accident;

(c) Plaintiff was not in a position of peril within the meaning of the "last clear chance" rule until the time of the impact between plaintiff and the car driven by defendant;

(d) Plaintiff was contemporaneously and actively at fault until the very moment of the accident;

(e) The instruction should not have contained the statement, "That the defendant knew or in the exercise of ordinary care should have known that the plaintiff could not escape from the situation (of danger) by her own efforts spent in the use of ordinary care."

(f) The instruction should have set forth that as a prerequisite for the application of the doctrine of "last clear chance" the jury must find that defendant had a clear opportunity to avoid the accident, "as he actually knew" plaintiff was in a situation of peril from which she could not escape by her own efforts in the exercise of ordinary care.

Second: The trial court committed prejudicial error in instructing the jury as follows:

"The plaintiff pedestrian, while proceeding with ordinary care to cross Vermont Avenue in a marked crosswalk at Melbourne Street, was justified in assuming, in the absence of reasonable warning of

danger, that her right of way would be respected by the defendant motorist."

Third: Plaintiff was guilty of contributory negligence as a matter of law.

[1, 2] The errors urged under paragraphs (a), (b), (c), and (d) of defendant's first proposition are without merit. Bearing in mind the rule that conflicts in testimony and the rule that the question of how far a witness' testimony has been discredited on cross-examination are for the determination of the trial jury and not an appellate court, the trial jury in the instant case, from the facts above stated, which find substantial support in the evidence, impliedly found that plaintiff, a woman of seventy-five years of age, was not negligent at the time she stepped from the curb and started to cross Vermont avenue; however, that she was negligent in not looking to the south after having left the curb, but that as she approached the center line of Vermont avenue she ceased to be negligent and acted as a reasonably prudent person similarly situated would have acted in turning her head to the north watching two southbound cars; that from this point until the time of the accident defendant was negligent in driving contrary to the provision of section 560, subdivision (a) of the Vehicle Code, St.1935, p. 188, into a marked crosswalk in which there was a pedestrian; and that, since defendant had observed plaintiff continuously and noted that she was oblivious to his approach from the time he was about thirty-five feet south of the crosswalk until the time of the accident, he knew that she was in a position of danger from which she could not by the exercise of reasonable care escape, and defendant by the exercise of ordinary care could have prevented injury by stopping his car, since he was only traveling fifteen miles per hour. Hence, this is a proper case for the application of the doctrine of "last clear chance".

[3] The language included in paragraph (e) of defendant's first proposition was correct. Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915.

The cases of New York L. Oil Co. v. United Railroads, 191 Cal. 96, 101, 215 P. 72, and Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 754, 134 P. 709, relied upon by defendant are not in point.

[4] There is no merit in the objection set forth in paragraph (f) of defendant's first proposition. The third and fifth elements, which the court stated in its instruction were prerequisites to the application of the doctrine of "last clear chance", fully meet defendant's criticism under this point.

[5] It was error to give the instructions set forth in defendant's second proposition. (White v. Davis, 103 Cal.App. 531, 545, 284 P. 1086.) The error, however, was not *prejudicial,* in view of the fact that the court repeatedly instructed the jury that plaintiff could not recover if she were contributorily negligent at the time the accident occurred. Such instructions cured the error of which defendant complains. (Thompson v. Baldwin, 26 Cal. App.2d 703, 706, 80 P.2d 198.)

[6] Defendant's third proposition is also without merit. As stated above, there was substantial evidence to support the jury's implied finding that the contributory negligence of plaintiff ceased at a point several feet before the accident occurred and that at the time of the accident she was free from contributory negligence in that she was acting as a reasonably prudent person in looking to her north as she approached the center of Vermont avenue and that contrary to defendant's version of the case plaintiff did not walk into the side of defendant's car but rather defendant's car swerved to the west and then to the east, striking plaintiff.

Our conclusion on this point makes it unnecessary to consider such cases as Flores v. Los Angeles Railway Corp., 15 Cal.App.2d 576, 59 P.2d 856; Burr v. Munson, 209 Ala. 362, 363, 96 So. 235; Steele v. Hamilton, 218 Mich. 522, 188 N.W. 345; Cline v. Cook, 216 Ky. 366, 287 S.W. 927; Grandy v. Southern Pac. Co., 9 Cal.App. 2d 441, 49 P.2d 1127, all of which cases are factually different from the present case.

For the foregoing reasons the judgment appealed from is affirmed,

I concur: MOORE, P. J.

WOOD, Justice.

I concur in the judgment. In my opinion it was not error to give the instruction set forth in defendant's "second proposition".

SPRING STREET CORPORATION v. WALSH, O'CONNOR & BARNESON et al.

Civ. 12414.

District Court of Appeal, Second District, Division 2, California.

April 23, 1940.

Rehearing Denied May 17, 1940.

Hearing Granted June 20, 1940.

Dismissed June 24, 1940.

1. Trusts ⇐9

Where debtor was both trustor and beneficiary in trust in which he attempted to place trust estate beyond reach of his creditors and at the same time to reserve to himself the right to enjoy the income from the estate, public policy precluded him from bringing about the result attempted by such means.

2. Attachment ⇐235

Where debtor was both trustor and beneficiary in trust in which he attempted to place trust estate beyond reach of his creditors, order directing sheriff to release from levy of writ of attachment the debtor's interest in trust could not be sustained on theory that debtor's interest had been transferred to trustee in bankruptcy, where motion was based on ground that the property was exempt from attachment or garnishment, since if debtor's interest had passed to bankruptcy trustee nothing was attached or garnished.

3. Attachment ⇐227

Where trust instrument executed by trustor provided that beneficiary could not dispose of his interest in trust estate and exempted income from creditors' claims but did not provide that corpus of trust estate could not be subjected to claims of creditors, the trust instrument did not justify order directing sheriff to release from levy of writ of attachment interest of the beneficiary in the trust.

4. Attachment ⇐249
Garnishment ⇐194

Where debtor's interest in spendthrift trust was sought to be reached by writ of attachment or garnishment, evidence that debtor did not need or require for his support or education all or any part of funds constituting either the income or the corpus of the trust and that debtor had ample independent means and income sufficient for his support and education aside from the trust funds or income therefrom was properly excluded, since beneficiary's interest in income of spendthrift trust can only be reached in statutory manner. Civ.Code, § 859.

5. Attachment ⇐58
Execution ⇐366

Under statute permitting application of surplus of income of spendthrift trust to claims of creditors "in the same manner as personal property which cannot be reached by execution," the rule of expressio unius est exclusio alterius is applicable and the ordinary process of court such as writ of attachment cannot be invoked but proceedings supplementary to execution can be used to enforce creditors' claims to the surplus. Civ.Code, § 859; Code Civ.Proc. §§ 714–721.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the Spring Street Corporation against Walsh, O'Connor & Barneson, a copartnership, and others to recover a judgment for rent, wherein a writ of attachment was issued and an attached notice of garnishment was served on the Bank of California National Association, trustee. From an order directing the sheriff to release from the levy of writ of attachment the interest of defendant H. J. Barneson in a trust, the plaintiff appeals.

Reversed.

Gibson, Dunn & Crutcher, by Norman S. Sterry, all of Los Angeles, for appellant.

Lloyd S. Ackerman, Philip S. Mathews, and Ackerman, Wayland & Mathews, all of San Francisco, for respondent.

WOOD, Justice.

The plaintiff has appealed from an order of the superior court directing the sheriff to release from the levy of a writ of attachment the interest of defendant H. J. Barneson in a trust known as the "Oakburn Trust".

Respondent and his two brothers by trust indenture dated November 29, 1924, transferred to Bank of California National Association as trustee 3,885 shares of the capital stock of the Oakburn Company. According to the terms of the indenture, each trustor reserved the right to receive one-third of the income of the trust property during his lifetime and upon his death his share would go to certain other par-

ties named. This indenture contained a spendthrift trust provision by which it was provided that the interest of each of the beneficiaries in the property would not be subject to any claim of a creditor.

Respondent was adjudicated bankrupt on June 8, 1933, and July 23, 1934, the trustee in bankruptcy sold to Harriet E. Barneson all of the right, title and interest of the trustee in bankruptcy in and to the property and income of the trust estate and sale was confirmed by court order. On October 29, 1935, Harriet E. Barneson executed a trust indenture by which she transferred to Bank of California National Association all the right, title and interest in and to the property and income of the trust estate which she had acquired by virtue of the sale to her by the trustee in bankruptcy. In this instrument she expressed the desire "to restore to said Harold J. Barneson all the right, title and interest which he heretofore had and enjoyed" under the trust indenture dated November 29, 1924. The trust indenture of October 29, 1935, contained a spendthrift provision as follows: "provided, however, and this indenture is expressly made subject to the condition, that said Harold J. Barneson and other beneficiaries of the trust created by this instrument and by said Trust Indenture, are, and each of them is, hereby restrained from disposing of or encumbering, in any manner, their respective interests, or any part thereof, in the trust hereby created, and in the property held subject to said trust and in the income thereof and in any part thereof, and the interest of said Harold J. Barneson and any other beneficiary of the property hereby transferred to said Trustee shall be held subject to the trusts hereby created, and the income thereof, while such property and income shall remain in the possession of the Trustee or in the possession of any successor thereof in the said trust, shall not be subject in any manner to any claim or claims of any creditors of said Harold J. Barneson and other such beneficiaries".

Appellant commenced the present action on December 22, 1938, to recover a judgment for rent alleged to have accrued upon a lease of real property. A writ of attachment was issued and a copy of the writ with an attachment notice of garnishment was served upon the trustee bank. The sheriff's notice to the bank is as follows: "You will please take notice that all Moneys, Goods, Credits, Effects, Debts, due or owing and all right, title and interest in and to the benefits, assets, and all moneys held for or due or payable to Lionel T. Barneson and Harold J. Barneson, also known as H. J. Barneson, or either of them, or to John Barneson, in that particular trust formed on the 29th day of November, 1924, between Lionel T. Barneson, Harold J. Barneson, John Leslie Barneson, and others, as trustors and the Bank of California National Association, a national bank, trustee, which trust is also known as the Oakburn Trust, are attached by virtue of said writ and you are hereby notified not to pay over or transfer same to anyone but myself. You are hereby required to furnish me a statement, in accordance with Section No. 546, Sub. 4, 7, 6, (4 & 6) Code of Civil Procedure." The bank withheld the income from the trust estate and respondent demanded of the sheriff that the attachment be released. Upon the failure of the sheriff to release the attachment respondent filed his motion in court for an order directing the sheriff to release the attachment, accompanied by an affidavit of respondent setting forth the facts above outlined.

In his written notice of motion respondent asked the trial court "* * * for an order determining that the entire right, title and interest of defendant H. J. Barneson in and to that certain trust known and designated as the 'Oakburn Trust,' which said trust was established, created and formed by an indenture in writing dated November 29, 1924, * * * is not subject to and is exempt from attachment, garnishment and all other process in said action, in whole and in part, and directing said sheriff of the city and county of San Francisco, state of California, to release such levy". In the court's order granting respondent's motion it is provided: "The Motion of the defendant H. J. Barneson for an order determining that the entire right, title and interest of defendant H. J. Barneson in and to that certain trust known and designated as the 'Oakburn Trust', which said trust was established, created and formed by an indenture in writing dated November 29, 1924, * * * having come on this day regularly for hearing, * * * It Is Hereby Ordered that said motion of said defendant H. J. Barneson be, and the same is hereby granted and the Sheriff of the City and County of San Francisco, State of California, is hereby directed to release from the said levy of the said Writ of At-

tachment heretofore issued in the above entitled action any and all moneys, goods credits, effects or debts due or owing to, and all right, title, and interest in and to the benefits, assets and all moneys held by said The Bank of California, National Association, a trustee for said defendant H. J. Barneson, also known as Harold J. Barneson, in the said 'Oakburn Trust' * * *"

[1, 2] Respondent's motion was specifically directed at the Oakburn Trust of November 29, 1934, and was based upon the claim that this trust estate is exempt from attachment or garnishment. The court specifically directed the release of the interest of respondent in the Oakburn Trust. In this the court erred. Respondent was both trustor and beneficiary in the Oakburn Trust, in which he attempted to place the trust estate beyond the reach of his creditors and at the same time to reserve to himself the right to enjoy the income from the estate. For reasons of public policy the law does not permit him to bring about the result attempted by such means. McColgan v. Magee, Inc., 172 Cal. 182, 155 P. 995, Ann.Cas.1917D, 1050. The ruling of the court cannot be sustained on the theory that respondent's interest in the trust estate was transferred to the trustee in bankruptcy, for the motion was based upon the ground that the property is exempt from attachment or garnishment. If in fact all of respondent's interest passed to the trustee in bankruptcy the only conclusion to be reached is that nothing was attached or garnished. Manifestly a motion may not be granted to dissolve an attachment upon the ground that property is exempt from execution where no property has been affected by the process of the court.

[3] If it be assumed that respondent's motion and the court's order were broad enough to cover the trust estate created by the trust indenture of October 29, 1935, executed by Harriet E. Barneson, nevertheless the ruling cannot be sustained. As heretofore shown, respondent cannot properly base his motion upon the indenture of November 29, 1924; and if he bases it upon the instrument of October 29, 1935, his rights are governed by the terms of the last mentioned instrument. Although Harriet E. Barneson provided in the instrument which she executed that respondent as beneficiary could not dispose of his interest in the trust estate, she did not provide that the corpus of the trust estate could not be subjected to the claims of creditors. The income only was exempted from creditors' claims.

[4, 5] During the course of the hearing in the court below appellant offered to prove that respondent did not need or require for his support or education all or any part of the funds constituting either the income or the corpus of the Oakburn Trust and that respondent had ample independent means and income sufficient for his support and education aside from any funds or income from the Oakburn Trust. This offer was properly rejected by the court. In making its offer of proof appellant relied upon section 859 of the Civil Code, wherein it is provided that the surplus of the rents and profits of a trust estate such as the one in question, "beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such persons, in the same manner as personal property which cannot be reached by execution". This section became effective with the enactment of the Civil Code in 1872. Before that time no part of the beneficiary's interest in the income of a spendthrift trust estate was in any manner subject to the claims of creditors. Seymour v. McAvoy, 121 Cal. 438, 53 P. 946. By section 859 that portion of the rents and profits of a spendthrift trust estate which is not necessary for the education and support of the beneficiary may be applied to the claims of the beneficiary's creditors; but the application must be made in the manner provided in the section. It is therein provided that the surplus is liable to the claims of creditors "in the same manner as personal property which cannot be reached by execution". Section 859 created a new right and specified the manner in which the right can be enforced. In so doing it negatived the enforcement of liability to creditors in any other manner. The rule of expressio unius est exclusio alterius is applicable to the present situation. 23 Cal.Jur. 740, and cases cited.

By providing that the surplus is liable to the claims of creditors in the same manner as personal property which cannot be reached by execution the legislature evidently intended that the ordinary process of the court such as a writ of attachment cannot be invoked; otherwise there would be no occasion for

the specific reference to personal property which cannot be reached by execution. The legislature doubtless intended that the proceedings supplementary to execution (Code Civ.Proc., sec. 714–721) can be used to enforce creditors' claims to the surplus. In Pacific Bank v. Robinson, 57 Cal. 520, 522, 40 Am.Rep. 120, it was held that "if there be property which cannot be reached by execution, and which the judgment debtor refuses to apply to the satisfaction of the judgment, he may be compelled, upon examination, in proceedings supplementary to execution, to deliver it in satisfaction of the judgment". Section 859 of the Civil Code was taken substantially from a statute of the state of New York which had been in force many years. In Dittmar v. Boni, 60 App.Div. 94, 69 N.Y.S. 708, 711, a case involving that statute, the court in considering the words "in the same manner as other personal property, which cannot be reached by execution", Rev.St.N.Y., 1829, pt. 2 c. 1, tit. 2, § 57, held that property which could not be reached by execution at law could be reached only "where a judgment has been recovered against a debtor, and an execution thereon has been issued and returned wholly or partly unsatisfied". The court further held that until the execution had been returned the court was without jurisdiction to grant any relief whatever.

The order is reversed.

I concur: McCOMB, J.

MOORE, Presiding Justice (concurring).

I concur in the judgment. However, I am not in accord with that portion of the opinion which holds that the court properly rejected the offer of proof of the necessities of the respondent. That offer was made for the purpose of proving the extent of the surplus of the assets over and above the needs of respondent. Sec. 859 of the Civ.Code. In the cases of the creation of such a trust any sum beyond that which "may be necessary for the education and support of" the beneficiary is liable to the claims of the creditors of such beneficiary in the same manner as personal property which cannot be reached by execution. The holding of the majority opinion on this point appears to be based upon the rule which excludes all others when one is mentioned. But the language of the section is that the surplus "is liable to the claims" of such creditors "in the same manner" as personal property which cannot be reached by execution. This could not mean that the surplus is not subject to garnishment.

What is intended by the section is that before the exact amount of the surplus can be ascertained, it is necessary to have a "supplemental proceeding" by means of which a judicial determination can be derived as to the exact amount of the surplus over and above the needs for support and education. If it had been the intention of the court to deny the motion to discharge the attachment on other grounds, it would then have been the duty of the court to hold a hearing on a supplemental proceeding, later to be invoked by the plaintiff in order to determine the amount of surplus remaining after reaching a determination as to the needs of the respondent.

The respondent, recognizing the virtue of said code section, averred in his affidavit that all of the income payable under the trust "is necessarily for the maintenance and support of affiant". This was a conclusion and the plaintiff was entitled to have the truth of it ascertained by evidential facts. If "said surplus" in such a trust is available to the creditors of the beneficiary, no good reason appears why the creditors should not be entitled to a lien upon it before it shall have been dissipated. Under section 540 of the Code of Civil Procedure, a writ of attachment may be levied upon all the property of defendant not exempt from execution. It is true that sections 690.1 to 690.24 specify the particular properties that are exempt from execution. But in view of the language of section 540, there is no reason why the legislature under some other provision of the law cannot exempt other properties as in the case of property in custodia legis. Dickerman v. Ahern, 93 Cal.App. 166, 269 P. 180; Franchises, 15 Cal.Jur. 1020; Interests in Partnership, sec. 2419 Civ.Code. If the creditor be denied such lien, to that extent the exemptions of such beneficiary are extended in such an amount as the "surplus" of the trust may be diverted before an order can be made to subject it to execution after a supplemental proceeding. In view of the fact that a spendthrift trust is created for the benefit of one whose talent for spending exceeds his talent for earning, this extraordinary privilege granted him by the law should not be multiplied by a too narrow construction of said section 859 in the cases of valid trusts.

LAISNE v. CALIFORNIA STATE BOARD OF OPTOMETRY et al.

Civ. 2531.

District Court of Appeal, Fourth District, California.

April 19, 1940.

Rehearing Denied May 15, 1940.

See 102 P.2d 538.

1. Mandamus ⇐87

Orders of officers and boards depriving persons of licenses to engage in business or practice of professions can only be reviewed in mandamus proceedings.

2. Constitutional law ⇐287

A "license" to engage in business or to practice a profession is a "property right" that cannot be taken away without due process of law. Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "License" and "Property Right".

3. Licenses ⇐21, 38

Officers and boards supervising issuance of licenses to engage in business or to practice a profession have only administrative powers and cannot exercise judicial functions, and courts must provide for notices and places of hearings and must pass on weight and sufficiency of evidence before licenses can be revoked. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

4. Mandamus ⇐87

One whose license to practice optometry had been revoked by State Board of Optometry was entitled to have board's order reviewed by courts in a mandamus proceeding. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

5. Mandamus ⇐170

A mandamus proceeding by one whose license to practice optometry had been revoked by State Board of Optometry to have board's order reviewed must be a trial de novo, since courts furnish accused the only tribunal in which due process clauses of Federal and State Constitutions can be satisfied. Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

6. Mandamus ⇐173

In a mandamus proceeding by one whose license to practice optometry has been revoked by State Board of Optometry, to have board's order reviewed, if plaintiff demands a trial, the proceeding should have all the attributes of any other trial, which would include the admission of all evidence that is competent and material to the issues made by the pleadings. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

7. Constitutional law ⇐312

If parties to mandamus proceeding to review order of State Board of Optometry revoking plaintiff's license to practice optometry are content to submit cause on evidence taken before the board, and such evidence is received and trial court passes on its weight and sufficiency, makes findings of fact and conclusions of law, and renders judgment, there has been "due process of law". Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Proceeding by E. W. Laisne against the California State Board of Optometry, and Harry E. Goodman and others, members of the California State Board of Optometry, for writ of mandamus to compel defendants to restore the plaintiff's license as an optometrist which had been revoked by defendants. From a judgment for defendants, the plaintiff appeals.

Reversed and remanded, with directions.

H. A. Savage and Lawrence W. Young, both of Fresno, for appellant.

Earl Warren, Atty. Gen., and Lionel Browne, and Thos. I. Coakley, Deputy Attys. Gen., for respondents.

MARKS, Justice.

Plaintiff, a licensed optometrist instituted this proceeding in the superior court seeking a writ of mandate to compel respondents, the California State Board of Optometry and its members, to restore his license as an optometrist which had been revoked on December 19, 1938. Respondents demurred to the complaint and moved to strike practically all of it. The motion to strike was granted and the demurrer overruled. Respondents answered and the trial was had. The trial court made findings of fact and conclusions of law and

rendered judgment for respondents. That judgment is now before us for review.

[1] The use of proceedings in mandamus to review the actions of various officers and boards having statewide authority is of recent origin in California. See, Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal.2d 75, 87 P.2d 848; McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205; Davis v. State Board of Optometry, 35 Cal.App.2d 428, 95 P.2d 959; Nider v. City Commission of City of Fresno, Cal.App., 97 P.2d 293. It is now established that orders of such officers and boards, depriving persons of licenses to engage in business or the practice of professions, can only be reviewed in mandamus proceedings. See Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119; Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 15 A.L.R. 1.

[2-4] That such orders must be reviewed in a mandamus proceeding by the courts of this state, where such review is properly demanded by the person deprived of such license, follows from those cases already cited, from St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033, and other cases of similar import. Those cases held that a license to engage in business or to practice a profession is a property right that could not be taken away without due process of law; that since such officers and boards have only administrative powers and could not exercise judicial functions "the courts must provide for the notices and places of hearings and must pass on the weight and sufficiency of the evidence before the licenses could be revoked. Thus, as no other forum was available, and as no other remedy was provided by law it was necessary to employ the writ of mandate to satisfy the due process clauses of the Constitutions." Nider v. City Commission of City of Fresno, supra [97 P.2d 300]; 14th Amendment to U. S. Constitution; sec. 13, art. I, Constitution of California.

While it is clear that such orders must be reviewed in the courts if the aggrieved party so demands, the exact procedure to be followed in the reviewing courts has not yet been directly decided. Probably this is due to the fact that in the three cases involving orders of an officer or board having statewide jurisdiction (the Drummey, McDonough and Davis cases) the litigants were content to rest their cases on the proceedings and evidence taken before the administrative bodies which was admitted in evidence without objection. However, in each case the trial court was required to pass on the weight and sufficiency of the evidence before it. In the Davis case the judgment was reversed because no findings of fact had been made. In that case the Appellate Court said [35 Cal.App.2d 428, 95 P.2d 962]: "Although the parties apparently agreed to submit the issues upon the evidence adduced at the hearing before the board, nevertheless, under the circumstances, the court was bound to determine the questions of fact involved and necessarily to pass judgment upon the value and effect of the evidence presented. Findings, therefore, were necessary, indeed indispensable unless waived. The record reveals that the findings were not waived. The parties submitted the issues upon an agreed record of the evidence; it was the trial court's duty to find as to the effect of such evidence and in that connection make the necessary findings. [Citing cases.] This the trial court failed to do, which was error."

In both the Drummey and the McDonough cases the reasoning of the Supreme Court strongly indicates that a trial de novo in the trial court was required in order to satisfy the due process clauses of our federal and state Constitutions.

[5-7] If the courts furnish to an accused the only tribunal in which the due process clauses of the Constitutions can be satisfied, and if it is only in those courts that a trial (technically speaking) of the charges against an accused can be had, the conclusion that it must be a trial de novo, seems to be inescapable. As a trial is necessary before a license can be revoked, if the accused demands a trial, that proceeding should have all of the attributes of any other trial which would include the admission of all evidence that is competent and material to the issues made by the pleadings. If the parties are content to submit the cause on the evidence taken before the board, and that evidence is received and the trial court passes on its weight and sufficiency, makes findings of fact and conclusions of law and renders judgment, certainly there has been due process of law. On the other hand, where, as here, the accused plaintiff offers evidence not contained in the record of the proceedings before the board, that evidence should be re-

ceived if it be competent and material to the issues before the court.

As we have observed, the trial court granted respondents' motion to strike practically all of the allegations of the complaint. It is true that the complaint was most loosely drawn and was full of legal conclusions which had no place in it. There were other allegations that were proper and germane to the issues. Practically all of them were striken out. This was error which was prejudicial to the plaintiff. Further, the findings of fact are equally defective. Certain paragraphs of the complaint were found to be true and others to be untrue, when some of those paragraphs had been stricken in their entirety. Consequently, we cannot determine just what facts were intended to be found as true in support of the judgment.

In fairness to the trial judge it should be observed that these errors which we have pointed out would seem to have resulted from an inadvertence of a former counsel for the respondents. However, these errors are in the record and, after an inspection of the original files which it was stipulated we might make, are clearly discernible.

The complaint should be amended so that the remaining legal conclusions may be eliminated and the facts pertinent to the controversy clearly alleged. A trial de novo should be had.

The judgment is reversed and the cause is remanded for new trial with the following directions to the trial court: Permit plaintiff to file an amended complaint, if he be so advised; permit respondents a reasonable time in which to plead to the amended complaint if one be filed.

We concur: BARNARD, P. J.; GRIFFIN, J.

15 Cal.2d 495

CANAVARRO et al. v. THEATRE & AMUSEMENT JANITORS UNION LOCAL NO. 9 et al.

APARTMENT HOUSE EMPLOYEES UNION LOCAL NO. 14 et al. v. BUILDING SERVICE EMPLOYEES' INTERNATIONAL UNION et al. (HARDY et al., Interveners).

S. F. 16392.

Supreme Court of California.

May 3, 1940.

1. Appeal and error ⇐460(2)

A mandatory injunction is automatically stayed by an appeal, and, if trial court should proceed to enforce it notwithstanding the stay, supersedeas may issue.

2. Appeal and error ⇐460(2), 477

A prohibitory injunction is not stayed by the taking of appeal, and supersedeas will not be granted except in rare circumstances.

3. Appeal and error ⇐460(2)

Where union and officers claimed right to discipline members after trial on charges filed, injunction granted to members against trial in any but specified manner was not a "mandatory injunction" and hence was not stayed by appeal, where there were no issues raised nor evidence presented to authorize court to order members to submit to trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Injunction".

4. Appeal and error ⇐479(1)

In suit by members of union for injunction against unfair trial by union officers, wherein relief was granted only to the extent of prescribing conditions under which the trial could be held, supersedeas would not be granted on appeal.

5. Appeal and error ⇐477

The effect of granting an injunction, which trial court has denied, is not a proper function of the writ of supersedeas.

SHENK, J., dissenting in part.

In Bank.

Action by Theodore Canavarro and others against the Theatre & Amusement Janitors Union Local No. 9 and others, for injunction and accounting, wherein Apartment House Employees Union Local No. 14 and others filed cross-complaints, and Charles Hardy and others intervened. From certain portions of an order granting in part the injunctive relief sought, plaintiffs and interveners appealed, and filed petition for writ of supersedeas.

Writ of supersedeas denied.

Picard & McCarty, of San Francisco, for appellants.

James L. Feely, of San Francisco, amicus curiae.

I. B. Padway, of San Francisco, for respondent Building Service Employees' International Union.

GIBSON, Justice.

This is a petition for a writ of supersedeas, arising out of a controversy between the officers of certain labor union locals and the officers and representatives of their international union. Upon the filing of the petition this court issued an order to show cause why the writ should not issue, and stayed all proceedings pending the hearing on said order.

On December 27, 1939, plaintiffs and appellants, members of certain local unions, brought an action in the superior court for an injunction and an accounting, against various local unions, the officers thereof, the international union, its president, George Scalise, and others. The main charge in the complaint is that the local unions are paying per capita taxes to the international union, but that the president thereof, in violation of its constitution, refuses to furnish the executive board with a statement of expenditures, and is wasting the money. It is also alleged that the president and others have entered into a conspiracy to prevent local unions from demanding an accounting, and in pursuance thereof purported to suspend from office Charles Hardy, duly elected fourth vice-president and western representative, because of his demands therefor, replacing him with one Meyer Lewis. Lewis, it is further alleged, threatens to take possession of the documents and property of the local unions. The prayer is that the defendant local unions and officers be restrained from delivering the documents or property and from paying the funds to the international union; that the international and its president be restrained from removing Hardy from his office; that the international and its president be compelled to account; and

that a referee be appointed to take the accounting.

On January 9, 1940, some of the local unions and officers who were named as defendants filed an answer and cross-complaint which seek the same relief as does the complaint.

On January 17, 1940, Hardy and his two sons, who are officials of local unions, intervened in the action, also seeking substantially the same relief, with an additional prayer. It appeared that Lewis, sent here by President Scalise to replace Charles Hardy, was instructed to hear and try charges of disloyalty, false propaganda against the international union, and other alleged improper conduct on the part of the Hardys. The record of such trial was to be sent to President Scalise for decision. Notice to that effect was sent to the Hardys. Accordingly, in their complaint they prayed that the threatened trial of them by Lewis and Scalise should be enjoined pending the trial of the main proceeding on the merits.

The trial court issued a temporary restraining order and directed defendants to show cause why a preliminary injunction should not be granted. A hearing was had and the court made its order, granting in part the injunctive relief sought, but refusing to restrain the trial of the Hardys. Plaintiffs and interveners appealed from certain portions of the order.

The present petition for supersedeas seeks to prevent the threatened trial of the Hardys pending the determination of the main case on the merits.

[1, 2] The law governing the issuance of writs of supersedeas in injunction cases has been fully discussed by this court in recent cases, and needs no detailed exposition here. A *mandatory* injunction is automatically stayed by an appeal, and if the trial court should proceed to enforce it notwithstanding this stay, supersedeas may issue. A *prohibitory* injunction is not stayed by the taking of an appeal, and supersedeas will not be granted except in rare circumstances. See Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Feinberg v. Doe, 14 Cal.2d 24, 92 P.2d 640. Recognizing these settled rules, petitioners contend that the court's order directs that the Hardys be tried, and in this respect is substantially a mandatory injunction which was stayed by the appeal.

To answer this contention requires a consideration of the provisions of the decree, and we find that the court ordered the following: (1) Those portions of the temporary restraining order which "interfere with or prevent the Executive Board" from trying the Hardys, on the charges made in the manner provided by the constitution and by-laws of the international union, be "set aside and discharged". (2) Provided, however, that board members Scalise (president) and Burke (third vice-president) be restrained from sitting on the board or in any way participating in the trial, "for the reason that they investigated said charges and caused the same to be made"; and "no one but members of the Executive Board not herein disqualified participate as judges in said trial". (3) The trial shall be "prompt and expeditious" in order to permit an appeal to the international convention in May, 1940; and for the convenience of the Hardys their residence (San Francisco), shall be the place of trial. (4) Because of the present illness of two members of the board, "it is ordered that said trial shall be conducted in the following manner": three members "shall hold and conduct the hearing in San Francisco * * * to commence not later than Tuesday, March 5, 1940"; notice of place of trial shall be furnished by March 4; a stenographic record shall be made and sent to the other two members who may participate after reading it. (5) The charge of disseminating false propaganda against the executive board is excluded and the board restrained from trying it. (6) The Hardys shall be permitted to participate as delegates in the convention, if elected. (7) The board "are hereby restrained from conducting said trial in any manner or place save as hereinabove provided".

Petitioners, as stated above, contend that this was "an affirmative and mandatory order" directing the three designated members of the executive board to try the Hardys in a certain manner at a certain time. They rely upon the quoted portions of the order, supra, and on inferences from the asserted facts that the constitution of the union does not authorize trial by the board, that no previous attempt had been made to try the Hardys before the board. Thus they reach the conclusion that the only authority for the trial comes from the court's order, and that consequently that order, laying down the conditions under which the trial shall be held, is in effect a

mandatory injunction directing that a trial be held.

[3] The argument is not convincing. Whether the union's constitution authorizes, expressly or by implication, the discipline of members or officers after trial on charges filed, is a problem not before us. The circumstances show quite clearly that respondents, the international officers, did claim such a right, and proceeded to act under it. It was that action under that purported authority which petitioners sought to prevent by applying to the trial court for an injunction. It was not respondents who sought the aid of the court; they did not and do not now claim authority to hold the trial by reason of the court's order.

Some of the quoted portions of the order, if completely separated from their context and read without any knowledge of the circumstances leading thereto, might suggest that the court was ordering that the Hardys be tried. But reading the entire order in the light of the background of the case, its purpose and effect are unmistakable. The court, recognizing the authority of the international union to take the disciplinary measures in question, but cognizant of the claims of unfairness made by petitioners, sought to place limitations upon the conduct of any such trial, practically all in the interests of petitioners. Thus, those who had brought the charges were disqualified from hearing them; the order required that a report be made of the proceedings, with right of appeal to the convention; and the court insisted upon a speedy hearing to safeguard this right of appeal. The provision that trial be before impartial members of the board was in lieu of the attempted trial before Lewis and Scalise. Petitioners were not initially forced to trial by the court's order. They were given a right to insist that any trial, if held, be conducted in a manner consistent with principles of fairness and impartiality.

Indeed, the order can hardly be interpreted any other way. There was no issue raised, nor evidence presented, on the authority of the court to order petitioners to submit to trial. It can hardly be imagined that the court would deliberately make such an order, requested by neither party, and supported by neither pleading nor proof. If, for example, respondents should choose to abandon the proceedings entirely, could it be said that the court would have power to punish them for contempt? Yet if the court ordered a trial, they would have to comply on pain of such punishment. The result would then be that without the request of either party, both would be forced to take action which each opposed. These speculations only serve to emphasize the unreasonableness of petitioners' theory.

[4, 5] Since there was, therefore, no mandatory injunction, the order of the court was not stayed by the appeal. Nor have petitioners made any showing which would warrant our issuance of supersedeas on any other ground. As a matter of fact, the opposite is true. Petitioners sought, in the lower court, to restrain their trial. The court gave relief only to the extent of prescribing conditions under which the trial could be held, but refused to enjoin it altogether. If we issue supersedeas, as requested, its effect would be to prevent the trial, thus granting the injunction which the trial court denied. We have on several occasions pointed out that this is not a proper function of the writ of supersedeas. See, Seltzer v. Musicians' Union, 12 Cal.2d 718, 87 P.2d 699; McCann v. Union Bank, 4 Cal.2d 24, 47 P.2d 283; Wollenshlager v. Riegel, 186 Cal. 622, 200 P. 726.

The writ is denied.

We concur: WASTE, C. J.; HOUSER, J.; CURTIS, J.; CARTER, J.

I concur in the judgment: EDMONDS, J.

SHENK, Justice (concurring and dissenting).

I concur in the order denying the writ of supersedeas for the reason that the portions of the order of the trial court from which an appeal was taken and which are claimed by the petitioners herein to be mandatory became ineffective by lapse of time. The trial court directed that the contemplated trial of the petitioners be conducted before three members of the general executive board and be commenced not later than March 5, 1940. That time had passed before the hearing on the application for the writ was had in this court, and the directions to hold the trial on a day that had long since passed became ineffective.

But I dissent from the holding that the portions of the order of the trial court directing the time, place and manner of the trial were not mandatory. In language too plain to be misunderstood the court assumed to direct the time when, the place

where, and the manner in which the trial should be had and to order a record thereof made and certified to absent members of the board. The consequences of this language cannot be minimized by assuming that the trial court could not have intended its obvious effect, inasmuch as it went beyond the issues then before the court. Whatever the reasons, the order was made and is reviewable on appeal.

Nor can I accede to the conclusion that the writ of supersedeas, if issued would have the effect of "granting the injunction which the trial court denied". The trial court did not deny a temporary injunction. It granted one restraining the board from "conducting the trial in any manner or place save as hereinabove provided". The fact that the operation of the writ, if issued, would not be upon the prohibitory features of the order appealed from, but would operate only to stay the effect of the provisions of the order which are clearly mandatory, is the natural consequence of the trial court's order and cannot affect the application of the well-established rules of law invoked by the petitioners.



15 Cal.2d 445

FISHBAUGH v. FISHBAUGH.

L. A. 16317.

Supreme Court of California.

April 27, 1940.

Rehearing Denied May 27, 1940.

1. Appeal and error ⇐1011(1)

In action for cancellation of modifications of property settlement agreement, and if rescission could not be had, for actual and exemplary damages, finding based on conflicting evidence, that husband had stated desire to re-establish marital relations and had made protestations of love to her was conclusive on appeal.

2. Fraud ⇐58(4)

In divorced wife's action for cancellation of modifications of property settlement agreement, and, if rescission could not be had, for actual and exemplary damages, evidence supported finding that wife relied on husband's representations regarding his desire to re-establish marital relations and his protestations of love.

3. Fraud ⇐59(1)

Where divorced wife executed contracts modifying original property settlement agreement because of fraudulent representations made to her by husband, divorced wife was entitled to judgment for damages in an amount equal to the difference in value, if any, to her between original contract and modification agreements.

4. Damages ⇐6

One who commits a wrongful act cannot wholly escape liability because of difficulty of ascertaining damages.

5. Fraud ⇐62

Where it appeared that under original property settlement agreement the least amount divorced wife was entitled to receive was $1,041 a month for life, and that under modification procured because of husband's fraudulent representation $750 per month over a term of years was probably the highest average amount the divorced wife would receive, evidence amply supported finding that divorced wife who had life expectancy of 24.29 years had been damaged to extent of $50,000.

6. Husband and wife ⇐ 279(6)

Where property settlement agreement required husband to pay to divorced wife $50,000 "as soon hereafter as he reasonably can do so", the husband's financial ability was the principal circumstance to be considered in determining what was a reasonable time for performance.

7. Husband and wife ⇐279(1)

Where modification of property settlement agreement required husband to pay divorced wife $50,000 "as soon hereafter as he reasonably can do so," to pay $10,000 within ten days after execution of modification contract, and from time to time when and in his judgment he could do so with reasonable safety to his then financial condition to pay additional sums until divorced wife had been paid full sum, husband promised in effect that he would not withhold all payments until reasonable time for payment of full sum had elapsed, but would pay $10,000 within ten days and would make further payments on account from time to time prior to maturity of full amount when he could do so with reasonable safety to his then financial condition.

8. Husband and wife ⇐281

Where modification of property settlement agreement required husband to pay to

divorced wife $50,000 "as soon hereafter as he reasonably can do so", evidence, showing that during period of 30 months from execution of modification agreement until commencement of wife's action against husband husband's net cash income amounted to more than $125,000, sustained finding that husband was in default in the performance of his obligations under the modification contract.

9. Husband and wife ⇐281

Where, in agreement modifying original property settlement agreement, husband agreed with divorced wife that "if, when, and as he sells" any of real property he would pay one-half of net proceeds of each sale upon his obligation to divorced wife, finding that husband agreed to sell within reasonable time after execution of modification agreement the real property conveyed to him was erroneous.

10. Contracts ⇐213(1)

An agreement, to apply the proceeds from any sale of property to an obligation which the promisor has agreed to pay, in all events lays no requirement upon him to sell such property within a reasonable time or at all.

11. Judges ⇐49(2)

In divorced wife's action for cancellation of agreement modifying property settlement agreement, alleged fact that trial judge at conclusion of trial stated that husband misrepresented his financial condition to his former wife, and that he took the law into his own hands and that judge read depositions not introduced in evidence, did not support charge of disqualification on ground of bias or prejudice. Code Civ.Proc. § 170.

12. Judges ⇐49(1)

If a judge in finding facts falls into error by basing them on inadmissible evidence, such an action may constitute sufficient grounds for reversal of judgment on appeal but will not support a charge of disqualification. Code Civ.Proc. § 170.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight and Ruben S. Schmidt, Judges.

Action by Mary Louise Fishbaugh against Ernest C. Fishbaugh for declaratory relief and cancellation of agreement modifying prior property settlement agreement. From the judgment defendant appeals.

Judgment modified and as modified affirmed.

Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles, for appellant.

Mathes & Sheppard and Wm. C. Mathes, all of Los Angeles (Lloyd Melvin Smith, of Los Angeles, of counsel), for respondent.

EDMONDS, Justice.

The controversy which occasioned this litigation concerns the actions of the appellant in securing a modification of the terms of a property settlement made before a divorce between him and the respondent, his former wife. She sued to set aside two later agreements, assertedly executed by her because of certain fraudulent misrepresentations made by the appellant. A judgment was rendered in her favor which, in effect, declares that the respective rights and obligations of the parties are as fixed by these agreements, and awards her damages in the sum of $50,000.

The litigants were married in 1914 and have since lived in California, where the appellant became a well-established and prosperous physician and surgeon. They lived together until March, 1930, when Dr. Fishbaugh left the family home. At this time all of their assets were community property.

The original property settlement was executed on December 23, 1930. Early in 1931 plaintiff sued for divorce. An interlocutory decree approving the property settlement agreement was entered on July 7, 1931, followed by a final decree the next year.

By her complaint the respondent alleges that in 1933, Dr. Fishbaugh represented to her that he desired to start anew, and wished to remarry her as soon as he was financially able, but that unless the requirements of their original agreement were modified he would be forced to resort to bankruptcy. In reliance upon these false representations, she agreed to rescind the previous agreement which she had made with him and enter into a preliminary one dated July 5, 1933, and another dated July 12, 1933. The second cause of action seeks to set aside these agreements for the rea-

son that there was no consideration for them. As a third ground for relief, Mrs. Fishbaugh asserts that an actual controversy exists between her and the doctor with respect to their legal rights and duties under the various writings she signed which entitles her to a judicial determination of their effect. The prayer of the complaint is for declaratory relief, including a cancellation of the agreements executed in July, 1933, and the reinstatement of the 1930 agreement, or a partial rescission together with an award of damages, or if no rescission can be had, an award of both actual and exemplary damages.

The respondent answered this complaint by denying all of its material allegations and pleading, as special defenses, that plaintiff had not rescinded the contract of 1933 nor restored $10,000 paid by him as consideration therefor. He also charged that respondent is guilty of laches in allowing an unreasonable length of time to elapse before attempting to rescind, because, although she knew after 1932 that he had no intention of remarrying her, yet she continued accepting the benefits of the July, 1933, agreements until January, 1936.

Upon these issues the court found that prior to the execution of the two agreements in July, 1933, Dr. Fishbaugh made numerous demonstrations to his former wife that he loved her and hoped that they could reestablish the family home; also, that he promised to remarry her as soon as he was able to straighten out his financial obligations. That the respondent, in reliance upon these representations, and upon assertions that unless the agreement made by him in 1930 was modified he would be forced into bankruptcy, agreed to terminate a trust made for her benefit, release certain insurance policies and real estate, rescind the agreement of December, 1930, and enter into a modified contract dated July 12, 1933.

The court further found that Dr. Fishbaugh at no time intended to remarry his former wife, but that she did not discover this until she and her daughter were ousted from possession of their home in 1935. That at no time in 1933 was the appellant's financial condition such that he was faced with bankruptcy; that he concealed the fact from her that he then had approximately $3,000 in cash on hand, and that his false statements and representations were made with the intention of causing her to execute agreements of July, 1933. That respondent, throughout their married life, and for some time subsequent to July, 1933, had held the deepest affection for Dr. Fishbaugh and relied upon him to handle her business affairs; that he knowingly accepted this trust and confidence, but used it to obtain an unfair advantage over her.

Other findings of the court are that Mrs. Fishbaugh would not have executed the later agreements if she had not relied upon and believed the representations made to her; that it is impossible to restore the status quo existing before July, 1933; that the original agreement of the parties was worth $180,000 to her in 1933, but the value of the July, 1933, agreements at that time was only $130,000; and that she has, therefore, been damaged in the sum of $50,000. Accordingly, Mrs. Fishbaugh was given judgment for that amount, and the rights and duties of the parties were declared to be those fixed by the two later agreements executed in July, 1933.

At the conclusion of the taking of evidence, Honorable Goodwin J. Knight, the trial judge, announced that he intended to find for Mrs. Fishbaugh, whereupon the appellant filed a statement of disqualification against him asserting bias and prejudice on his part. A motion to strike this statement from the files was granted by Judge Kenny. After the findings and judgment were signed, the appellant moved for a new trial, again urging the disqualification of Judge Knight. The motion constituting the second attempt to disqualify him was heard by Judge Schmidt and denied. Later the motion for a new trial was denied by Judge Knight, whereupon Dr. Fishbaugh appealed from the judgment and also from the order made by Judge Schmidt.

As grounds for reversal of the judgment, the appellant contends that there is no substantial evidence to support the findings upon which it is based. More specifically, he asserts that the evidence does not support the finding either that Mrs. Fishbaugh has been damaged in the sum of $50,000 or in any other amount, or that any false statements concerning his financial condition were made by him, or that he promised to remarry the respondent, or that there was any reliance by her upon any promise of remarriage or statement of financial distress. That if there was, in fact, such misrepresentations, the court erroneously found that Mrs. Fishbaugh did not know until July, 1935, that he had no intention of remarrying her and allowed her to rescind

after a delay of two and one-half years. He vigorously attacks the finding that a fiduciary relationship existed between them in 1933.

The appellant further urges that the trial judge decided the issues of fact upon his knowledge of circumstances outside the record and not proper subjects of judicial notice. Another contention is that certain errors were made in the construction of the July 12, 1933, contract which imposes duties upon him contrary to its express terms. Finally, he declares that Judge Kenny erred in striking the statement of disqualification made against Judge Knight. He insists that the charges of bias and prejudice were sufficient to require a verified answer within the time allowed by section 170 of the Code of Civil Procedure, and because this provision was not complied with, all proceedings thereafter, which include the signing of the findings of fact, conclusions of law, and the judgment, are void.

Although there is sharp conflict in the evidence concerning Dr. Fishbaugh's alleged representations that he intended to marry the respondent as soon as he was able to straighten out his financial troubles, her testimony to that effect is not only positive and direct but is supported by many letters written by him. She declared that in the early part of 1933, the doctor negotiated with her and her attorney for a modification of the agreement he had previously made. At that time, she said, he represented that he was having serious financial difficulties and had been advised that bankruptcy was his only solution. He intimated, also, that a discharge in bankruptcy would probably relieve him of his obligations under the property settlement agreement.

Apparently these efforts were unavailing until in July, 1933. According to Mrs. Fishbaugh, upon a visit to her at that time he told her he was in great financial distress and needed her assistance. He made protestations of love to her and told her he was desirous of establishing the family home. That night or the next night, Dr. Fishbaugh had dinner with her in her home. On this occasion, also, he said that he loved her and was sorry for everything that he had done, and that he would remarry her as soon as he was financially able to do so.

On July 3d, Mrs. Fishbaugh and her attorney met with the doctor and at that time the attorney was instructed to give appellant "anything he wants". Thereafter, on July 5th, an instrument was executed which authorized a partial termination of the trust provided for in the original agreement, and released to appellant $120,000 in life insurance. On July 12th another contract was executed.

[1] The doctor and Mrs. Fishbaugh agree that during the month of July he was not only a frequent visitor at her home, but that they also went out to dinner several times, to the theater, and to the homes of mutual friends. He denies that he at any time told the respondent that he loved her, or that he wished to reestablish marital relations, but the trier of fact has resolved the conflict in evidence against him and that finding is conclusive upon appeal. It is, therefore, immaterial whether representations concerning bankruptcy were fraudulently made.

[2] There is also substantial evidence to support the finding that the respondent relied upon Dr. Fishbaugh's representations. For several months prior to July, 1933, he had been attempting to secure a modification of the property settlement agreement made at the time of divorce. It was not until after his visits to Mrs. Fishbaugh that she consented to release him from his former obligations and instructed her attorney to give him "anything he wants". It is certainly not unlikely that manifestations of love for his former wife and assertions of a desire to remarry her, of which she testified in detail, were decisive factors in securing her consent to the modified agreement, and the trial judge was entitled to credit that testimony and find in accordance with it.

The appellant's contention that the evidence does not support the award of damages requires a consideration of the three contracts which are in controversy. The agreement of 1930 provided that all of the real property then owned by the parties should be conveyed to a trustee, the net income to accumulate until it amounted to $200,000. Dr. Fishbaugh was required to pay $1,000 per month to the trustee until the funds in its hands totaled $200,000. Policies of insurance upon Dr. Fishbaugh's life to the amount of $120,000 were assigned to the trustee as additional security. Pending the accumulation of the trust funds, Dr. Fishbaugh agreed to pay the respondent $1,000 per month, these payments to continue during her lifetime until the trustee held $200,000 upon which there was

an income sufficient to pay her at least $1,000 per month. Mrs. Fishbaugh was also given the exclusive right to occupy the family home until the same should be sold by the trustee, and the doctor agreed to pay the taxes, assessments, and repairs thereon. She was also to receive $15,000 in cash, payable over a period of three years, and certain items of personal property were set aside to her. Dr. Fishbaugh retained numerous shares of stock, his office furniture, books, automobile, and professional accounts receivable.

The first agreement executed by the parties in July, 1933, revoked the trust provisions requiring the deposit of insurance policies and authorized their reassignment to Dr. Fishbaugh. The second agreement terminated the trust and provided that all property then held by the trustee should be conveyed to the doctor as his own separate property. Its terms required him to pay his former wife $750 per month, so long as she remained unmarried, and until she received the sum of $50,000. After that amount had been paid she was to receive $500 per month for the remainder of her lifetime or until marriage. In the event the doctor's income from the practice of his profession should exceed $50,000 in any one calendar year, he agreed to pay her $3,000 additional for that year at the rate of $250 per month. He also agreed to pay her $10,000 within 10 days after the execution of the contract, and $40,000 more as soon as reasonably possible.

Upon the sale of any of the real property conveyed by the trustee to Dr. Fishbaugh pursuant to the agreement, one-half of the proceeds of the sale after the payment of expenses and encumbrances was to be paid to the respondent and credited by her upon the obligation to pay $50,000. To secure this payment the contract provided for the assignment of the life insurance policies to her. It also included Dr. Fishbaugh's agreement that if he should die before her, she should receive the balance of the $50,000 then unpaid in lieu of monthly payments.

Mrs. Fishbaugh was also given the right to reside in the home until the appellant shall "desire to live there and give her 30 days' notice to quit the premises" and the assignment to her of certain personal property, consisting principally of household furniture, was affirmed. In the event of default in the performance of any of the terms of the contract, Mrs. Fishbaugh might demand restoration of the former agreement. Concurrently, Dr. Fishbaugh agreed to pay any income taxes that should be assessed against her.

[3, 4] The trial court having found that the respondent executed the two contracts of 1933 because of the fraudulent representations made to her by Dr. Fishbaugh, she was entitled to judgment for damages in an amount equal to the difference in value, if any, to her between the original contract and the later agreements. Garstang v. Skinner, 165 Cal. 721, 134 P. 329; Cross v. Bouck, 175 Cal. 253, 165 P. 702. This amount is undoubtedly, difficult to determine with certainty because many provisions of each contract depend upon contingencies. But one who commits a wrongful act cannot wholly escape liability because of such a difficulty. Hartman Ranch Co. v. Associated Oil Co., 10 Cal. 2d 232, 73 P.2d 1163; Rilovich v. Raymond, 20 Cal.App.2d 630, 67 P.2d 1062.

Under the contract made in 1930, the parties conveyed to a trustee "all of the real property now owned or held by both or either" of them. All net income from this property and from any other assets of the trust to the amount of $1,041 per month, was payable to Mrs. Fishbaugh pending the accumulation of $200,000 in cash, either by sale of the property or by deposits to be made by the appellant. Until the trustee held $200,000 in cash, Dr. Fishbaugh agreed to pay to it $1,000 per month. He also assigned to the trustee "as additional security and as part of the corpus of the trust", policies of insurance upon his life to an amount of $120,000.

By the terms of this contract, Mrs. Fishbaugh expressly retained all of her rights to the community property placed in trust for her benefit. However, when the trustee held $200,000 in cash, it was authorized to reconvey to Dr. Fishbaugh, as his separate property, all real estate then remaining in the trust, and to reassign the life insurance policies "free of any claim of the trustee and of the second party". But until that event occurred the respondent's interest in the trust was of substantial value, for the evidence shows that the real estate cost about $325,000 and at the time of the trial was subject to encumbrances aggregating approximately $55,000. She also had a further interest in the corpus of the trust, for after the $200,000 was accumulated, if she outlived her daughter, one-half of that amount was subject to her

testamentary disposition or passed to her heirs.

In the later contract, Dr. Fishbaugh agreed to pay the respondent $50,000 as consideration for the termination of the trust and the trustee's conveyance to him of all property then held by it. This amount was not payable at once but, except for $10,000, only "as soon hereafter as he reasonably can do so". However, the appellant agreed to pay on account of this obligation one-half of the net amount which he should receive upon the sale of any real property conveyed to him by the trustee.

In addition to these amounts, the respondent might receive additional sums from the sale of the former community property, in that the remaining one-half of the purchase price, after all defendant's outlays had been deducted, was payable to her. But these outlays were specified as including the original purchase price, interest at six per cent, insurance, taxes, assessments and all other charges directly or indirectly paid by the appellant for upkeep and maintenance. The value of this interest was, therefore, problematical and, very possibly, comparatively small.

[5] To appraise with certainty the value of Mrs. Fishbaugh's interest in the former community property under each of the two contracts is difficult, if not practically impossible. Certainly the doctor obtained property of very considerable value for his promise to pay her $50,000. The difference in value to her, so far as monthly income is concerned, between the two is more readily ascertainable. The least amount she was entitled to receive, according to the terms of the original contract, was $1,041 a month for life. Under the second contract, Dr. Fishbaugh agreed to pay her $750 per month during her lifetime, or so long as she remained unmarried, with the added provision that after the $50,000 consideration for the revocation of the trust had been paid by him, then the amount of the monthly payments should be reduced to $500. This was subject to the further contingency that if the appellant's net income from his profession should exceed $50,000 for any calendar year, then he would pay her an additional amount of $3,000 for that year.

Under these circumstances, $750 per month over a term of years is probably the highest average amount Mrs. Fishbaugh would receive. In July, 1933, she had a life expectancy of 24.29 years, as computed by the "American Experience Table of Mortality", and the difference to her in the value of an annuity for life of $1,000 per month and one of $750 per month was $47,373.30. She testified that the former contract was worth $125,000 more to her than the 1933 agreement. The evidence, therefore, amply supports the findings of damages.

The appellant also attacks other findings in which the court construed provisions of the 1933 contract concerning the time when he was required to make payments upon the obligation of $50,000. One of these is that Dr. Fishbaugh agreed to pay this amount "within a reasonable time after the 12th of July, 1933". This finding, asserts appellant, is not supported by the evidence.

According to the construction of the contract by the trial court, the appellant agreed to pay Mrs. Fishbaugh, in all events, the sum of $50,000, $10,000 not more than ten days after the 12th day of July, 1933, and the balance within a reasonable time thereafter. Also, the court found, he agreed to pay to her, prior to the maturity of the whole unpaid balance thereof, additional sums on account of the obligation from time to time as and when he could make such periodical payments with reasonable safety to his financial condition. As against this construction, the appellant insists that his obligation to her is not to pay when he is able, but when, in his judgment, he is able to do so.

[6, 7] However, the express terms of the contract are, first, that "in all events" appellant will pay $50,000 "as soon hereafter as he reasonably can do so"; second, that he will pay $10,000 within ten days after the execution of the contract; and, third, "that from time to time hereafter, when and in his judgment he can do so with reasonable safety to his then financial condition, he will pay to second party additional sums until she has thus been paid * * * the full sum". The first of these promises is an unconditional promise to pay "in all events", as soon as he could "reasonably" do so, a reasonable time being dependent upon the circumstances. Of course, the appellant's financial ability is the principal circumstance to be considered in determining what is a reasonable time for performance. The second and third promises are to make payments on account.

The appellant thereby promised, in effect, that he would not withhold all payment

until a reasonable time for payment of the full sum had elapsed, but would pay $10,000 within ten days and would make further payments on account "from time to time" prior to the maturity of the full amount, whenever he could do so "with reasonable safety to his then financial condition". If, as he contends, the provision as to his "judgment" modifies the entire obligation, and does not refer merely to payments on account, why were the significant phrases "in all events" and "as soon hereafter as he reasonably can do so", used in connection with the promise to pay the amount of $50,000? Manifestly the appellant's promise was not the ordinary promise to pay "when able", such as that considered in Van Buskirk v. Kuhns, 1913, 164 Cal. 472, 129 P. 587, 44 L.R.A.,N.S., 710, Ann. Cas.1914B, 932, and similar cases, but, as found by the trial court, to pay $50,000 "in all events", and with the further obligation to make partial payments thereon as his financial condition allowed him to do so.

[8] The appellant also complains of the trial court's further finding that the balance of the $40,000, after payment of the $10,000, is owing and unpaid by the appellant; that at the time of the commencement of this action, a reasonable time had not yet elapsed for the payment of this amount, but that since July, 1933, the defendant could reasonably have paid to Mrs. Fishbaugh the sum of $10,000 with reasonable safety to his financial condition; and that by reason of the appellant's failure to make any payment whatever during this period on account of his obligation, he is now in default in the performance of his obligations under the contract. But the appellant's own testimony showed that during the period of thirty months from July, 1933, until the commencement of this action, the net cash income from all sources amounted to more than $125,000. This and other evidence furnishes substantial support for the finding of the trial court.

[9, 10] However, the court also found that Dr. Fishbaugh agreed with the respondent to sell, within a reasonable time after July 12, 1933, the real property conveyed to him by the trustee. This finding is completely at variance with the express provision of the contract, which is that "if, when and as he sells" any of it, that he will pay one-half of the net proceeds of each sale upon his obligation. There is no agreement upon the appellant's part to sell any of this property, hence the court was in error in making its finding in this regard. An agreement to apply the proceeds from any sale of the property to an obligation which the promisor has agreed to pay "in all events" lays no requirement upon him to sell such property within a reasonable time, or at all.

Concerning the efforts made by the appellant to disqualify Judge Knight, the statement of asserted bias or prejudice does not comply with the requirements fixed by section 170 of the Code of Civil Procedure. According to this statement, the judge said at the conclusion of the trial that appellant "misrepresented his financial condition" to his former wife and that he "took the law into his own hands". But Judge Knight was acting as the finder of the facts, and if the evidence introduced before him was in conflict, he had the right and it was his duty to believe the testimony of the party who it appeared to him was telling the truth.

[11, 12] Other statements made by Judge Knight concern the value of a piece of property upon which there was no evidence introduced except the original sale price, and an opinion as to whether a prominent banker might have given Dr. Fishbaugh assistance in his financial difficulties. Complaint is also made that Judge Knight read depositions not introduced into evidence. But neither the statements charged to Judge Knight nor his reading of the depositions, if he did so, show bias or prejudice on his part. If a judge in finding facts falls into error by basing them upon inadmissible evidence, such an action may constitute sufficient ground for a reversal of the judgment upon appeal, but will not support a charge of disqualification under section 170 of the Code of Civil Procedure. McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 155 P. 86. The statement of disqualification was therefore properly stricken from the file. For the same reasons the order of December 3, 1936, denying the appellant's motion to disqualify Judge Knight, must be affirmed and it is so ordered.

However, the judgment is modified by striking therefrom the provision: "That by said agreements of July, 1933, the defendant became and is now obligated to the plaintiff to sell the properties hereinafter described within a reasonable time

after the 12th day of July, 1933; that at the time of the commencement of this action a reasonable time had not yet elapsed for the performance by the defendant of said obligation to sell said real properties." As so modified it is affirmed, respondent to recover costs on appeal.

We concur: WASTE, C. J.; SHENK, J.; GIBSON, J.; CURTIS, J.; CARTER, J.

HOUSER, Justice (dissenting).

I dissent.

Undeniably, the facts are that for and during a period of several weeks next preceding the execution of the two contracts which form the basis of the instant action, the various provisions of such contracts not only were the subject of negotiations and were thoroughly considered by each of the parties thereto, but also that the said provisions constituted the subject matter of each of several serious discussions that occurred between able and experienced counsel who represented the respective parties. Everyone who in any way was connected with the matter was completely familiar with each and every detail of the original contract as well as with each of the several provisions of the new contracts which thereafter were executed. No one was deceived nor was anyone misled by any representation which may have been made by defendant. The single circumstance that he may not have expressly divulged the fact that he had approximately $3,000 on deposit in a bank in no way operated to plaintiff's disadvantage, nor did it constitute a factor in her determination to enter into either of the agreements. That item of defendant's assets, considered in comparison with the total value of the properties and the other respective interests of the parties, was so small as to be regarded as insignificant and of no consequence as an inducement to the execution of the contracts. As a matter of record, in addition to the several advantages by which plaintiff benefited by reason of the provisions of the new contract, she received a cash consideration of $10,000. In such a situation, from a legal standpoint it was impossible that plaintiff could have been defrauded. In fact, the only ground (if any) upon which plaintiff's case may be rested is the asserted fact based on her testimony to the effect that she was induced to enter into each of the contracts by reason of the alleged fraudulent promise of defendant that he would remarry her. Although perhaps unnecessary of corroboration, no substantial evidence may be found in the record to support her testimony in that regard. To the contrary, following the date when, according to her testimony, defendant had promised to remarry her, the undisputed evidence discloses the fact that each and every letter, communication, or documentary evidence of any kind refutes the testimony that was given by plaintiff in that respect. Not only were the parties treating one with the other "at arm's length" but, practically, they were "at swords' points". At no time during the course of the negotiations when the respective attorneys were present was an asserted promise by defendant of remarriage to plaintiff even mentioned or hinted. Every scrap of evidence and every inference deducible from any source not only proclaim the unreliability of plaintiff's testimony in that regard, but also demand (without practicability of successful denial) that such testimony be regarded as unequivocally impeached. To my mind, far from being considered as substantial evidence of a promise by defendant to remarry her, plaintiff's testimony fails to provide even a "scintilla" of evidence in that regard. But conceding the possibility that such conviction may not be well founded, assuredly it is patent that plaintiff slept on such rights as at any time she may have possessed. As far as the record herein discloses, for two and one-half years plaintiff carefully guarded and safely kept her secret. To no one did she ever divulge the asserted fact of such a promise, save possibly to her present attorneys who assumedly were informed thereof shortly preceding the commencement of the instant action. If her claim was genuine, why was it not asserted at some time during the period when negotiations were pending, or at least within a reasonable time after it must have been apparent to plaintiff that defendant had no intention of ever remarrying her? The authorities are numerous to the effect that although a plea of the statute of limitations may not be available to a defendant, nevertheless if an unreasonable delay in bringing an appropriate action has ensued the defendant may successfully set up such a plea as a defense. In my opinion, by her laches plaintiff has estopped herself from the maintenance of the instant action.

The foregoing suggestions constitute my principal objections to the conclusion that has been reached in the prevailing opinion

herein; but the fact that other objections have not been here set forth should not be considered as conclusive or even as an indication that there are not several other equally valid and sufficient reasons why the judgment should be reversed.



15 Cal.2d 380

JOHNSON v. FONTANA COUNTY FIRE PROTECTION DIST. et al.

L. A. 17319.

Supreme Court of California.

April 15, 1940.

1. Municipal corporations ⇐961

A judgment against county fire protection district for injuries resulting from negligent operation of automobile by district employee acting in scope of his employment is a "cost of maintenance" within statute authorizing board of supervisors of district to levy taxes to defray cost of maintenance of district, if liability for such injury is imposed on district by law. St.1925, p. 672, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Cost of Maintenance".

2. Municipal corporations ⇐880, 883

The supervisors of county fire protection district act in a representative capacity and hold title to property of district for the use and benefit of the district and collect and pay out money of the district for benefit of district and in carrying out its purposes. St.1925, p. 671, § 5.

3. Municipal corporations ⇐724

A county fire protection district performs a "governmental function" in furnishing protection against fire. St.1925, p. 671, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Function".

4. Automobiles ⇐187

A county fire protection district is a "district established by law" within statute imposing liability on a district established by law for injury resulting from negligent operation of automobile by district employee acting in the scope of his employment. Civ. Code, § 1714½, now Vehicle Code, § 400; St.1925, p. 672, § 7.

5. Judgment ⇐584, 720

A "former adjudication" between the same parties may be either final determination of the rights of the parties or may be an adjudication of certain questions of fact which have been put in issue and decided.

See Words and Phrases, Permanent Edition, for all other definitions of "Former Adjudication".

6. Judgment ⇐720

A judgment operates as an estoppel to prevent the parties thereto or their privies from contending to the contrary as to a matter of fact which was found against them in arriving at the judgment.

7. Judgment ⇐702

A judgment for motorist suing county fire protection district for injury sustained in collision with automobile allegedly driven by district employee was res judicata in mandamus proceeding against county board of supervisors to compel levy of tax to pay judgment, of issue whether driver was employee of district, where supervisors were parties to mandamus proceeding only in their representative capacity as the governing body of the district, and the real parties in interest in motorist's action and mandamus proceeding were the same. St.1925, p. 671, § 5.

8. Judgment ⇐519

A judgment not appealed from became final and is not open to collateral attack by respondents in mandamus proceeding to compel payment thereof.

9. Mandamus ⇐180

The county board of supervisors being governing body of fire protection district within county and hence authorized to pay judgment against district, if there was money properly available therefor, or, if not, to levy tax for such purpose on taxable realty in district, judgment creditor was entitled to writ of mandamus to compel payment of judgment by such board, though it was erroneously assumed by terms of prayer for writ or those of alternative writ that district board of fire commissioners was or might be in existence and authorized to act for district in matter of such payment, especially where petitioner also asked relief against county board and general relief.

10. Mandamus ⇐180

A peremptory writ of mandamus may issue in appropriate case, though it cannot legally follow directions in alternative writ, where principles of justice and fairness require its issuance.

11. Mandamus ⇐187(7)

On appeal from judgment denying writ of mandamus to compel payment of previous judgment, respondents' motion for diminution of record to include original alternative writ, with judgment roll in action wherein previous judgment was rendered, will be denied, where Supreme Court concluded that petitioner was entitled to peremptory writ and considered effect of previous judgment as though judgment roll had been included in present record.

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Proceeding by Rolland J. Johnson against the Fontana County Fire Protection District and others for a writ of mandamus to compel payment of a judgment for petitioner against defendant district and another. From a judgment denying the writ, petitioner appeals.

Reversed with instructions.

For prior opinion, see Cal.App., 93 P. 2d 168.

A. J. Getz, of Los Angeles, for appellant.

Jerome B. Kavanaugh, of San Bernardino, for respondents.

Swing & Swing, of San Bernardino, for respondents Board of Supervisors.

Lasher B. Gallagher, of Los Angeles, amicus curiae.

HOUSER, Justice.

This is an appeal from a judgment denying petitioner's application for a writ of mandamus. The proceeding was instituted for the purpose of compelling the payment of a judgment which the petitioner theretofore had recovered against the Fontana County Fire Protection District, and against one George Calkins, asserted to be the agent or employee of the district.

A hearing was granted by this court after decision by the District Court of Appeal, on rehearing, in which that court upheld the judgment of the trial court denying issuance of a peremptory writ upon the ground that the peremptory writ, if issued, could not be made to conform legally to the exact terms of the alternative writ—the hearing having been granted herein in order to give further consideration to the several questions presented on the appeal. After a review of the entire record we conclude that the first opinion prepared by the District Court of Appeal, 87 P.2d 426, and filed on February 8, 1939, correctly expresses the views of this court with respect to the principal issues presented by the appeal. Therefore, we shall incorporate hereinafter, as a part of this opinion, certain portions of the language of that decision.

It appears that on May 23, 1923, an act of the legislature (Stats.1923, p. 431) with relation to the organization and maintenance of fire protection districts was approved by the governor, and in due course thereafter became the law of this state.

Briefly, as far as here seems essential to be noted in that respect, the provisions of the act authorize the board of supervisors of any county of the state to proceed in a specified manner toward the formation and organization of fire protection districts within the county; and in the event that any objection be made to the proposed creation of any fire protection district, the board is authorized to call and conduct an election by the qualified voters of the proposed district on the question whether the organization and establishment of such district shall become effective. The act also provides that the board of supervisors "shall be the governing body" of the district; and among the various powers and duties of such body as are therein specified is included the right to appoint "agents and employees * * * to police the district", and *"to perform all other acts necessary or proper to accomplish the purposes"* of the act. Section 5. (Emphasis added.) By the terms of the act the said governing body is also authorized "to maintain and operate the property acquired for the purposes of the district", as well as to "acquire real or personal property needful for the purposes of said district and to dispose of the same when no longer needed",—the title to such properties to be vested in the county in which such district is located. Furthermore, power

is conferred upon the board of supervisors to levy taxes on the taxable property in the district to defray the cost of maintenance and other expenditures of the district; and, in specified circumstances, procedure is outlined for the dissolution of the district, the determination of which is effected by a majority vote of the voters of the district,—and for the disposition of the property of the district in the event of such dissolution.

In 1925 (Stats.1925, p. 671) the original act was amended, by which it was provided that the board of supervisors be retained as the "governing body" (section 2) of a fire protection district, also that the said board might appoint five commissioners as its agents to manage the affairs of the district and to exercise any or all of the powers therein specified.

However, by a further amendment to the act noted in statutes of 1931, page 1599, the provision which related to the appointment by the board of supervisors of "five commissioners as its agents to manage the affairs" of the district was deleted from the act,—which alteration had the probable effect of restoring the pertinent original provisions of the act with respect to the management of the district by the said board.

Pursuant to such statute and the 1925 amendment hereinbefore referred to, on April 16, 1928, the board of supervisors of San Bernardino county adopted a resolution by which it was declared that the respondent Fontana County Fire Protection District had been duly established; and thereafter, on April 20 of the same year, the said board of supervisors appointed a board of fire commissioners for that district,—the members of which board assumed office and thereafter continued to serve in their appointive capacity as such board of fire commissioners for the district, at least up to and including the date of the commencement of the action against Calkins and the district which resulted in the rendition of the judgment here sought to be enforced.

With regard to the last-mentioned judgment, it appears that on or about October 3, 1935, appellant herein, as plaintiff, commenced an action in the superior court of San Bernardino county against George Calkins, the Fontana County Fire Protection District, the county of San Bernardino, and others (as to whom the action was later dismissed), to recover a judgment for damages asserted to have arisen from personal injuries alleged to have been sustained by plaintiff through the negligence of defendant Calkins in the operation of a certain "Willys Knight" automobile. The complaint filed therein contained allegations to the effect that "the defendant, The Fontana County Fire Protection District, * * * was, and now is, a body politic and a district organized and existing pursuant to a statute of the State of California, approved May 23rd, 1923; Statutes of 1923, Page 431 thereof, as amended"; also that the defendant, George Calkins, was the owner of the aforementioned automobile "and that at all times herein mentioned, * * * the Defendant George Calkins was an officer, agent and employee of the said District, * * * and was driving and operating the said 'Willys Knight' [automobile] within the scope of his office, agency and employment as such officer, agent and employee * * * and on behalf of said District * * * and with the knowledge and consent of [the latter]". By its answer to said complaint the defendant Fontana County Fire Protection District specifically admitted the truth of each and all of said allegations.

On the trial of the mandamus action, the following facts were stipulated: That before the former action came to trial it was dismissed as against the county of San Bernardino; that the defendants George Calkins and the fire protection district appeared at the trial, pursuant to which a judgment for $3,500 and costs was entered in favor of plaintiff and against George Calkins and the said district; that the judgment had become final as no appeal therefrom had been taken; and that "said George Calkins was, at the time of said collision, acting as a volunteer fireman for said Fontana County Fire Protection District, by appointment of one Earl Reeves, who was then and there acting in the capacity of Fire Chief of the Fontana Volunteer Fire Department; that said Earl Reeves was acting as such Fire Chief under appointment by the aforementioned Fire Commissioners".

The answer of the several respondents herein to the petition for the writ of mandamus discloses the fact that their principal defense and objection to its issuance consisted in the alleged invalidity of the judgment which theretofore had

been rendered in favor of plaintiff against the Fontana County Fire Protection District,—for the reason, as asserted by them, that the district is not "an entity against which such a judgment can be rendered, and that there is no provision in law for the rendition of such a judgment against said Fontana County Fire Protection District predicated upon the negligence of said George Calkins, and that the records and proceedings in [the] action show upon their face that the said judgment is void"; also for the asserted reason that "there is no provision in law for collecting any such judgment against said Fontana County Fire Protection District", it not being "a body politic or a district which can be sued * * *." By amended answer to the petition for the writ, certain of the respondents further alleged, in addition to the foregoing, that "the said 'Fontana County Fire Protection District' is not * * * a public corporation, a body politic or *a district established by law,* or a subdivision of the State of California, * * *"; also "that the said George Calkins was not * * * appointed by the Board of Supervisors as an agent, officer or employee of said Fontana County Fire Protection District, and upon information and belief these respondents allege that at no time mentioned in said complaint was said George Calkins an officer, agent or employee of said Fontana County Fire Protection District, nor was he at any of the times mentioned in said complaint acting within the scope of any agency or employment under said Fontana County Fire Protection District, and that if he were then assuming to so act, he was doing so without authority and without being appointed, employed or authorized so to do". (Emphasis added.)

The trial court made its findings of fact and conclusions of law strictly in accordance with the said defense of the respondents to the writ, in that its findings of fact recited "that the said Fontana County Fire Protection District is not a body politic, nor is it a county or a city; nor is it a district against which any suit or action can be maintained or prosecuted; that said Fontana County Fire Protection District has no legal entity, nor legal status as an entity, and had no authority to employ agents or servants, nor to contract any liability, either directly or indirectly, for which such district would be liable; that no provision has been made in law or otherwise for the payment of any judgment rendered or entered against such district"; furthermore, "that there is no statute or law which authorized the bringing or prosecution of the action by petitioner against Fontana County Fire Protection District, in which action the aforesaid judgment was rendered, and that such judgment is without force or effect insofar as said district is concerned". In other words, the respondents to the petition alleged, and the trial court found and declared as its conclusions of law, that Fontana County Fire Protection District was not a body politic nor a legal entity; that it had no authority to employ agents or servants; and that, as such, no suit or action might be maintained or prosecuted against it. In accordance therewith the trial court rendered the judgment which is the subject of the instant appeal, to wit, that the petitioner was "not entitled to the relief prayed for and that the application for a writ of mandamus be denied, * *."

We here quote from the first decision of the District Court of Appeal hereinbefore referred to (reported in 87 P.2d 426, 429), which includes further consideration of the points raised on this appeal by the respective parties:

[1] "The [respondents contend] that nothing in the act, pursuant to which the district was formed, authorized the supervisors to levy a tax for the purpose of paying such a judgment as the one here in question. That act, however, makes the board of supervisors the governing body of such a district with the right to appoint agents and employees to carry out the purposes of the district to acquire real and personal property needful for such purposes, and to perform all other acts necessary or proper to accomplish the purposes of the act. The board of supervisors are also authorized to levy a tax sufficient to defray *the cost of maintenance* of the district. One of the costs of maintenance would be a judgment of this nature, arising from the manner in which the operations of the district are carried on, if liability therefor is imposed upon the district by statute. Section 1714½ of the Civil Code, now section 400 of the Vehicle Code, imposed liability on a *'district established by law'* for negligence in the operation of any motor vehicle owned by the district and for

any injury occurring as the result of the negligent operation of any other motor vehicle by any officer, agent or employee of the district when acting within the scope of his office, agency or employment, and further provides that any such injured person may sue any 'district established by law'. If the district here in question is a district established by law, within the meaning of this statute, it is liable for the negligence of its agents and employees, the amount for which the district is thus liable is a part of the cost of maintenance of the district, and the authority and duty of the supervisors to levy a tax sufficient to cover the same sufficiently appears from the act under which the district was created and the statute imposing liability.

[2-4] "The next question presented is whether this district is one established by law within the meaning of the statute. The [respondents contend] that such a district is not an entity which can be sued because it has no autonomy, performs no functions in its own name, owns no property, has no money, and as a district pays no part of the cost or expenses incurred for fire protection. It is argued that the formation of such a district is simply a means of designating the exterior boundaries of property that requires fire protection and which will be assessed for that purpose, that the board of supervisors has complete control, the owners of property within the district have no voice as to how the district shall be managed or how fire protection shall be provided, and that such a district is analogous to a street improvement district created only to bear the burden of the cost of street improvements but which has no separate entity and which cannot be sued.

"The act under which the district was organized provides that such a district can be established and dissolved only upon the vote of the people of the district. While the supervisors are the governing board of the district and hold title to its property they act in a representative capacity and hold this property for the use and benefit of the district. While they handle the money of the district they collect and pay out this money for the benefit of the district and in carrying out its purposes. There is not much similarity between such a district and an assessment district which carries on no continuous function and exists solely for the purpose of paying for a public improvement. In a very real sense the district is not only performing functions but performing a well recognized governmental function in furnishing protection against fire. The very purposes for which the district is organized call for a continuing exercise of this governmental function which involves the use of property, including automobiles to be operated upon the public highways. The district is not only established pursuant to law but the purposes of its establishment necessarily contemplate the use of necessary equipment and the carrying out of these operations requires, under present conditions, the use of automobiles. Negligence in the use of automobiles by various governmental agencies led to the adoption of section 1714½ of the Civil Code, the terms of which are now found in section 400 of the Vehicle Code. There is no essential difference between the operation of an automobile by the agent or employee of a fire protection district and the operation of such a vehicle by an agent or employee of one of the other governmental agencies named in the statute. The statute was aimed at a condition existing, and which might exist, on the highways and the language used, 'district established by law', is broad enough to include the district here in question. The legislature must have intended to impose liability for the negligence of its agents in the use of automobiles on such a district as this which is created pursuant to a statute, and which uses agents and automobiles in the continuous performance of a governmental function.

"In an amended answer the respondent supervisors alleged that George Calkins was not an agent or employee of the district and the court so found. The appellant contends that the court's finding and conclusion in that regard are erroneous since the fact Calkins was an agent and employee of the district was judicially determined in the damage action, to which the district was a party, and that such previous determination of that fact is res adjudicata in this proceeding. It is [respondents'] position that the implied finding of the jury in the former action, that Calkins was an employee of the district, is overcome by the court's finding in this proceeding and

that the question of whether or not Calkins was an agent or employee of the district was open for consideration in this proceeding because of the above-mentioned stipulation to the effect that Calkins was at the time acting as a volunteer fireman under appointment by one Earl Reeves, who was acting as fire chief under appointment by the five commissioners. If the question was an open one it may be conceded that the stipulated facts with respect to the appointment of Calkins support the court's finding. This is especially true since the power of the supervisors to delegate certain of their duties to appointed fire commissioners was probably ended in 1931, when the provision authorizing the appointment of commissioners and the delegation of duties to them was stricken from the statute. The question, however, was not an open one merely because of the stipulation above referred to. The parties simply stipulated as to certain facts relied upon by them respectively, and it was in no way stipulated that any particular fact should be controlling in the face of other facts which were also stipulated. Whether or not the previous judgment, with its implied finding of agency, was controlling here must depend upon general rules of law applicable to that question.

[5, 6] "A former adjudication between the same parties may be either a final determination of the rights of the parties or may be an adjudication of certain questions of fact which have been put in issue and decided. People v. Bailey, 30 Cal.App. 581, 158 P. 1036. A judgment operates as an estoppel to prevent the parties thereto or their privies from contending to the contrary as to a matter of fact which was found against them in arriving at the judgment. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73; Baker v. Eilers Music Co., 175 Cal. 657, 166 P. 1008; Gage Canal Co. v. East Riverside Water Co., 180 Cal. 204, 180 P. 332.

"In the matter now before us it appears that the district was made a defendant in the previous damage action, in which it was alleged that Calkins was an agent and employee of the district. The district admitted this fact in its answer and the judgment against the district, which followed, could only have been based upon that fact. While the supervisors, as the governing board of the district, were not made parties to the former action, the district appeared and defended the action, specifically admitting that Calkins was at the time an agent of the district and acting within the scope of his employment. We think it may not be successfully contended that the real parties in interest were not the same in that action and in the present proceeding. While the supervisors are made parties to this proceeding it is fully apparent that they are parties thereto only in their representative capacity, as the governing board of the district. In Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387, 392, the court said:

"'Appellants make the point that, inasmuch as the former suits were in reality County of Los Angeles v. [Dodge], Chairman of the Board of Supervisors and City of Los Angeles v. [Snyder], Mayor [51 Cal.App. 492, 197 P. 403], the rule should not apply. If, however, fraud and collusion be absent, the public interest may be as well represented by the mayor or chairman of the board of supervisors as by any set of taxpayers. For example, the fact that a man has been elected mayor of the city is no reason to suspect that he will not properly represent the public interest, and when such officer defends an action relating to a public contract, no reason can be found why he may not be a suitable, if not the most suitable, representative of the public interest in the matter. This very question was raised in State ex rel. Davis v. Willis, 19 N.D. 209, 124 N.W. 706. There the estoppel by judgment was made to rest upon the case of State ex rel. McCue v. Blaisdell, 18 N.D. 31, 119 N.W. 360, which was a suit by the Attorney General applying for a writ of certiorari against the Secretary of State, and in this connection the court, in disposing of the contention that the taxpayer was not a party to the suit, said: "Appellant urges, however, that he is not bound by any of the facts adjudged in that proceeding, for the reason that he was not a party thereto, and that the record of that proceeding nowhere discloses any connection of his with that case. It is apparent, however, that plaintiff, acting as he does in a representative capacity, is, constructively at least, a party to any action or proceeding in which the same interest was plaintiff. * * * Standing as he does as representative in a matter of general interest

to all of the citizens of Ward county, he is concluded with reference to any state of fact which was or might have been adjudged against that interest in a former action in which the same interest was plaintiff or defendant."'

"In Servente v. Murray, 10 Cal.App. 2d 355, 52 P.2d 270, 272, it is said: 'The identity of the issue and the determination thereof is of more importance than the identity of the parties named. If they hold the same rights of interest as principals, agents, or representatives and are in fact adverse parties, or their interests are adverse in the two proceedings, the identity of the parties is sufficient. In the present case the identity of the petitioner is identical with the petitioner in the prior proceeding. In the first action there was an adjudication against the members of the pension board of the city of Alameda consisting of the city manager, mayor, and treasurer ex officio. The present action was instituted against the mayor, city manager, treasurer, auditor, and chief of police of the same city. The respondent officers in each case were the agents of the municipality and equally bound by the original judgment. * * * In each proceeding the respondents were merely the representatives of the real adverse party, the municipality. Special circumstances may arise making this rule inapplicable, but generally a political subdivision and the officers, boards, commissions, agents, and representatives thereof form but a single entity. Price v. Sixth District Agricultural Assn., supra, 201 Cal. 502, at page 513, 258 P. 387; Davidson v. Baldwin, 2 Cal.App. 733, 84 P. 238; Bernhard v. Wall, 184 Cal. 612, 194 P. 1040; People v. Holladay, 93 Cal. 241, 29 P. 54, 27 Am.St.Rep. 186.'

[7] "We think these principles apply here and that the previous judgment was controlling on the question of whether or not Calkins was an agent of the district, and that such a question was not open to consideration in the mandamus proceeding." (Emphasis added.)

[8] Additionally, as hereinbefore has been stated, as no appeal was taken from the original judgment it long since had become final and, in accordance with the above rulings, it is not now open to what amounts to no more than a collateral attack by the respondents herein.

[9, 10] From the foregoing, therefore, it becomes apparent that, notwithstanding the question with respect to the existence or nonexistence of the board of fire commissioners at the time the action was originally instituted, the board of supervisors nevertheless was the governing body of the respondent district and, as such, had full authority to pay plaintiff's judgment if there was money properly available therefor,—or, if funds were not available, to levy a tax for that purpose upon the taxable real property within the district. The obvious purpose of the mandamus proceeding was to enforce the payment of petitioner's judgment, and as he had a substantial right to protect we should not deny him relief for the reason that either by the terms of his prayer, or by those of the alternative writ, it was assumed that the board of fire commissioners was or might be then in existence and possessed of the authority to act for or on behalf of the district in the matter of the payment of said judgment. In that regard it appears that petitioner also asked relief against the duly constituted board, to wit, the board of supervisors. Furthermore, it appears that the prayer of the petitioner contained a request for general relief. In a proper case this court may pursue the *exception* to the general rule that a peremptory writ will not issue where it legally cannot follow the directions set forth in the alternative writ. Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann.Cas.1917D, 670. Where principles of justice and fairness may require its issuance, the writ may issue in an appropriate case despite the provisions of the alternative writ.

Accordingly, it follows that the judgment is reversed, with instructions to the trial court to issue a peremptory writ of mandamus directed to the board of supervisors of San Bernardino county as the governing board of the Fontana County Fire Protection District, requisitioning the county auditor of San Bernardino county to draw a warrant upon funds of the said Fontana County Fire Protection District for payment of the judgment herein mentioned together with interest for the period and in the amount set forth in the alternative writ; directing the county treasurer to pay such warrant if there be sufficient money in the county treasury to the credit of the said

fire protection district not otherwise appropriated; or, if there be insufficient funds to pay the said warrant, directing the board of supervisors to include the amount of such unpaid judgment, with interest and costs, in the next tax levy made or to be made by the said board on the taxable real property within the limits of the said fire district, and that the said county treasurer be ordered to pay the said warrant when such tax so levied is collected.

[11] Respondents herein also have filed a motion for diminution of the record to have included as a part of the present record (1) the original alternative writ issued in the present action, together with (2) the judgment roll in the former action entitled Johnson v. Calkins, No. 38967. In view of the conclusions arrived at hereinbefore respecting appellant's right to have issued a peremptory writ in accordance with the terms and in the manner heretofore indicated, and since the court in the present action has considered the effect of the said former judgment (No. 38967) the same as though the judgment roll therein had been included in the present record, the said motion for diminution is denied.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; GIBSON, J.; CARTER, J.; SHENK, J.



15 Cal.2d 472

WING v. FOREST LAWN CEMETERY ASS'N et al.

L. A. 16777.

Supreme Court of California.

April 30, 1940.

1. Cemeteries ⇐5

The statute, as it existed in 1929, authorizing cemetery corporations to acquire lands which should be held exclusively as cemeteries for burial of the dead did not impose perpetual restrictions on the free use of real property, but merely granted corporate powers, the exercise of which could be questioned only by the state in quo warranto proceedings. Civ.Code, § 608.

2. Contracts ⇐167

All applicable laws in existence when an agreement is made form a part thereof as fully as though expressly incorporated in its terms, but such rule should be limited to those laws which are applicable and which affect the validity, construction, discharge or enforcement of the contract, and application thereof should not be extended to lengths which approach absurdity.

3. Cemeteries ⇐5

The statute, as it existed in 1929, authorizing cemetery corporations to acquire lands which should be held exclusively as cemeteries for burial of the dead, did not, if it were assumed that terms of the statute were in effect incorporated in deed to burial lot, prohibit operation of a mortuary business on the premises. Civ.Code, § 608.

4. Cemeteries ⇐15

Cemetery lands may be used for such purposes as are incident to the burial of the dead, so long as the rights of the lot owners in their own lots and the rights of egress and ingress thereto are not invaded.

5. Deeds ⇐94

A deed is the final and exclusive memorial of the intention and rights of the parties.

6. Covenants ⇐49

Any provisions of an instrument creating or claimed to create a restrictive negative easement will be strictly construed, any doubt being resolved in favor of the free use of the land.

7. Covenants ⇐68

A deed by which it is sought to establish an equitable servitude must contain a proper expression of intent to create an equitable easement and some designation or description of the dominant tenement.

8. Covenants ⇐49

The mere imposition by grantor of restrictions on lands of grantee would not impliedly place the same restrictions on lands retained by grantor.

9. Cemeteries ⇐15

A recital in deed to burial lots that restrictions placed on the lots of grantee might be enforced by other owners of burial space in the cemetery did not create a reciprocal negative easement, in absence of reference to a common plan of restriction, or of covenant between grantor and grantee that lots being conveyed by grantor or subsequently

to be conveyed would be subject to any such plan.

10. Cemeteries ⇐15

A deed to burial lots in private cemetery did not convey to grantee a restrictive negative easement against maintenance by cemetery corporations of a mortuary business on the cemetery premises because of recitals therein that lots were conveyed for interment purposes only and that deed was one of a series of like purport, the covenant in which should run with the property and be enforceable by lot owners, in absence of a designation of a dominant tenement or expression of general plan of which instant conveyance was a part.

11. Cemeteries ⇐15

The owner of burial space in private cemetery was not entitled to maintain action to enjoin operation on premises of the cemetery of a mortuary business which did not violate any restrictive covenant in owner's deed, in absence of allegation of facts showing irreparable or probable injury from operation of the business.

12. Cemeteries ⇐15

If deed to burial space in private cemetery created a valid equitable easement, enforcement thereof would be governed by equitable principles.

13. Appeal and error ⇐959(1)

Where proposed amended complaint failed in the same respect as original to state facts sufficient to constitute a cause of action, the Supreme Court would not interfere with denial of motion to file proposed amended complaint.

14. Appeal and error ⇐959(1)
Pleading ⇐236(1)

The privilege of amending a complaint rests in the sound discretion of the trial court and will not be disturbed in absence of a showing of gross abuse.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Helen S. Wing against the Forest Lawn Cemetery Association and others to enjoin the operation of a funeral director's and embalming business on the premises of the Forest Lawn Memorial Park, a private cemetery located in Los Angeles county. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Michael F. Shannon, Thomas A. Wood, and Charles W. Wolfe, all of Los Angeles, for appellant.

Call & Murphey and Robert B. Murphey, all of Los Angeles, for respondents.

Raymond Brennan and Byron C. Hanna, both of Los Angeles, Sullivan, Roche & Johnson, of San Francisco, Ed. P. Sample, of San Diego, and Hanna & Morton, of Los Angeles, amici curiæ.

CARTER, Justice.

This is an appeal from a judgment of dismissal entered upon an order sustaining a demurrer in an action brought by an owner of burial space in Forest Lawn Memorial Park, a private cemetery located in Los Angeles county, to enjoin the operation of a funeral director's and embalming business on the premises of said cemetery. Defendant's demurrer to plaintiff's original complaint was sustained without leave to amend. Plaintiff then moved to file a proposed amended complaint, but said motion was denied on the ground that the proposed amended complaint contained no new or different facts sufficient to constitute a cause of action. Thereupon, there was entered the judgment from which plaintiff herein appeals.

It is alleged in plaintiff's complaint that on May 11, 1929, she purchased from the Forest Lawn Memorial Park Association two lots, for interment purposes only, and that in violation of a restrictive negative easement contained in the deed thereto, the defendant corporations are now maintaining a mortuary business on the premises of said Forest Lawn Memorial Park.

Plaintiff's claim to a restrictive negative easement is predicated on (1) the provisions of section 608 of the Civil Code as in effect at the time of the execution of her deed, and (2) the wording of said deed. Defendants deny that any restriction as to the operation and management of a mortuary arises either from said deed or said statute, and contend that plaintiff in her complaint has stated no cause of action.

The questions requiring our consideration are whether the complaint alleges facts showing the existence of such a restriction, and if so, whether a violation of the same should be relieved by the issuance of an injunction.

Numerous authorities are cited by plaintiff to the effect that parties are presumed to contract with reference to laws in existence at the time a contract is made and

that statutes pertinent to the subject of an agreement enter into and become as much a part of it as though the language were incorporated in its terms. Basing her argument on these premises, plaintiff asserts that when the deed to her lot was executed in 1929, the use to which cemetery corporations could put their lands was limited to the burial of the dead by the language of Civil Code, section 608. The portion of said section from which she makes this deduction is as follows: "Corporations organized to establish and maintain cemeteries may take, by purchase, donation, or devise, land, not exceeding three hundred and twenty acres in extent, in the county wherein their articles of incorporation are filed, or in an adjoining county, and may employ any surplus moneys in the treasury thereof for such purpose; such lands to be held and occupied exclusively as a cemetery for the burial of the dead. * * *"

[1, 2] Defendants on the other hand point out that said section, as it existed in 1929, was a part of that division of the Civil Code which dealt with the incorporation and powers of various types of corporations, and contend that said section was not intended to be a declaration of the legislature imposing perpetual restrictions on the free use of real property, but merely a grant of corporate powers, the exercise of which can be questioned only by the state in a quo warranto proceeding. Support for this view of the statute is found in the case of Odd Fellows' Cemetery Association v. San Francisco, 140 Cal. 226, at page 232, 73 P. 987, at page 988, where this court said:

"The provisions of the act of 1859 for the incorporation of rural cemetery associations (St.1859, p. 281, c. 267), which are substantially reenacted in sections 608 to 616 of the Civil Code, are cited as general laws conflicting with this ordinance. *Section 4 of the act, and section 608 of the Civil Code, give such corporations power to take and hold, within the county, lands, not exceeding 320 acres in extent, to be held and occupied exclusively for cemeteries.* This is a grant of power to such corporations to own property, and the limitation of the amount that may be acquired, and of the uses to which such property may be devoted." See, also, Estate of Gay, 138 Cal. 552, 557, 71 P. 707, 94 Am.St.Rep. 70, and Application of Laurel Hill Cemetery Association, 73 Cal.App. 193, 198, 238 P. 732.

We are inclined to agree with this contention of the defendants, although mindful of the rule as it has been stated that "all applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms". Gally v. Wynne, 96 Cal.App. 145, 148, 273 P. 825, 826. This rule, however, should be limited to those laws which are "applicable" and which affect "the validity, construction, discharge, or enforcement of the contract" (Burke v. Meyerstein, 94 Cal.App. 349, 353, 271 P. 343, 345; Connecticut Mutual Life Ins. Co. v. Cushman, 108 U.S. 51, 2 S.Ct. 236, 27 L.Ed. 648, 653; Rosenplaenter v. Prov. Savings Life Assur. Soc., 6 Cir., 96 F. 721, 727, 46 L.R.A. 473), and care should be taken that its application is not extended to lengths which approach absurdity.

[3, 4] Nevertheless, assuming for the purposes of this opinion only, that the terms of said section were in effect incorporated into plaintiff's deed to interment space in her burial lots, we do not find that the operation of a mortuary is inconsistent with the holding and occupying of land *"exclusively as a cemetery* for the burial of the dead".

In her interpretation of its meaning, plaintiff would transpose this clause to read that such land must be occupied "as a cemetery *exclusively* for the burial of the dead", rather than as adopted by the legislature where the words "burial of the dead" are used in a manner descriptive of the word "cemetery" without reference back to the word "exclusively". That such an interpretation has previously been placed on the same clause by this court is indicated by the italicized portion of the above quotation from the case of Odd Fellows' Cemetery Association v. San Francisco, supra.

Cemeteries have always been and are now used primarily for the burial of the dead, but portions of cemetery properties have likewise been used for numerous other incidental purposes, such as greenhouses, nurseries, chapels, administration buildings and tool houses. In many instances these and other practices have received judicial approbation. For instance, in the case of State v. Lakewood Cemetery Ass'n, 93 Minn. 191, 101 N.W. 161, 162, a corporation organized under a statute similar to Civil Code section 608, which provided that a cemetery association might purchase land

not exceeding three hundred acres in area "to be held, actually used and occupied exclusively for a cemetery for the burial of the dead, and for purposes necessary or proper thereto" (Gen.Laws Minn.1901, c. 220, § 1); it was stated at page 163 of 101 N.W. that:

"The use of a small portion thereof for a greenhouse for the purpose of growing flowers and plants to be used in beautifying the grounds, clearly, in our judgment, falls within the authority conferred upon appellant. It is a matter of common knowledge that greenhouses are maintained by many of the large cemetery associations throughout the country, and the sale of a small amount of the surplus stock is but an incident to the general management. We are of the opinion the land so acquired is exempt from taxation."

Likewise, in Dries v. Charles Evans Cemetery Co., 109 Pa.Super. 498, 167 A. 237, 238, wherein the cemetery company, a nonprofit organization, was created by a special charter permitting it to own land for "a burial cemetery", it was held that the company had the implied power to buy and sell stone vaults to its lot owners, the court saying that "the essential purpose in the institution of the cemetery and the subsequent conveyance to lot owners is to provide for the burial of the corpse, and that the form or material of the container is an incident thereof" and that "the cemetery company had a right, without profit, to transact, in addition to maintaining their main purpose, such subordinate and connected matters which fit in essentially or are at least convenient to the due prosecution of the chartered purposes".

In State v. Lakewood Cemetery, 197 Minn. 501, 267 N.W. 510, 511, a cemetery corporation whose articles of incorporation permitted the erection of a "suitable chapel and office building, and *other structures that may be essential or proper for carrying out in the best manner the purposes of the association*" erected a building of which a part was used as a toolhouse, another part as an incinerator, and the remaining portion for the making and storing of wooden and concrete vaults. The court therein gave its approval to these activities in the following language:

"That the actions of the defendant * * * are being performed properly and legally by the defendant, and that the defendant, in engaging in the manufacture and sale to its own lot owners of wooden and concrete burial vaults has been and is acting entirely within its corporate rights and powers."

Manifestly the operation of a mortuary where bodies are prepared for interment or cremation is a much closer and more intimate incident of burial than the activities above referred to. We therefore conclude that cemetery lands may be used for such purposes as are incident to the burial of the dead, so long as the rights of the lot owners in their own lots and their rights of egress and ingress thereto are not invaded. Vesper v. Forest Lawn Cemetery Association, 20 Cal.App.2d 157, 163, 67 P.2d 368; Certia v. U. of Notre Dame Du Lac., 82 Ind. App. 542, 141 N.E. 318.

Plaintiff's second contention is that the deed to her two burial lots conveyed to her a restrictive negative easement in all lands retained by the grantor and in the lots to be subsequently conveyed by it to other grantees.

An examination of said deed reveals that two lots were conveyed to Helen S. Wing "for interment purposes only". The deed further stated:

"All right, title and interest of said Grantee in and to said premises is, and at all times shall be subject to the following conditions, exceptions, reservations, and restrictions, to-wit:

"(a) That said premises shall be used for interment purposes only."

Following the enumeration of several other such conditions, exceptions, reservations and restrictions is the statement which forms the principal basis for plaintiff's claim to a restrictive easement and the only portion of said deed which we deem it necessary to discuss:

"This is one of a series of conveyances of like purport and effect, the restrictions, covenants and conditions hereinabove expressed shall be and be deemed to be covenants running with the property and enforceable not only by the cemetery association in charge of said Memorial Park, but also by any individual owner or owners of burial space therein."

It is plaintiff's position that said paragraph indicated that the land was being sold under a common plan—and that it created an equitable easement or servitude in all other lands retained or sold by the defendant cemetery corporations. Defendants contend that the first clause—"This is one of a series of conveyances of like purport and effect"—is merely a

recital and not a covenant on the part of the grantor to do or refrain from doing anything; that the next clause—"and the restrictions, covenants and conditions hereinabove expressed shall be and be deemed to be covenants running with the property"—refers only to those restrictions imposed on the burial space conveyed to the grantee by the deed; and that the succeeding clause that said restrictions are to be "enforceable not only by the Cemetery Association in charge of said Memorial Park, but also by any individual owner or owners of burial space therein" is solely for the purpose of making the grantee's covenant enforceable not only by the grantor but by the owners of burial space as third party beneficiaries.

Viewing this paragraph in the light of the decisions in this state, it cannot be said that there was thereby created a valid equitable easement in the lands retained by the grantor or to be afterwards conveyed by it.

[5, 6] The law is well settled in California, that the deed is the final and exclusive memorial of the intention and rights of the parties. Martin v. Holm, 197 Cal. 733, 742, 242 P. 718; Werner v. Graham, 181 Cal. 174, 185, 183 P. 945; Berryman v. Hotel Savoy Co., 160 Cal. 559, 566, 117 P. 677, 37 L.R.A., N.S., 5; McBride v. Freeman, 191 Cal. 152, 156, 215 P. 678. Furthermore, any provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land. Werner v. Graham, 181 Cal. 174, 181, 183 P. 945; Firth v. Marovich, 160 Cal. 257, 116 P. 729, Ann.Cas.1912D, 1190; Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677, 37 L.R.A.,N.S., 5; Bresee v. Dunn, 178 Cal. 96, 172 P. 387.

[7] Werner v. Graham, 181 Cal. 174, 183 P. 945, 948, has often been cited as the leading case in this state defining the manner in which an equitable servitude may be established. That case makes it requisite not only that the deed contain (1) a proper expression of intent to create an equitable easement; that is, reference to a common plan of restriction or indication of an agreement between the grantor and grantee that the conveyed lot be taken subject to some such plan, but also (2) "some designation or description of what is an essential factor, namely, the dominant tenement".

Measured by these standards it can scarcely be said that an equitable easement was created by plaintiff's deed. Certainly, there is no description of a dominant tenement which is to be benefited by the restriction placed upon the property of the grantee. The importance of describing with certainty the property to be affected by a restrictive easement has been commented on by Professor William Edward Burby in 10 So.Cal.Law Rev. 281, at p. 289, n. 21, thusly:

"The desirability of adhering to the rule announced in Wagner v. Hanna [38 Cal. 111, 99 Am.Dec. 354] (cited in Werner v. Graham, supra,) in connection with the creation of equitable easements, seems apparent. There should be some written evidence, either in the form of a plat or otherwise, delineating or pointing out the extent of the property affected by the restrictions. A more extensive area is usually involved in the case of equitable easements than is the case in the creation of legally enforceable easements. As a matter of policy, the understanding of the parties should be definite and clear, and should not be left to mere conjecture. Property described in the deed creating the equitable easements, and no other property should be affected thereby."

Clearly, the recital that "This is one of a series of conveyances of like purport and effect" designates no dominant tenement, refers to no map, plat or tract or otherwise indicates the location or extent of the land which is to be affected by the restrictions set forth in the grantee's deed to her property. Although the grantor by the terms of said deed imposed numerous restrictions on the lots conveyed to the grantee, it in no wise bound itself to impose restrictions on any which may have been retained by it, or to convey other property which it may have held subject to the same or similar restrictions or to do anything in favor of the property of the grantee.

A similar situation was presented in the case of Kuhn v. Saum, 316 Mo. 805, 291 S.W. 104, at page 105, wherein the supreme court of Missouri said:

"The next inquiry is whether the deed from the St. Louis Improvement Company to respondent imposed a negative easement in favor of the grantee on the remaining lands of the grantor, which included the lot subsequently purchased by appellants. In this connection it will be

noted that all the covenants in that deed, which may be termed restrictive, were made on the part of the grantee. The grantor made none. That fact, standing alone, shows prima facie that the restrictions were imposed solely for the benefit of the grantor's remaining land. Consequently, if the grantor made use of his remaining land which did not conform to such restrictions, his grantee had no ground of complaint. And if the grantee could not compel his grantor to observe the restrictions, he could not compel a subsequent grantee to do so. Beattie v. Howell, 98 N.J.Eq. 163, 129 A. 822. However, the deed from the St. Louis Improvement Company to respondent expressly provided that the restrictions were made 'for the mutual benefit of all parties purchasing lots by similar conveyances from this grantor.' But the grantor on its part did not covenant to make similar conveyances of the other lots, or any of them, and he did not make a similar conveyance to appellants' grantor."

[8] Therefore, it cannot be said that by the mere imposition of restrictions on the lands of the grantee, the grantor impliedly placed the same restrictions on lands retained by it.

[9] It is true that the deed stated that the restrictions placed on the land of the grantee might be enforced against the land of the grantee by other owners of burial space in Memorial Park, but said statement did not have the effect of creating a reciprocal negative easement. There is no reference to a common plan of restrictions; no indication that one is in existence or no covenant between the grantor and grantee that lots being conveyed by the grantor to the grantee or subsequently to be conveyed to other grantees will be subject to any such plan and no covenant or warranty can be implied from the mere recital that "This is one of a series of like purport and effect." O'Sullivan v. Griffith, 153 Cal. 502, 506, 95 P. 873, 96 P. 323.

The recent case of Moe v. Gier, 116 Cal.App. 403, 2 P.2d 852, 853, is in point. The owner of a tract of land subdivided it into lots, mapped the same and sold many of the lots. Some of the deeds contained building restrictions and stated that the right to enforce same should "run to each owner of any lot described on the aforesaid map". However, in the words of the court (116 Cal.App. page 406, 2 P.2d page 853):

"Many of the deeds are silent relative to restrictions, and, except for the provision above set forth as to certain lots, it is not stated that the land conveyed by the deed is a part or portion of a larger tract, or that the restrictions contained in the deeds are for the benefit of other lands, nor was there in any of the deeds any description or designation of the land which was the dominant tenement, nor was there in any of the deeds, any statement that the restrictions imposed upon each or any of the parcels of land were part of a general plan of restriction common to all the parcels in the tract or designed for the mutual benefit of all the parcels contained in the tract, nor was there in any of the deeds any statement that the parcel thereby conveyed should be subject to restrictions in accordance with any plan for the benefit of all other parcels in the tract, or that all other parcels in the tract should be subject to such restrictions for its benefit."

The court therein held that the mere fact that the tract had been subdivided and that some of the deeds contained building restrictions upon the lots therein conveyed, did not impose any such restrictions upon the tract generally, there being no clear expression of any such intended general restriction in said deeds. At page 409 of 116 Cal.App., at page 854 of 2 P.2d, the court said:

"The language in the deeds involved herein did not create equitable servitudes. To create an equitable servitude in the grant of lands in a large area, it is essential that there must be a general scheme of restrictions sufficiently uniform in character to indicate unmistakably a designated and adopted plan throughout common to all purchasers of lots. The restrictions must not only appear in one deed, but in all the deeds, and must expressly declare that such restrictions are for the benefit of and run with all other lots in the designated area. In other words, the restrictions must be for the mutual benefit of all parcel owners and each lot imposed with a servitude for the benefit of each and every other lot. It is necessary to state in the deed what is the servient and what is the dominant tenement. See Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677, 37 L.R.A.,N.S., 5; Werner v. Graham, 181 Cal., at 174, 183 P. 945; McBride v. Freeman,

191 Cal. 152, 215 P. 678. The intent of the parties to create mutual and reciprocal rights of restrictions between the grantees of the original grantor must appear in the deed. Gamble v. Fierman, 82 Cal.App., [180] at page 182, 255 P. 269."

The strictness of the above rule is regarded as somewhat relaxed by the case of Martin v. Holm, 197 Cal. 733, 242 P. 718. However, in that case this court held that the deeds and agreements in question expressly contained a covenant on the part of the grantors to subdivide, restricting the entire tract; that the original grantors had in mind a general plan of building restrictions intended for the benefit of all the lots, including their own, that the conveyances which followed each imposed the same or similar restrictions; and that grantees of three lots who took a deed which omitted these restrictions took the same with notice and were bound thereby.

[10] Since, in this case, there is no designation of a dominant tenement and no expression of any general plan of which plaintiff's conveyance is a part, there is no basis for holding that her deed contained a valid equitable easement in the lands retained by or subsequently to have been conveyed by her grantor.

[11] Furthermore, we think it is obvious that plaintiff has alleged no facts satisfactorily showing an irreparable or probable injury which would be necessary in order to justify her demand for defendants to cease doing business.

Plaintiff asserts that she need not plead any monetary damage in order to obtain an injunction against the defendants for the reason that she seeks relief from the violation of a covenant and not from tortious acts, citing as authority the case of Walker v. Haslett, 44 Cal.App. 394, 186 P. 622. However, inasmuch as we have determined hereinabove that defendants are not violating a restrictive covenant, it is of prime importance that plaintiff allege facts to show wherein she has been or is to be injured by the operation of defendants' mortuary. In the case of Vesper v. Forest Lawn Cemetery Association, 20 Cal.App. 2d 157, 67 P.2d 368, 370, another owner of burial space sought to enjoin the same defendants from the operation of the identical mortuary involved herein. The court sustained a demurrer to plaintiff's complaint because the plaintiff there involved had likewise failed to allege that he had sustained an injury. We find the language of that case applicable here and quote with approval the following:

"It does not appear either in the original complaint or in the proposed amended complaint that the mortuary can be seen from his lots or that the operation of the mortuary has depreciated the value of his lots, or that upon resale he would suffer loss. Clearly one who has suffered no injury nor damage, nor whose rights have been in anywise invaded, nor who has suffered any interference in his easement, nor who has alleged nor is able to establish that the maintenance of a mortuary impairs the beauty and value of his lot, nor the convenience of ingress to or egress from it, has ground to complain of another, or to enjoin another's acts."

And in support of its decision that plaintiff had failed to state a cause of action entitling him to the relief sought, the court said:

"In Clough v. Healy Co., 53 Cal.App. 397, 200 P. 378, 379, an injunction was refused, the court there saying: 'The right must be clear, and an injunction of the character here in question will be denied when the obstruction does not constitute a material interference with the right of the owner of the easement, or where the damage sustained by him is merely nominal.'"

[12] In this connection we wish to point out that even were we to regard the deed herein as having created a valid equitable easement, its enforcement would have to be governed by equitable principles. It is on this same principle that the courts of this state have relaxed building restrictions where conditions have so changed that to enforce them would work an unreasonable hardship on the owners of property within the restricted area. Hess v. Country Club Park, 213 Cal. 613, 619, 2 P.2d 782, and cases cited. As stated by Professor William E. Burby, 10 So.Cal. Law Rev. 281, at page 287:

"There is, however, one vital distinction between a legal and an equitable easement. The latter type of burden, being under the exclusive jurisdiction of a court of equity, will not be considered as in esse if, under the facts of a particular case, enforcement would not be in furtherance of public interest. Restrictions will not be enforced if enforcement would be inequitable and unjust. It is not a matter

of balancing the equities but, given a case where enforcement would be unjust, it properly may be said that there has been no invasion of any property right." See 4 Pom.Equit. Jurisprudence, 4th ed. 1919, 3958n-3959n.

[13, 14] Plaintiff contends that the trial court erred in denying her motion to file her proposed amended complaint. We have examined said complaint and find that it failed in the same respects as the original to state facts sufficient to constitute a cause of action. We shall, therefore, not interfere with said ruling of the trial court, since the privilege of amending a complaint rests in the sound discretion of that tribunal (Whyte v. City of Sacramento, 65 Cal.App. 534, 224 P. 1008; Buckley v. Howe, 86 Cal. 596, 25 P. 132; Hansen v. Carr, 73 Cal.App. 511, 238 P. 1048) and will not be disturbed in the absence of a showing of gross abuse. Fetterley v. Gibson, 210 Cal. 282, 291 P. 411.

We have considered the other contentions made by plaintiff and find that they do not require further discussion since they are without merit.

In view of our determination that plaintiff's complaint failed to state a cause of action for injunctive relief and that the trial court did not err in refusing to allow plaintiff to file her proposed amended complaint, the judgment of said court is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; GIBSON, J.

I concur in the judgment: HOUSER, J.



15 Cal.2d 460

CHESNEY v. BYRAM, Tax Collector.

L. A. 16484.

Supreme Court of California.

April 29, 1940.

Rehearing Denied May 27, 1940.

1. Constitutional law ⇐33

The constitutional provision exempting property of veterans from taxation to a specified extent was "self-executing", meaning that it required no legislative enactment to put it into effect, but not meaning that the Legislature did not have power to provide reasonable regulation for exercise of the right to exemption. Pol.Code, § 3612; Const. art. 13, § 1¼.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing".

2. Taxation ⇐193

The statute requiring veterans entitled to partial exemption from taxation to furnish information under oath on prescribed forms, and providing that failure to do so shall be deemed waiver of the constitutional exemption, is a reasonable and valid regulation of the exercise of the constitutional right, and not an invalid limitation or restriction on such right. Pol.Code, § 3612; Const. art. 13, § 1¼.

3. Constitutional law ⇐26

The Legislature may enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions.

4. Constitutional law ⇐43(1)

A right granted by the Constitution may be waived by the inaction of person entitled to exercise such right.

5. Taxation ⇐193

The statute requiring an institution claiming exemption from taxation for church property to file affidavit on penalty of being deemed to have waived the exemption is not ineffective as an attempt to limit the constitutional exemption of church property from taxation, since such constitutional right may be waived. Pol.Code, § 3611, as amended by St.1929, p. 1028; Const. art. 13, § 1½.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Charles D. Chesney against H. L. Byram, County Tax Collector, for writ of mandate to compel Collector to accept payment of specified amount as full amount of taxes due. From a judgment granting writ of mandate, defendant appeals.

Reversed, with directions.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellant.

Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, for respondent.

CARTER, Justice.

This is an appeal from a judgment of the superior court of Los Angeles county granting a writ of mandate against appellant, H. L. Byram, tax collector of the county of Los Angeles, compelling him to receive the sum of $21.84 as the full amount of taxes due on the real property of respondent for the fiscal year 1936–37, in lieu of taxes in the sum of $67 levied upon and extended against said property on the assessment roll of said county for said year.

Respondent's property was assessed by the Los Angeles county assessor for the fiscal year 1936–37 at the value of $1,350. He claims an exemption in the amount of $1,000, by reason of his being a veteran within the meaning of section 1¼ of article XIII of the Constitution of California. He tendered payment to the appellant of taxes based upon the valuation of $350, which tender was refused. Respondent then secured a writ of mandate compelling appellant to accept the amount tendered and to issue a receipt in full for respondent's taxes.

The provision of the Constitution above referred to reads as follows: "The property to the amount of one thousand dollars of every resident of this State who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom, * * * shall be exempt from taxation; provided, this exemption shall not apply to any person named herein owning property of the value of five thousand dollars or more, or where the wife of such soldier or sailor owns property of the value of five thousand dollars or more. No exemption shall be made under the provisions of this act of the property of a person who is not legal resident of the State."

Section 3612 of the Political Code provides that every person entitled to such exemption from taxation shall give to the assessor under oath all information required upon forms prescribed by the State Board of Equalization and failure of any person entitled to such exemption so to do shall be deemed as a waiver of such exemption.

The allegations of the petition for a writ of mandate bring respondent within the constitutional provision for exemption, to-wit: that he is and was during the fiscal year 1936–37, a resident of California, that he served in the marine corps of the United States during the world war and received an honorable discharge therefrom, that he is married, that neither he nor his wife nor the two together owned property greater than $5,000 in value, and that in 1936 he furnished a copy of his honorable discharge to the county assessor. Respondent further alleged that at no time did he file an application for exemption or any affidavit as required by section 3612 of the Political Code.

The appellant, tax collector of the county of Los Angeles, contends that the failure of respondent herein to make the exemption claim required by Political Code section 3612 constituted a waiver of said exemption. The respondent, however, maintains his right thereto, claiming that the provision in said section, that a veteran having failed to make proof of his constitutional right to exemption prior to completion of the assessment roll "waives" such exemption, is unconstitutional and void, as being an invalid statutory "limitation" on such constitutional right.

The sole question then before this court is whether the waiver provision of section 3612 of the Political Code is an invalid infringement upon a constitutional right, or is a valid legislative provision regulating the exercise or assertion thereof.

Respondent contends that section 1¼ of article XIII of the Constitution is self-executing and that section 3612 of the Political Code is an attempt to limit the constitutional right to exemption from taxation granted to veterans under said provision of the Constitution. It has been held that: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." Cooley's Constitutional Limitations, 7th ed., p. 121; Winchester v. Howard, 136 Cal. 432, 439, 64 P. 692, 69 P. 77, 89 Am.St.Rep. 153; People v. Hoge, 55 Cal. 612.

[1] We are disposed to hold that the constitutional provision above-mentioned is self-executing; that is, that it required no legislative enactment to put it into effect. If the legislature had failed to make any provision for a veteran to avail himself of the tax exemption provided for in said provision of the Constitution, we are of the opinion that the veteran would nevertheless be entitled to the exemption provided for. How such exemption could be ob-

tained, would be a matter first for the determination of the assessors of the respective political subdivisions, and in case of their failure to recognize the right granted to the veteran, their action would be subject to review by the courts. However, it does not follow from the determination that the above-mentioned constitutional provision is self-executing, that the legislature did not have the power to enact legislation providing reasonable regulation for the exercise of the right to the exemption granted by the Constitution, and if section 3612 of the Political Code constitutes such reasonable regulation and not an invalid limitation of the right thereby granted, the power of the legislature to enact said section should be upheld. Chester v. Hall, 55 Cal.App. 611, 204 P. 237; First M. E. Church v. Los Angeles County, 204 Cal. 201, 267 P. 703.

In the case of Chester v. Hall, supra, the court held that the requirement of section 1083a of the Political Code that the signer of a petition for a county charter election shall affix thereto the date of such signing is not void as making an additional requirement to the self-executing character of section 7½ of article XI of the Constitution, since it in no manner prevents any person from signing but merely facilitates the operation of the constitutional provision and places a safeguard around the exercise of the rights thereby secured.

In that case the court said [55 Cal.App. 611, 204 P. 239]: "It is clear that the constitutional provision in question is self-executing, but it does not follow that legislation may not be enacted to facilitate its operation and place safeguards around the exercise of the rights thereby secured so long as the right itself is not curtailed or its exercise unreasonably burdened. 'Legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.' Cooley's Constitutional Limitations (7th Ed.) page 122. See, also, Welch v. Williams, 96 Cal. 365, 31 P. 222; State v. Hooker, 22 Okl. 712, 98 P. 964; City of Pond Creek v. Haskell, 21 Okl. 711, 97 P. 338; Stevens v. Benson, 50 Or. 269, 91 P. 577; State v. Superior Court, 81 Wash. 623, 143 P. 461, Ann.Cas. 1916B, 838. The requirement of section 1083a of the Political Code that the signer of a petition shall 'affix thereto the date of such signing' in no manner prevents any person from signing or places an undue burden on the exercise of the right. The Constitution prescribes the qualifications of electors, and provides that all persons having such qualifications 'shall be entitled to vote at all elections.' The Constitution makes no provision for the registration of electors, yet registration laws have always been upheld as reasonable regulations by the Legislature for the purpose of ascertaining who are qualified electors and preventing illegal voting."

In the case of First M. E. Church v. Los Angeles County, supra, this court while declining to pass upon the question of whether or not section 1½ of article XIII of the Constitution of California is self-executing, made this comment with respect to legislation enacted for the purpose of facilitating the operation of a self-executing provision of the Constitution [204 Cal. 201, 267 P. 704]: "It may be assumed, as argued by respondent, that even though a constitutional provision is self-executing, the Legislature may, and in many instances must, enact legislation to facilitate its operation, and to provide convenient remedies for the protection of the right established, and for the determination thereof and the regulation of claims thereto. Such legislation must be in furtherance of the purposes of the constitutional provisions, but, if so, it is valid and enforceable. The last provision of section 3611 is, we think, such a law. It is regulatory and places no unreasonable burden upon those entitled under section 1½ of article 13 of the Constitution to tax exemption. It creates no hardship to require of a property owner that he file an affidavit showing that the property claimed to be exempt is used solely for religious worship, that it is required for the convenient use and occupation of the building upon the premises, and that the same is not rented for such purposes and rent received by the owner therefor."

[2] We are not impressed with the argument advanced by respondent to the effect that the provisions of section 3612 of the Political Code imposes an unreasonable restriction or limitation upon the exercise of the right to the exemption granted by the constitutional provision above mentioned. On the other hand, it appears

to us reasonable and proper that some method should be provided by the legislature for the determination of those who may be entitled to the exemption provided for in the Constitution. It is obvious that the burden should be upon the person claiming the exemption to establish his right thereto. The method provided for under section 3612 of the Political Code is a simple one and is available to all who desire to claim the exemption provided for under the above-mentioned provision of the Constitution; in fact, it would be much easier and simpler for a person claiming such exemption to comply with the provisions of section 3612 of the Political Code than to resort to the procedure followed by respondent in this case, even if the tax collector had complied with respondent's request to accept the sum of $21.84 in full payment of the taxes due from respondent, and the latter had not been required to institute this action.

[3] It has been uniformly held that the legislature has the power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions. Bergevin v. Curtz, 127 Cal. 86, 59 P. 312; Chester v. Hall, 55 Cal. App. 611, 204 P. 237; Crescent Wharf, etc., Company v. Los Angeles, 207 Cal. 430, 278 P. 1028; Western Salt Company v. City of San Diego, 181 Cal. 696, 186 P. 345; Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712; Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539; Potter v. Ames, 43 Cal. 75. In the case of Bergevin v. Curtz, supra, this court considered the effect of a statute requiring a citizen to register in order to exercise the voting franchise guaranteed by the Constitution. In discussing the power of the legislature to impose conditions on those entitled to exercise the voting franchise under the Constitution, this court said: "We do not think the legislature, even if it attempted to do so, could add any essential to the constitutional definition of an elector. It is settled by the great weight of authority that the legislature has the power to enact reasonable provisions for the purpose of requiring persons who are electors, and who desire to vote, to show that they have the necessary qualifications, as by requiring registration or requiring an affidavit or oath as to qualifications, as a condition precedent to the right of such electors to exercise the privilege of voting. Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only reasonable regulations for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting. These regulations must be reasonable, and must not conflict with the requirements of the constitution. The legislature has required that all electors, as a condition of the right to vote, shall have their names properly and in due season entered upon the great register of the county. Pol.Code, § 1094. The section provides that in the register shall be entered the names of the qualified electors of the county, and 'that any elector who has registered and thereafter moved his residence to another precinct in the same county thirty days before an election may have his registration transferred to such other precinct upon his application.' *The legislature has made no attempt to change or add to the qualifications of an elector, but has simply provided a means whereby the elector who is entitled to vote may be known by having his name enrolled upon an authentic list.*"

In the case of Crescent Wharf, etc., Company v. Los Angeles, supra, this court had before it a case involving the right of a person whose property had been appropriated for public use to compensation for such property in accordance with the provisions of section 14 of article I of the Constitution of California. In that case it was contended by the plaintiff that its right to recover such compensation could not be abrogated by a charter provision of the city of Los Angeles requiring the presentation of a claim as a condition precedent to the commencement of an action to recover the value of the property appropriated by the city. In answering this contention, this court speaking through the late Mr. Justice Seawell said [207 Cal. 430, 278 P. 1029]: "All that the framers of the Constitution meant to do was to protect the citizen in his ownership of property against the state or its agencies appropriating private property to public uses against the will of the owner without making just compensation for all damages which the owner should sustain by the exercise of governmental power. It was not intended to remove the subject-matter beyond the operation of reasonable statutory enactments which affect property rights generally, such as the bar of the statute of limitations."

Certainly, if the legislature has the power to pass statutes providing reasonable

regulations and control over the constitutional right of a citizen to vote and the constitutional right of a citizen to recover compensation for his property which has been appropriated to a public use, it should likewise have the power to enact statutory provisions providing reasonable regulations and control over the exercise of rights granted by the Constitution for the exemption of property from taxation.

In determining the reasonableness of the regulation provided for in section 3612 of the Political Code as applied to the exercise of the right of a veteran to exemption from taxation under section 1¼ of article XIII of the Constitution, let us examine the constitutional provision and ascertain to whom it applies and what property is exempted from taxation thereunder. It is obvious that the exemption therein provided for is available to veterans of a particular class, having specific qualifications as to experience, property ownership and residence, to-wit: (1) He must be a resident of this state; (2) he must have served in the army, navy, marine corps or revenue marine service of the United States army in time of war; (3) he must have received an honorable discharge; and, (4) neither he nor his wife is the owner of property of the value of $5,000 or more. If such veteran falls within the classification above-outlined, he is entitled to an exemption from taxation of any property owned by him up to the value of $1,000. It is obvious that before an assessor can determine whether or not a property owner is entitled to an exemption under the above-mentioned provision of the Constitution, it is necessary to obtain sufficient information to enable him to ascertain whether or not such person comes within the classification specified therein. It is likewise obvious that such determination and ascertainment is necessary in order to enable the assessor to make up his assessment roll and determine the value of property within the political sub-division subject to assessment and taxation. Such determination must be made not later than the first of July of each year as the assessment roll is thereupon submitted to the Board of Equalization of the respective political subdivisions and the valuation determined by such board is used as the basis for the tax rate required to raise revenue for the maintenance of the government.

It would seem to be consonant with the establishment of a sound fiscal policy to have all matters of exemption of property from taxation determined not later than July 1st of each year, and it is obvious that this can only be done by the application of a uniform regulation to those who are entitled to exemptions. The legislature undoubtedly had the foregoing considerations in mind in the adoption of section 3612 of the Political Code and similar enactments for the determination of claims for exemption of property from taxation. Such regulations, if reasonable, as those provided for under section 3612 of the Political Code, do not constitute a limitation or restriction upon the constitutional right of the person entitled to the exemption, but simply establishes a rule for the determination of whether or not the right is to be exercised or waived.

The provisions of section 3612 of the Political Code establishes a uniform system throughout the state for those desiring to claim the exemption granted by the Consitution under the provisions of section 1¼ of article XIII thereof. It amply safeguards the exercise of the right of those entitled to the exemption, facilitates the operation of the system of assessment and taxation now authorized by law, and protects the public against the fraudulent claims of those not entitled to the exemption who may nevertheless assert their claim thereto. Such legislation is clearly not in contravention of the constitutional right to which it relates.

That a right to have property exempted from taxation can be waived, there can be no doubt. Even counsel for respondent in the case at bar concedes that unless appropriate legal proceedings were instituted by the exemption claimant to resist the payment of the tax or the recovery of the tax after the same is paid within the time provided for in the statute of limitation applicable thereto, the exemption claimant would lose his right; in other words, the exemption claimant would waive his right to the exemption by failing to assert his claim in time to have his exemption noted on the assessment roll or by failing to take appropriate action thereafter within the period of time allowed by the statute for the recovery of taxes paid under protest.

[4] It is well settled that a right granted by the Constitution may be waived by the inaction of the person entitled to exercise such right. Probably the most common example of such waiver is disclosed by those cases where a property

owner whose property has been taken or damaged for public use fails to avail himself of the remedies provided for by statute to either recover the property so taken or compensation and damages for its taking. It has been repeatedly held that mere inaction on the part of the owner of such property may constitute a waiver of the right to compensation or damages guaranteed to him by section 14 of article I of the Constitution of California. Bigelow v. Ballerino, 111 Cal. 559, 44 P. 307; Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.,N.S., 185; Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539; Yonker v. City of San Gabriel, 23 Cal.App.2d 556, 73 P.2d 623.

The trial court based its decision in favor of the respondent in this action upon the case of St. John's Church v. County of Los Angeles, 5 Cal.App.2d 235, 42 P.2d 1093, wherein it was held that a similar provision of the Constitution (sec. 1½ of art. XIII) exempting church properties from taxation was self-executing, and that no legislation was necessary to achieve its purpose, and that no legislation was permissible that would impair, limit or destroy the rights thereby granted. In the written opinion filed by the learned trial judge in overruling the demurrer in the case at bar, he said: "On the authority of that case (St. John's Church v. County of Los Angeles) it must be held that that part of section 3612 of the Political Code which declares that failure to make the affidavit and to furnish the evidence therein required operates as a waiver of the constitutional exemption is void by reason of its being in excess of the power of the legislature to impair or destroy the exemption granted by a self-executing provision of the Constitution."

[5] While it may be argued that a different rule should be applied to the legislation relating to the exemption of church property under the above-mentioned provision of the Constitution, it is our conclusion that the same rule should be applied to such legislation as that involved in the case at bar, and we therefore disapprove the holding of the District Court of Appeal in the case of St. John's Church v. County of Los Angeles, supra, to the effect that the provision in subdivision 3 of section 3611 of the Political Code that the failure on the part of the person claiming the exemption to make the affidavit mentioned therein should be deemed a waiver of such exemption is ineffective for the reason that it constitutes an attempt by the legislature to limit the exemption provided for in section 1½ of article XIII of the Constitution.

In view of what we have said with respect to the power of the legislature to enact statutes providing for reasonable regulation and control of a constitutional right, we deem it unnecessary to devote further time in this opinion to a discussion of the St. John's Church case. We can see no reason why the same rule as to waiver of the right to exemption should not apply to church property as to any other right granted by the Constitution, and we think it is immaterial whether such waiver is the result of the failure of the exemption claimant to comply with the provisions of the statute providing such reasonable regulation or is the result of inaction on the part of such claimant.

The regulation provided for in section 3611 of the Political Code before its amendment in 1929 was held not to be unreasonable in the case of First M. E. Church v. Los Angeles County, supra, as appears from the portion of the opinion in said case hereinabove quoted. The 1929 amendment, St. 1929, p. 1028, to section 3611 of the Political Code simply provides that the failure of the exemption claimant to make the affidavit required by said section constitutes a waiver of the exemption. From what we have heretofore said with reference to a similar provision contained in section 3612 of the Political Code, this amendment did not transform said section from a reasonable regulation into an invalid limitation upon the exercise of the constitutional right granted by section 1½ of article XIII of the Constitution.

The basis of the decision of the District Court of Appeal in the St. John's Church case appears to be that property subject to exemption from taxation under the provisions of section 1½ of article XIII of the Constitution of California, is not subject to assessment and taxation and that any attempt to place the same on the assessment roll of a political subdivision for the purpose of assessment and taxation is abortive. In the opinion in said case, the court said [5 Cal.App.2d 235, 42 P.2d 1095]: "The basic question is whether or not the property is taxable, and, while reasonable regulations may be made for the making of preliminary proof and while a failure to com-

ply therewith may subject an owner of such property to the burden of making his proof in a more inconvenient and expensive manner, through an action in court, it cannot confer an authority to tax which has been expressly withheld by the Constitution. The authority to levy such a tax thus withheld cannot be acquired by a statute providing, in effect, that, if the owner does not claim the exemption before the assessment roll is completed, the tax will be levied."

The inevitable result to be obtained by the line of reasoning which is the basis of the decision in the St. John's Church case must be, that if an owner of property exempt from taxation under the provisions of section 1½ of article XIII of the Constitution would fail to assert a claim of exemption for said property, and the same would be assessed and the taxes thereon become delinquent and the property sold in accordance with the law authorizing the sale of property for delinquent taxes, a purchaser at such delinquent tax sale would not acquire a valid title to the property; in other words, all proceedings in connection with the assessment, levy of taxes and sale of said property would be void. It would therefore follow that the owner of such property could ignore all proceedings instituted by public officials to have said property subjected to assessment, levy and payment of taxes, and would suffer no loss as the result of such inaction or failure to assert a claim of exemption. It is obvious that such a situation would have a detrimental effect upon the administration of the laws providing for the assessment, levy and collection of taxes, and would create a condition of uncertainty with respect to what property was available for the purpose of taxation within the respective political subdivisions which have the power to levy and collect taxes for the maintenance of local government.

The opinion of the District Court of Appeal in the St. John's Church case does not discuss the well-settled rules that a right granted under a provision of the Constitution may be waived and that the legislature has the power to enact statutes providing for reasonable regulation and control of a right granted by the Constitution. The application of these rules to the factual situation in said case would have resulted inevitably in the reversal of the judgment rendered therein.

The judgment is reversed with directions to the trial court to enter judgment in favor of appellant denying respondent the relief prayed for in his petition.

We concur: WASTE, C. J.; GIBSON, J.; EDMONDS, J.; CURTIS, J.; SHENK, J.; HOUSER, J.



STATE v. MARIN MUNICIPAL WATER DIST.*

Civ. 11108.

District Court of Appeal, First District, Division 2, California.

April 25, 1940.

Hearing Granted June 24, 1940.

1. Waters and water courses ⇐192

A municipal water district is a "person" under the statute permitting the department of public works to require any person maintaining pipe line on any state highway to move such line at his own expense whenever necessary to insure safety of traveling public or to permit improvement of the highway. St.1935, p. 249, § 19; p. 290, § 680.

See Words and Phrases, Permanent Edition, for all other definitions of "Person".

2. Waters and water courses ⇐192

A water main maintained by a municipal water district under the surface of a state highway was "upon" the state highway under the statute permitting department of public works to require any person maintaining a pipe line on any state highway to move it at his own cost when public safety requires it, since the word "upon" has the meanings of, in, or into a position, relation, or state denoted by on, in, or into the position of being supported by something. St. 1935, p. 290, § 680.

See Words and Phrases, Permanent Edition, for all other definitions of "Upon".

3. Waters and water courses ⇐192

Under the provisions of the Streets and Highways Code, the department of public

* Subsequent opinion 111 P.2d 651.

works may proceed to cause the relocation within a state highway of structures installed pursuant to a franchise duly granted, and is not limited to requiring the removal from a highway of encroachments of an owner who did not have an existing franchise. St.1935, p. 290, § 680.

4. Waters and water courses ⇐192

Fact that notice of department of public works demanding that municipal water district, maintaining water main under state highway, relocate it at expense of district, recited that instrument was issued pursuant to specified statute, did not invalidate notice when department sought to rely on other sections not mentioned in the notice, since the recital, not being a statutory part of the notice, was surplusage which did not vitiate. St.1935, p. 290, § 680.

5. Appeal and error ⇐1071(5)

In suit by department of public works to recover, from municipal water district, cost of removal and relocation of a water main maintained by district under state highway, district was not prejudiced by an immaterial finding, which was unsupported by the evidence, that sum expended by department was on behalf of and for use and benefit of district. St.1935, p. 290, § 680.

6. Waters and water courses ⇐192

A municipal water district, which secured permission from county board of supervisors to place water main under county road which subsequently became a state highway, did not obtain a contractual right to a portion of the lands of the state, since title of the state to the highways consists of easements. St.1911, Ex.Sess., p. 104, § 19; St. 1935, p. 290, § 680; Const. art. 11, § 19.

7. Constitutional law ⇐134

Requiring a municipal water district, maintaining water main under state highway to relocate main so that it would not be a menace to the free enjoyment of the highway, did not interfere with district's constitutional or statutory rights. St.1935, p. 290, § 680.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the State of California, acting by and through its Department of Public Works, against the Marin Municipal Water District, to recover alleged cost of removal and relocation of a portion of the water main. From an adverse judgment, defendant appeals.

Affirmed.

Duke & Cowen, Robert D. Duke, and Laurence A. Cowen, all of San Rafael, for appellant.

C. C. Carleton, Chief Counsel, Department of Public Works, Robert E. Reed, C. R. Montgomery, and Frank B. Durkee, Attys., Department of Public Works, all of Sacramento, for respondent.

STURTEVANT, Justice.

This is an appeal by the defendant, Marin Municipal Water District, a municipal water district, duly organized and existing under and by virtue of the laws of the state of California, from a judgment of the superior court of the county of Marin for the sum of $3,681.14 in an action by plaintiff to recover the alleged cost of removal and relocation of a portion of the water main which rested in Bolinas street. That street was a county road at the time the water main was installed. Bolinas street was, on the 13th day of July, 1934, selected and adopted as part of the state highway system between Waldo and the Golden Gate Bridge in the county of Marin.

On or about the 5th day of April, 1909, the Marin County Water and Power Company, a corporation, was granted permission and authority by the board of supervisors of the county of Marin, state of California, to place or cause to be placed within and along Bolinas street, a county road in said county of Marin, and particularly along the southerly side thereof, between Madrone street and Grover street and within that portion of said Bolinas street subsequently included in and made a part of the state highway, a certain water main with a diameter of approximately twelve inches and from said date, to and including the date on which the assets, properties, property rights, and interests of said corporation, including said water main, were acquired by the defendant herein, said corporation did maintain within said Bolinas street said water main. Thereafter the defendant, Marin Municipal Water District, acquired all of the right, title and interest of said Marin County Water and Power Company in and to said water main and to and including the 28th day of May, 1936, defendant did maintain and cause to be maintained within said Bolinas street the water main.

On the 22d day of May, 1936, the Department of Public Works served upon the defendant a written notice under the provisions of section 680 of the Streets and Highways Code (chap. 29, Stats. 1935, p. 290), demanding that the said water main should be removed from the southerly side to the northerly side of Bolinas street at the sole cost and expense of the defendant. The defendant did not remove said water main and it was thereafter caused to be removed from the southerly side to the northerly side of Bolinas street by the Department of Public Works, the labor and material necessary for such removal of the water main being the said sum of $3,681.14.

The defendant claims that section 680 of the Streets and Highways Code does not apply to municipal water districts. In so far as pertinent to the facts of this case, said section, in 1935, provided as follows:

[1, 2] "Whenever a franchise shall have been granted by any county or city in any public highway which has been or is subsequently constituted a State highway, the department may enforce any obligations of the grantee or holder of such franchise in respect to the repair of the highway. The department may require any *person* who has placed and maintained any pole, pole line, pipe, pipe line, conduit, street railroad tracks, or other structures or facilities *upon* any State highway, *whether under such or any franchise,* to move the same at his own cost and expense to such different location in the highway as is specified in a written demand of the department, whenever necessary to insure the safety of the traveling public or to permit of the improvement of the highway; provided, that no such change of location shall be required for a temporary purpose. The department shall specify in the demand a reasonable time within which the work of relocation must be commenced and the grantee or owner must commence such relocation within the time specified in said demand and thereafter diligently prosecute the same to completion.

"The department may likewise serve such a demand on the owner of any encroachment to require its removal entirely from the right of way, where the owner does not have an existing franchise right to place and maintain the same therein.

"In case the owner fails to comply with any such demand, the encroachments specified in the demand become subject to the provisions of Article 3 of this chapter." (Italics defendant's.)

It contends that it is not a "person" but that it is a separate and distinct governmental entity, or political subdivision of the state, quasi municipal in character, with power to carry on the particular functions committed to it; and, as such districts were not specifically mentioned in section 680, the defendant was not included within the provisions of said section. We think the point may not be sustained. As the word "person" is used in said section it is clear it is used in a very broad sense. Section 19 of the Streets and Highways Code provides: "'Person' means any person, firm, partnership, association, corporation, organization or business trust." Furthermore, the nature of a municipal water district was before the court in Henshaw v. Foster, 176 Cal. 507, 169 P. 82. On page 515 of 176 Cal., on page 85 of 169 P., Mr. Justice Melvin, speaking for the court, said: "In the opinion in the Madera District Case [92 Cal. 296, 28 P. 272, 14 L.R.A. 755, 27 Am.St.Rep. 106] the irrigation district was treated as a public corporation to be invested with certain political duties to be exercised in behalf of the state. That a water district such as the one sought to be established in San Diego county is also such a corporation may not be doubted under the authority of that decision." It is apparent therefore that the defendant is a "person" within the meaning of that word as used in said statute. Again the defendant contends its structures were not "upon" any state highway. In other words, it contends its structures were not upon the surface and therefore it was not subject to the provisions of the Streets and Highways Code. While the word "upon" might be used to designate things on the surface, the statute was not so worded and the word "upon", as commonly used, has the additional meanings of "in or into a position, relation, or state denoted by on; in or into the position of being supported by, * * * something". Webster's New International Dictionary. Manifestly the word "upon" was used in this broader sense. The meaning claimed by the defendant would apply to only such obstructions as boulders, etc., that had rolled onto the highway.

[3] In this connection the defendant states that under the provisions of section 680, as that section was worded in 1935, the notice and demand could legally extend only to the complete removal of encroach-

ments of an owner who "did not have an existing franchise right to place and maintain the same therein". Not so. The last two paragraphs contained a provision authorizing proceedings to remove such encroachments, but the first paragraph also contained provisions authorizing proceedings in a proper case to cause the relocation within the highway of structures installed pursuant to a franchise duly granted.

[4] Again the defendant calls to our attention that the notice and demand recited said instrument was issued pursuant to section 680 of the Streets and Highways Code. It then asserts the plaintiff is now seeking to rely on not only section 680 but other sections. The objection has no merit. The recital was not a statutory part of the notice. It was purely surplusage which, under well-settled rules, does not vitiate.

[5] In its next point the defendant contends the finding that the sum expended by the plaintiff was on behalf of and for the use and benefit of defendant is not supported by the law or the evidence. True it is that the findings contain, among others, the finding under attack. However, both the allegation in the complaint and the finding in response thereto were immaterial. That being so, it is obvious the finding complained of was not prejudicial to the defendant's case.

[6] Before proceeding to discuss the remaining points made by the defendant it should be noted that it claims a franchise pursuant to the provisions of section 19, article XI of the Constitution, as that section was worded before the amendment of October 10, 1911. It also claims a franchise as defined in section 19 of chapter 19 of the Statutes of 1911, Extra Session, p. 104. Section 19 of said statutes is as follows: "The board of directors shall have power to construct works across any stream of water, water course, street, avenue, highway, railway, canal, ditch, or flume which the route of said works may intersect or cross; provided, such works are constructed in such manner as to afford security for life and property, and said board of directors shall restore the crossings and intersections to their former state as near as may be, or in a manner not to have impaired unnecessarily their usefulness. Every company whose right of way shall be intersected or crossed by said works shall unite with said board of directors in forming said intersections and crossings and grant the rights therefor. *The right of way is hereby given, dedicated and set apart to locate, construct and maintain said works over and through any of the lands which are now or may be the property of this state, and to have the same rights and privileges appertaining thereto as have been or may be granted to the municipalities within the state.*" (Emphasis appellant's.) The defendant italicizes the last sentence and makes the claim that it obtained a contractual right in and to a portion of "the lands" of the state of California. Bearing in mind that the title of the state to the highways consists of easements and that the state holds other lands in its governmental capacity and still other lands in its proprietary capacity, it is at once apparent the last sentence of said section 19 is not involved in this action. That is so because it is not claimed that any portion of the pipe which was removed was anywhere except on the right of way of the state highway. Therefore, as we proceed, we will address ourselves to the rights of the defendant to occupy any specific part or portion of the state highway. The sole question presented by the record consisted of the right of the plaintiff, under the facts pleaded, to require the defendant to move its pipes from one location to another location in the state highway.

[7] Taking up the remaining points, the defendant contends its contractual rights could not be impaired by the state nor by any of its agencies and that such rights are protected by both the state and federal Constitutions. Those propositions are not disputed by the plaintiff. Neither party made any allegation, neither party introduced any proof, and there is no finding to the effect that the Department of Public Works was depriving or seeking to deprive the defendant of its franchise to deliver water. However, plaintiff contends that causing the defendant to move its pipes to a place where they will not be a menace to the free enjoyment of the public highway does not interfere with the statutory or constitutional rights of the defendant. That contention is clearly sustained. People v. Lawley, 17 Cal.App. 331, 349, 119 P. 1089; Merced Falls Gas, etc., Co. v. Turner, 2 Cal.App. 720, 721, 84 P. 239; New Orleans Gas Co. v. Drainage Comm., 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831; Moffat v. City and County of Denver, 57 Colo. 473, 143 P. 577.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

38 Cal.App.2d 717

SOCIAL WELFARE BOARD OF STATE DEPARTMENT OF SOCIAL WELFARE v. JOHNSON, County Auditor.

Civ. 6448.

District Court of Appeal, Third District, California.

May 3, 1940.

1. Mandamus ⇐154(2)

A petition seeking to compel county auditor of San Joaquin county to draw warrant in favor of needy children alleging that children were needy children and that their mother was dead and that their father was a resident of the county of San Joaquin and that the State Department of Social Welfare had ordered that aid be granted to the children and that board of supervisors of San Joaquin county ordered the payment of such sum, but that auditor refused to issue a warrant, was sufficient as against general demurrer. St.1937, p. 1005, 1070, 1071, 1072, §§ 1 et seq., 1526(a), 1528, 1551; Pol. Code, § 4091.

2. Counties ⇐164

Where it was alleged that father of half orphans was a resident of San Joaquin county and that the board of supervisors ordered payment of certain sum for children's aid, it was the duty of county auditor to draw warrant for first month and for each successive month thereafter, if ordered to do so by the Board of Supervisors. St.1937, p. 1070, § 1526(a); Pol.Code, § 4091.

Proceeding for mandate by the Social Welfare Board of the State Department of Social Welfare against F. H. Johnson, as Auditor of the county of San Joaquin in the state of California. On general demurrer.

Demurrer overruled.

Earl Warren, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for petitioner.

R. M. Dunne, Geo. F. Buck, F. C. Clowdsley, Dist. Atty., and Chester E. Watson, Deputy Dist. Atty., all of Stockton, for respondent.

PER CURIAM.

Petitioner has filed in this court a petition for a writ of mandate to compel respondent, as auditor of San Joaquin county, to draw his warrant in the sum of $25 per month in payment of children's aid to Frank and Sarah De Lucca, who are alleged to be "needy children" under the act entitled "Aid to Needy Children" (Welfare and Institutions Code, St.1937, p. 1005). Respondent filed a general demurrer to the petition, and the sole question before us is whether or not there are sufficient facts set forth to justify the relief sought.

The petition sets forth the following ultimate facts: That the children mentioned are "needy children" within the meaning of the act granting aid to needy children; that their mother is dead; that their father is a resident of San Joaquin county; that said children live with their grandparents in Contra Costa county; that the board of supervisors of San Joaquin county denied aid to said children upon the ground that they were not residents of that county; that a dispute arose between San Joaquin and Contra Costa counties in respect to the liability for the support of said children, and the question was submitted to the Department of Social Welfare under the provisions of section 1528 of the code above mentioned; that thereafter said department found and determined that the residence of said children was in San Joaquin county; that the latter county refused to grant such aid, and an appeal was taken to the State Department of Social Welfare under section 1551 of the code mentioned; that said department made its order on appeal that said aid be granted in the amount of $25 per month; that thereafter the board of supervisors of San Joaquin county ordered the payment of said sum, but the respondent auditor refuses to draw or issue a warrant pursuant to said order.

[1, 2] We are of the opinion that the petition states sufficient facts to justify the relief sought. It alleges that the father of the half-orphans is a resident of San Joaquin county. Section 1526, subdivision (a) of the Welfare and Institutions Code provides: "That the residence of the father determines that of the child during the lifetime of the father," with certain exceptions, none of which is applicable here. The board of supervisors ordered the payment of the amount in question. It is the duty of the auditor to issue a warrant when a claim is ordered paid by the supervisors. Pol.Code, sec. 4091. The pleading shows that the demand was a legal one, and that the supervisors ordered its payment. Under such circumstances it was the legal duty of respondent to draw a warrant for the

first month and for each successive month thereafter, if ordered to do so by the board of supervisors.

It is urged by respondent that the Social Welfare Board had no authority or jurisdiction to order payment of the amount, as such act was a judicial one. We see no necessity for discussing that question, as the petition clearly states grounds for relief without resorting to the allegation concerning the decision of the Social Welfare Board.

The demurrer is overruled.



38 Cal.App.2d 309

BAUER v. BAUER et al.

Civ. 11339.

District Court of Appeal, First District, Division 2, California.

May 4, 1940.

Hearing Denied June 3, 1940.

1. Appeal and error ⇐80(1)

A judgment settling all the issues which had arisen or might arise between adverse parties and reserving in trial court jurisdiction to make further orders as may be necessary to enforce provisions of the decree was an appealable "final judgment" and not an "interlocutory judgment". Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Interlocutory Judgment".

2. Appeal and error ⇐80(1)

If further judicial action by trial court is necessary to a final determination of the rights of the parties, the judgment is an "interlocutory judgment" only, but if no further questions can come before the court after a judgment has been entered, except such as are necessary to be determined in carrying the judgment into effect, it is a "final judgment" from which an appeal may be taken. Code Civ.Proc. § 963.

3. Appeal and error ⇐891

It is only in exceptional cases that appellate courts should grant an application to take additional evidence.

4. Appeal and error ⇐891

A defendant's application for an order to take additional evidence would be denied by District Court of Appeal where application was not filed until 2½ years after discovery of such evidence and until after an adverse decision, and evidence merely tended to corroborate testimony given on trial, and was in accord with plaintiff's theory.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

On petition for rehearing and on application for an order to take additional evidence.

Petition and application denied.

Prior opinion, 100 P.2d 1070.

Pacht, Pelton, Warne & Black, of Los Angeles, for appellant.

William C. Jensen, of Los Angeles, for respondent.

Clyde C. Triplett, of Los Angeles, for defendant S. A. Best.

PER CURIAM.

Since the opinion was filed in this cause, appellant has substituted new counsel and has filed a petition for rehearing and an application for an order to take additional evidence.

We shall first consider the petition for rehearing. There is but one new point raised therein. Appellant now contends that "This court is without jurisdiction to hear or determine the instant appeal because the judgment from which the appeal was taken is an interlocutory and not a final judgment". It is of interest to note that this contention is now made by the party who prosecuted the appeal and that the point was not previously suggested by any of the parties. A consideration of this contention requires the statement of further facts.

In the opinion heretofore filed we made but passing reference to the answer and cross-complaint of defendant S. A. Best or the portions of the findings or judgment relating to his claimed interest in the bonds. The trial court found that he had entered into a certain written agreement with plaintiff with respect to said bonds and by virtue of that agreement, the trial court decreed that he recover from plaintiff the sum of $2775; that he had a lien upon three of the bonds to secure the pay-

ment of said sum plus costs of sale; and that said three bonds be sold in the manner provided for the sale of pledged property and the proceeds be distributed as directed by said judgment. It was provided however that no proceedings to sell the bonds should be commenced until the expiration of ten days after the rendition of the judgment in order that defendant Bauer might within that time comply with the provisions of the decree and thereby enable plaintiff to pay said indebtedness from the proceeds of the redemption of the bonds. It was further decreed that in the event defendant Bauer failed to comply and the sale of the three bonds thereby became necessary, that plaintiff should recover from defendant Bauer an additional amount equal to the costs incurred in such sale.

Then followed the final paragraph of the judgment, upon which paragraph appellant relies in making the above mentioned contention. It read as follows: "This court shall retain jurisdiction of this cause and all of the parties who have appeared herein for the purpose of making such further orders as may be necessary to enforce the provisions of this decree and finally settling and determining the rights and obligations of each and all of said parties with respect each to the other and pertaining to those matters and things as to which this court has made its Findings of Fact and Conclusions of Law. After such settlement and determination, the court will render its final judgment herein and in said final judgment the amount of and division of costs will be fixed and adjudged as between each and all of the parties to this action."

Said portions of the judgment were not mentioned in the opinion heretofore filed herein as there appeared to be no controversy concerning them. Appellant presented in his briefs only the points discussed in said opinion and no claim was then made that said portions of the judgment made the judgment interlocutory and non-appealable.

Our reading of the entire judgment, including said last paragraph, leads us to the conclusion that said judgment was a final judgment within the meaning of section 963 of the Code of Civil Procedure and that it was therefore appealable. It may be conceded that the last paragraph of the judgment indicated that another and "final judgment" was contemplated but we believe that this paragraph was inserted only out of an abundance of caution as the trial court expressly retained jurisdiction to "enforce the provisions of this decree". The wording found therein to the effect that it retained jurisdiction for the purpose of "finally settling and determining the rights and obligations of each and all of said parties with respect each to the other and pertaining to those matters and things as to which this court has made its findings of fact and conclusions of law" did not render said judgment interlocutory under the circumstances. The judgment entered, based upon said findings of fact and conclusions of law, disposed of every matter in controversy between the parties. It is entirely apparent that it was intended to settle and did settle all of the issues that had arisen or might arise except perhaps such questions as might arise and require determination solely for the purpose of carrying an otherwise final judgment into effect. The nature of the judgment before us shows that no other questions could arise after the judgment was entered.

[1, 2] Such being the case, we believe that the view that said judgment was a final judgment is supported by the text, quoted with approval by appellant and found in 2 California Jurisprudence at page 139, which reads as follows: "The general test applicable in determining whether a judgment is final or merely interlocutory therefore, is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only. But if no further questions can come before the court after a judgment has been entered, except such as are necessary to be determined in carrying the judgment into effect, the judgment is final." See Zappettini v. Buckles, 167 Cal. 27, 138 P. 696; Security-First Nat. Bank v. Superior Ct., 132 Cal.App. 683, 23 P.2d 1055.

We have examined the judgments under consideration in the authorities cited by appellant and find none of them similar to the one before us. It appears to us that the court would have had the jurisdiction which it intended to reserve without including any express reservation to that effect in the judgment. If such express reservation had been omitted there would have been nothing to give

said judgment the semblance of an interlocutory judgment and we find nothing in the express reservation here which had the effect of converting it from a final judgment into an interlocutory judgment.

We now turn to appellant's application for an order to take additional evidence. This application presents an unusual situation.

The evidence which appellant seeks to introduce in this court is a letter which appellant claims was written to him by his father under date of May 29, 1918, and was delivered to him in January 1919. He states that said letter has been in his possession, being kept in his safe deposit box, at all times since January 1919. On the trial in 1936, appellant and his father denied the existence of any written memorandum relating to the bond transaction or the alleged trust. Appellant now states that he discovered said letter in his safe deposit box on September 20, 1937. He further states that his former counsel then told him that it was too late to use it and that it would be important only in the event of a new trial. No application with respect to said letter was made in this cause until April 15, 1940, being at a time following the filing of the decision of this court and following appellant's substitution of new counsel.

[3, 4] We are of the opinion that said application should be denied. It may first be pointed out that said application was not promptly made after the alleged discovery of the additional evidence. The letter was admittedly discovered by appellant in his own possession over two and one-half years prior to the time that said application was made. It is only in exceptional cases that appellate courts should grant an application to take additional evidence and we believe that a delay in filing an application until two and one-half years after the discovery of such evidence and until after the filing of an adverse decision should ordinarily be a sufficient reason for the denial thereof. A further reason exists, however, for the denial of the application before us. It does not appear that the production of said letter on the trial or during the consideration of the appeal would have changed the result either in the trial court or in the appellate court. At most, said letter merely tends to corroborate some of the testimony given on the trial and it appears to be in accord with plaintiff's theory which was sustained by the trial court. All parties agreed that the parties discussed the means of protecting plaintiff from harassment by the creditors of her former husband and that they all agreed to give the transaction at least the appearance of a trust with appellant as the named trustee. The registration of the bonds in the name of "O. W. Bauer, trustee for Alice R. Kitts" and the execution of any memorandum purportedly creating a trust was entirely consistent with this understanding. The real issue was whether the parties had actually intended to create a trust or had merely adopted the form of a trust as a "fiction and a sham" as claimed by plaintiff and as found by the trial court. Plaintiff claimed and the trial court found that her father had intended to make an unconditional gift of the bonds to plaintiff and that he delivered them to plaintiff for that purpose. The first paragraph of the letter now sought to be placed in evidence before this court reads as follows: "I have made a gift to your sister Alice R. Kitts of * * * (the bonds in question describing them in detail)." In other paragraphs of the letter are found references to the purported trust, which references were somewhat in line with certain oral evidence offered by appellant on the trial. The first paragraph, however, was entirely in line with plaintiff's theory and with the testimony of her father on the trial to the effect that he decided to help plaintiff "by giving her bonds enough to keep her in good circumstances and I also bought a house for her for a home". Even if appellant should be permitted to introduce said letter in this court, we find nothing therein to justify the making of other and different findings from those made by the trial court or to justify a reversal of the judgment by this court.

In view of the conclusions which we have reached, it appears unnecessary to consider whether this is a proper case, in any event, for the taking of such additional evidence on application of the appellant under the rules laid down in Tupman v. Haberkern, 208 Cal. 256, 280 P. 970.

Appellant's application for an order to take additional evidence is denied and the petition for a rehearing is also denied.

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SECOND SERIES

15 Cal.2d 486

QUINN v. ROSENFELD.

S. F. 16354.

Supreme Court of California.

April 30, 1940.

1. Automobiles ⇐9, 217(3)

The provisions of San Francisco ordinance prohibiting pedestrians from crossing streets outside the central traffic or business district, other than at right angles to the curb, and when crossing at other than a crosswalk requiring them to yield right of way to vehicles, and provision making it unlawful to be in roadway other than a safety zone or crosswalk, except when necessary, do not prohibit crossing street in a residence district between intersections, and provisions are not invalid as being inconsistent with the Vehicle Code. Vehicle Code, §§ 458, 459, 560–564; St.1935, pp. 164, 188.

2. Automobiles ⇐217(3)

An unchanging lettered "stop" warning is not a "controlled stop and go signal" within statute providing that between adjacent intersections where traffic is controlled by a traffic signal device or by police officers, pedestrians shall not cross except in a crosswalk, as the statute refers to mechanically controlled stop and go signals which are operating as traffic control signal devices. Vehicle Code, § 563, St. 1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Controlled Stop and Go Signal".

3. Automobiles ⇐160(4)

Under the Vehicle Code, pedestrian crossing street in residence district, other than at crosswalk, was required to yield right of way to all vehicles, but motorist was not thereby relieved from duty of exercising due care and such duty was constant and would be breached if, under the circumstances, motorist failed to see when an ordinarily prudent person exercising due care would have seen. Vehicle Code § 562, St. 1935, p. 188.

4. Appeal and error ⇐1008(1)

In action for injuries sustained by pedestrian when struck by automobile as pedestrian was crossing street in residence district other than at crosswalk, question of whether under the evidence pedestrian did all that a reasonable man was required to do in compliance with statute, as well as the questions of negligence, contributory negligence and of proximate cause were for the trial court. Vehicle Code, §§ 458, 459, 560–564, St.1935, pp. 164, 188.

5. Trial ⇐398

Where the findings of probative facts are susceptible of a construction which will support judgment for plaintiff, the findings of probative facts do not adversely affect the findings of ultimate facts, irrespective of alleged inconsistency.

In Bank.

Appeal from Superior Court of City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Hugh J. Quinn against M. Rosenfeld to recover damages for personal injuries sustained when plaintiff was run into by defendant's automobile. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 95 P.2d 191.

Cooley, Crowley & Supple, of San Francisco, for appellant.

F. Bert Fernhoff, of Oakland, and Robert R. Ashton, of Los Angeles, amici curiae.

James C. Purcell and William E. Ferriter, both of San Francisco, for respondent.

Philander B. Beadle, of San Francisco, amicus curiæ.

Felix M. Cunningham, of Beverly Hills, amicus curiæ for John Barry, Jr.

John J. Taheny, of San Francisco, amicus curiæ for John J. Casey.

Joseph Francis Murphy, of San Francisco, amicus curiæ.

SHENK, Justice.

The plaintiff sued to recover damages for personal injuries suffered when he was run into by the defendant's automobile as he was crossing Geary street between Scott and Divisadero streets in the city of San Francisco. The defendant denied the charge of negligence and interposed the defense of contributory negligence. The case was tried without a jury. The court found for the plaintiff on all the issues and rendered judgment in his favor for $2,800. The defendant appealed.

The plaintiff had been employed for about seven years at a firehouse located in a residential district on the northerly side of Geary street between Scott street on the east and Divisadero street on the west. About 6:35 p. m. on September 2o, 1937,

the plaintiff stepped from the northerly curb in front of the firehouse, with the intention of crossing the street at that point for the purpose of going to a store on the southeast corner of Geary and Divisadero streets. There was no crosswalk at the point of crossing selected by the plaintiff. There were established crosswalks and stop signs at both intersections. A pole with a lighted street lamp stood about 2 feet east of the point where the plaintiff entered the street, and the doors of the lighted firehouse remained open. The plaintiff wore a dark blue uniform. He stopped behind a parked car which was to the west of him. There were no parked cars to the east for a distance of about 75 feet. He looked to the east and at a distance of 135 to 150 feet observed the lights of the defendant's car in the traffic lane on the north side of the car tracks approaching at a speed of about 20 to 25 miles an hour. He proceeded safely as far as the northerly rail of the westbound car tracks and stopped again to permit another westbound automobile, which had passed the defendant's car and which was moving at a high rate of speed, to pass in front of him. Before proceeding he observed the defendant's car again, and saw that it was swerving onto the westbound car tracks and coming directly towards him. He stepped back but before he could clear the defendant's path he was struck by the right front fender of the vehicle.

The defendant testified that at no time did he see a man in the path of his car, but that he became aware of a shadow which he thought was a car backing out from the curb and that he swerved to his left to avoid it.

[1] The principal ground of the appeal is that the evidence does not support the findings or the judgment. Over the objection of the plaintiff, paragraphs 2 and 3 of section 10, article IV, of the San Francisco Traffic Ordinance (No. 7691 New Series) were introduced in evidence. Paragraph 2 reads: "Outside of the central traffic district or a business district, no pedestrian shall cross a roadway other than by a route at right angles to the curb, and when crossing at any other place other than a crosswalk, shall yield the right of way to all other vehicles on the roadway."

Paragraph 3 is as follows: "It shall be unlawful for any person to be in any roadway other than in a safety zone or crosswalk, provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian."

It is the defendant's contention that inasmuch as crosswalks were established at Scott and Divisadero streets, a necessary use of the street at the point selected was not shown by the plaintiff, and that his attempt to cross at that point under the circumstances was negligence which proximately contributed to his injuries as a matter of law.

The plaintiff's position is that the ordinance was void because its provisions were in conflict with the California Vehicle Code, St.1935, p. 93, relying on Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; that in any event his conduct was not in violation of the ordinance, but, if otherwise, the question of proximate cause was one of fact and not of law.

Chapter 10 of division IX of the Vehicle Code relating to "Traffic Laws" deals with "Pedestrians' Rights and Duties". (Secs. 560 to 564, St.1935, p. 188). Section 560 states the pedestrian's right of way at crosswalks. Sections 561 and 562 direct when the pedestrian shall yield the right of way. Section 562 provides:

"(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

"(b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway."

Section 563 reads:

"(a) At intersections where traffic is controlled by a traffic signal device or by police officers, pedestrians shall not cross the roadway against a red or stop signal.

"(b) Between adjacent intersections so controlled pedestrians shall not cross at any place except in a crosswalk."

Section 564 states the duty of the pedestrian in country areas to walk close to his left hand edge of the roadway.

Section 458, also contained within division IX of the Vehicle Code, reads:

"The provisions of this division are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein."

The ordinance does not fall within any of the express authorizations (sec. 459).

The defendant argues that the ordinance related to a matter not covered by division IX of the Vehicle Code, and was therefore a valid enactment, relying on Mann v. Scott, 180 Cal. 550, 182 P. 281, and similar cases. However, our conclusion that the ordinance appears not to prohibit crossing between the intersections here involved makes it unnecessary to discuss the other questions regarding the validity of the ordinance. The only parts of the ordinance introduced in evidence, as noted, were paragraphs 2 and 3.

It is apparent from the language of paragraph 2 that the pedestrian is permitted to cross roadways outside of the central or a business district at a place other than a crosswalk, so long as he does so by a route at right angles to the curb and yields the right of way to all vehicles on the roadway. Here the street was in a residence district and was therefore outside the central or a business district.

Paragraph 3 makes it unlawful for any person to be in any roadway other than in a safety zone or crosswalk, "provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian".

We cannot construe the language of paragraph 3 as a prohibition against crossing except at a crosswalk. If it were so construed it would be contrary to and inconsistent with the provisions of paragraph 2. Ordinarily, crossing a street is a necessary and proper use of it, and the permission to cross at points between crosswalks implied in the language of paragraph 2 is a recognition of such use as a necessary use. So construed, the provisions of the ordinance are not inconsistent with the provisions of the Vehicle Code. Therefore, unless it clearly appears that the ordinance contains some restriction not included in the statute there is no occasion in a case such as this to consider further the question of claimed invalidity. No serious contention is made that the plaintiff was crossing the roadway otherwise than at right angles to the curb. The plaintiff testified that his route was on such a straight line, and not diagonally, from his position in the rear of the parked car. The defendant testified that he did not see the plaintiff.

[2] We find no merit in the contention that the provisions of section 563 of the Vehicle Code were applicable. It appears that there were "stop" signs at the intersections, but there was no evidence that the intersections were controlled by a "traffic control signal device" or by a police officer. An unchanging lettered "stop" warning is a sign, not a controlled "stop and go" signal. The language of the section, which also refers to control by police officers and prohibits crossing against a red or stop signal, must necessarily refer to mechanically controlled stop and go signals, which are operating, as "traffic control signal devices". Brown v. Regan, 10 Cal.2d 519, 75 P.2d 1063.

[3, 4] By section 562(a) of the Vehicle Code the plaintiff was required to yield the right of way to all vehicles on the roadway. But by the provision of subdivision (b) of the same section the defendant was not thereby relieved from the duty of exercising due care. His duty did not arise only when he saw the plaintiff. It was a constant duty, and that duty would be breached if, under the circumstances, he failed to see what an ordinarily prudent person exercising due care would have seen. We cannot say that before proceeding the plaintiff should have waited for a vehicle to pass which was traveling at a relatively slow rate of speed and approaching from a distance of 135 to 150 feet, nor that his failure to do so necessarily constituted a violation of the statute. On the record here presented the question whether the plaintiff did all that a reasonable man was required to do in compliance with the statute, the questions of negligence, contributory negligence and of proximate cause, were for the court to determine. Genola v. Barnett, 14 Cal.2d 217, 93 P.2d 109, and cases cited; see, also, Mitrovitch v. Graves, 25 Cal.App.2d 649, 78 P.2d 227.

The case of Meincke v. Oakland Garage, Inc., 11 Cal.2d 255, 79 P.2d 91, is not controlling on the facts of this case. There the violation of a city ordinance prohibiting crossing between intersections was admitted. The question of alleged conflict between the ordinance and the state law was not presented by the parties. It was attempted to be presented for the first time by an amicus curiae in support of a petition for a rehearing in this court.

[5] There is no merit in the contention that the probative facts found are inconsistent with the findings of the ultimate facts and that they overcome the latter as a matter of law. The findings of the pro-

bative facts are susceptible of a construction which will support the judgment for the plaintiff. In such case they do not, of course, adversely affect the findings of the ultimate facts. People v. McCue, 150 Cal. 195, 198, 199, 88 P. 899; Hammond Lumber Co. v. Barth Investment Company, 202 Cal. 606, 609, 262 P. 31.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; HOUSER, J.; GIBSON, J.; CARTER, J.



15 Cal.2d 492

PEOPLE v. RYAN.

Cr. 4236.

Supreme Court of California.

May 1, 1940.

Gaming ⇐98(5)

Evidence established that room wherein accused was arrested during raid was occupied for purpose of recording or registering bets or selling pools on result of horse races and sustained conviction for violating statute relating to occupying room with paraphernalia for purpose of recording or registering bets. Pen.Code, § 337a, subd. 2.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Jack Ryan was convicted of occupying room with paraphernalia for purpose of recording or registering bets upon result of horse races and he appeals.

Affirmed.

Prior opinion, 90 P.2d 603.

S. W. Thompson, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

PULLEN, Justice pro tem.

Appellant, with others, was jointly charged with violating subdivision 2 of section 337a of the Penal Code. Ryan was found guilty. From an order denying a motion for a new trial, an appeal was taken to the District Court of Appeal. The transcript of the proceedings of the trial court as presented to the appellate court clearly showed that at the time of pronouncing judgment the court found appellant guilty of a violation of subdivision 3, section 337a of the Penal Code. The appellate court, in reviewing the record, held the judgment defective because the defendant had been adjudged guilty of an offense not alleged in the information, and thereupon reversed the trial court.

Thereafter, the People filed a petition for a hearing before this court, which petition was granted. Following the granting of the petion for a hearing, the attorney-general, upon behalf of the state, presented a motion for diminution of the record based upon an affidavit of the official court reporter who reported all the proceedings had at the trial of Ryan in the superior court, and affiant declared that the transcript wherever it purported to say that the trial court found the defendant then guilty of a violation of subdivision 3 of section 337a of the Penal Code, was a mistake in transcription, and that the court stated, and the transcript should have read, "Subdivision 2" of said section.

Upon the hearing of the motion this court granted the same and issued an order correcting the record upon which the District Court acted, so that the only point considered and acted upon by that court is not now in the record, nor is the point now before us. We are satisfied that if the amended and corrected record had been presented to the District Court, that tribunal would have reached the same conclusion that we now find to be decisive of the appeal.

The point here presented is that the evidence is insufficient to support the verdict and that the same is contrary to the evidence.

The evidence submitted to the trial court, sitting without a jury, was, briefly, that two officers went to a certain dwelling house in Los Angeles, and upon looking through a window, saw the defendant Ryan seated at a table in a rear room, upon which table were telephones, an amplifier, papers and other paraphernalia; the officers observed Ryan answering a telephone and making certain notations on a paper lying on a table before him. Upon demanding admission, Ryan, and the other men who were in the room, left that room and went into another part of the house.

Upon examining the room in question the officers found certain papers known among racing men as betting markers or betting records, four telephones and an amplifier, an adding machine, and a rack in which were filed a number of betting records. They placed Ryan under arrest, and he then told the arresting officers that that was his home and that he would take the "rap". He also stated he had been operating for several months, although not continuously—that sometimes his play was not heavy enough to justify remaining open.

Defendant was charged with a violation of subdivision 2 of section 337a of the Penal Code, which provides that every person "who * * * keeps or occupies * * * any room * * * with * * * book, * * * papers, apparatus, device or paraphernalia, for the purpose of recording or registering * * * bets * * or wagers * * * upon the result * * of any trial * * * or contest * * * of skill, speed or power of endurance of man or beast * * * Is punishable * * *".

For the purpose of this appeal appellant admits the evidence before the court showed that in a house which defendant Ryan occupied the officers found certain paraphernalia that is usually kept and found in places where the wagering on horse racing is carried on, but contended that proof alone of the occupancy of a place "with books and paraphernalia" which might have been used for the purposes prohibited by section 337a of the Penal Code is not sufficient, but that the proof must further show that the place was occupied for the purpose of recording or registering bets or selling pools upon the result of the prohibited contests. In other words, does the prepositional phrase "for the purpose of recording or registering any bet" modify "occupies" or does it modify the phrase "with a book * * * paper * * * apparatus * * * or paraphernalia?" If the latter construction is correct then it is the paraphernalia and apparatus which must be for the purpose of recording a bet, and not the occupying, for the purpose of recording or registering the bets.

Support for the contention of appellant is found in People v. Tuttle, 27 Cal.App.2d 647, 81 P.2d 571, 572, wherein the court said: "Although it was incumbent upon the prosecution to prove that the room was kept for the purpose set forth in the code provision it was not necessary to make this proof by direct evidence."

In view of the abundance of the evidence that the room was kept by defendant for the acts prescribed by the statute we need not approve nor disapprove the construction of the language placed thereon by the court in that case, for here the circumstantial evidence is sufficient to support the finding that the room was kept for the purpose of accepting wagers on a horse race. The usual equipment was found therein; a horse race was being announced over the loud speaker when the officers gained admission to the room; defendant was seated at a desk, pencil in hand, talking over the telephone; he attempted to run out of the room but was interrupted by the officers; and his admission tended to connect him directly with the establishment and the activities there being carried on.

The evidence is ample to support the verdict. The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J; HOUSER, J.; EDMONDS, J.



15 Cal.2d 425

Ex parte FULLER.

Cr. 4276.

Supreme Court of California.

April 26, 1940.

1. Pawnbrokers and money lenders ⇐1

Regulations of lenders and brokers making or negotiating loans of $300 or less may validly be imposed if they constitute a reasonable exertion of governmental authority for the public good.

2. Constitutional law ⇐48

If there is a proper legislative purpose, a law enacted to carry out that purpose, if not arbitrary nor discriminatory, must be upheld by the courts.

3. Evidence ⇐5(2)

It is a matter of common knowledge that persons who have no banking credit and require small loans to pay debts, meet taxes, or provide funds for emergency needs

have always found difficulty in obtaining money unless they paid a very high rate of interest, amounting in many cases to oppression.

4. Pawnbrokers and money lenders ⇐1

The small loan business cannot be subjected to unreasonable regulation.

5. Pawnbrokers and money lenders ⇐1

A lawful occupation, such as small loan business, may be regulated for the protection of the public but the degree of such regulation must be commensurate with the evils to be remedied.

6. Pawnbrokers and money lenders ⇐2

Provisions of the Small Loan Act requiring one engaged in small loan business to procure license are not invalid. St.1939, pp. 2679, 2886.

7. Usury ⇐6

The section of usury law referring to the receiving in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value than at rate of $12 upon $100 for one year, does not refer to anything other than "interest." St.1919, p. lxxxiii, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest".

8. Usury ⇐53, 55, 59

The word "interest" as used in the usury law is broad enough to cover bonus, commission or any other form of compensation paid to the lender for the use of money, but it does not include brokerage or other compensation paid to a third person, or expense items such as appraisals, recording fees, insurance, or similar charges. St.1919, p. lxxxiii.

9. Pawnbrokers and money lenders ⇐1

Brokerage or other compensation paid to a third person for procuring loan or expense items such as appraisals, recording fees, insurance or similar charges are proper subjects of regulation, and one purpose of the Small Loan Act was to limit the amounts which may be exacted therefor. St.1939, pp. 2679, 2886.

10. Pawnbrokers and money lenders ⇐2

The Small Loan Act limiting amounts which may be exacted for brokerage or other compensation paid to a third person or expense items such as appraisals, recording fees, insurance or similar charges is not invalid as in conflict with the usury law, an initiative measure, which restricts interest but leaves the Legislature supreme in all other fields of loan regulation. St.1919, p. lxxxiii; St.1939, pp. 2679, 2886.

11. Constitutional law ⇐18

The 1934 constitutional amendment specifically exempting personal property brokers from the operation of the usury law and giving Legislature power to prescribe methods of regulation and rates and reducing maximum permissible interest rate from 12 to 10 per cent., did not otherwise affect requirements of the usury law as to those classes of lenders which were specifically exempted from that regulation. St.1919, p. lxxxiii; St.1939, pp. 2679, 2886; Const. art. 20, § 22.

12. Pawnbrokers and money lenders ⇐2

The Small Loan Act which prohibits an interest charge of more than 10 per cent. per annum and also denies a licensee the right to contract for or receive service or expense charges beyond the actual outlay and limits the aggregate amount of such interest and charges to 2½ per cent. per month on loans of less than $100 and 2 per cent. on any remainder of an unpaid balance of principal in excess of that amount, is not invalid on ground that it authorizes greater charges than permitted by the usury law, an initiative measure, and constitutional amendment, limiting interest to 10 per cent. St.1919, p. lxxxiii; St.1939, pp. 2679, 2886; Const. art. 20, § 22.

13. Pawnbrokers and money lenders ⇐2

The Small Loan Act limiting amounts which may be charged for brokerage or other compensation paid to a third person or expense items such as appraisals, recording fees, insurance or similar charges, could not be held unconstitutional on theory that it deprives lender of right to collect legal costs authorized by usury law, an initiative measure, since the failure of the usury law to limit charges did not operate as a prohibition against any limitation being imposed upon charges. St.1919, p. lxxxiii; St.1939, pp. 2679, 2886.

14. Pawnbrokers and money lenders ⇐2

The penalty provision of the Small Loan Act which voids interest and charges made in violation of the act is not in conflict with penalty provision of the usury law, an initiative measure, which voids interest whether collected or not, since charges are not affected by the usury law and the Legislature retains full authority and control over charg-

es. St.1919, p. lxxxiii; St.1939, pp. 2679, 2886.

15. Pawnbrokers and money lenders ⇐2

The Small Loan Act prohibiting an interest charge of more than 10 per cent. per annum and also denying a licensee the right to contract for or receive service or expense charges beyond actual outlay and limiting the aggregate amount of such interest and charges to 2½ per cent. per month on loans of less than $100 and 2 per cent. on any remainder of an unpaid balance of principal in excess of that amount, is not invalid on ground that it discriminates between lenders charging different rates of interest on theory that the maximum limitation on the aggregate amounts which could be charged borrowers did not take into consideration variations in interest charges. St.1939, pp. 2679, 2886.

16. Pawnbrokers and money lenders ⇐2

The Small Loan Act limiting interest to 10 per cent. per annum did not permit rate of interest greater than 10 per cent. allowed by Constitution because of provision that a month should be a period of 30 consecutive days and that the aggregate total of interest and charges should not exceed 2½ per cent. per month on the first $100 of any loan and 2 per cent. per month on the remainder of loan. St.1939, pp. 2679, 2886; Const. art. 20, § 22.

17. Constitutional law ⇐48

Where classification made by Legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts and one who assails the classification must carry the burden of showing that the action is arbitrary.

18. Constitutional law ⇐240(1), 296(1)
Pawnbrokers and money lenders ⇐2

The Small Loan Act exempting from its operation banks, trust companies, building and loan associations, industrial loan companies, credit unions, licensed pawnbrokers, nonprofit agricultural co-operatives, corporations loaning money pursuant to Agricultural Credits Act, bona fide conditional contracts of sale involving disposition of personal property when not used for purpose of evading the act, licensed personal property brokers, and licensed real estate brokers does not deny "due process" and "equal protection" of law because it does not uniformly apply to all classes of lenders. St.1939, pp. 2679, 2886; St.1919, p. 1252; Agricultural Credits Act of 1923, 12 U.S.C.A. § 1151 et seq.; Const.Cal. art. 1, §§ 13, 21; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process" and "Equal Protection".

19. Constitutional law ⇐240(1), 296(1)
Pawnbrokers and money lenders ⇐2

The Small Loan Act does not deny "due process" and "equal protection" of law because of fact that it applies only to loans of $300 or less. St.1939, pp. 2679, 2886; Const. Cal. art. 1, §§ 13, 21; U.S.C.A.Const. Amend. 14.

In Bank.

Habeas corpus proceeding by Roland A. Fuller.

Writ denied and petitioner remanded to custody.

Alfred Jay Luke, of Los Angeles, for petitioner.

A. D. Schaffer and Anthony Podesta, both of San Francisco, amici curiæ for John Stack.

Marshall Hickson, City Atty., of Santa Monica, for respondent.

Earl Warren, Atty. Gen., Thomas Coakley, Deputy Atty. Gen., and A. S. Montague, of Los Angeles, amici curiæ for Com'r of Corporations.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, amici curiæ.

Ralph E. Hoyt, Dist. Atty., Alameda County, J. F. Coakley, Chief Asst. Dist. Atty., Cecil Mosbacher, Deputy Dist. Atty., and Stanley C. Smallwood, Deputy Dist. Atty., all of Oakland, amici curiæ.

Cross & Brandt, Christopher M. Bradley, and Alex Sherriffs, all of San Francisco, amici curiæ for San Francisco Legal Aid Soc.

EDMONDS, Justice.

The constitutionality of legislation known as the Small Loan Act (Stats.1939, chaps. 953, p. 2679, and 1045, p. 2886) is challenged by the petitioner in this proceeding. He alleges that he has been arrested and detained for violations of these statutes, which were passed at approximately the same time and are substantially identical, and seeks his release upon a writ of habeas corpus.

According to the petitioner, as a broker he negotiated an unsecured loan of $50 in return for a fee of $2.50, and as a lender he made an unsecured loan of his own money in the amount of $50 at a rate of interest of 8 per cent per annum without any additional charges. Both transactions are alleged to have been entered into by him in the regular course of his business, and without his having applied for or obtained either the broker's or the lender's license required by the statutes which are now in effect because, as he asserts, these laws impinge upon the due process, equal protection, and privileges and immunities clauses of the federal constitution and corresponding provisions of the California Constitution, Const.U.S.Amend., 14, Const. Cal. art. 1, §§ 13, 21.

[1, 2] The legislation under attack expresses the purpose of the state of California to supervise the small loan business. Each of the statutes includes regulations with which lenders and brokers making or negotiating loans of $300 or less are required to comply. Such regulations may validly be imposed if they constitute a reasonable exertion of governmental authority for the public good. If there is a proper legislative purpose, a law enacted to carry out that purpose, if not arbitrary nor discriminatory, must be upheld by the courts. Wholesale Tobacco Dealers Bureau, etc., v. National Candy & Tobacco Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486; Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177; Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469.

[3] It is a matter of common knowledge that persons who have no banking credit and require small loans to pay debts, meet taxes, or provide funds for emergency needs, have always found difficulty in obtaining money unless they paid a very high interest rate, amounting, in many cases, to oppression. Such borrowers are often ignorant and usually in immediate need. They are, therefore, likely to be willing, and in fact are often forced by their unfortunate circumstances, to accept whatever terms the lenders may ask. Reported decisions show rates exacted from needy borrowers ranging as high as 1300 per cent. Tennessee Finance Co. v. Thompson, 6 Cir., 278 F. 597 (260 per cent); Cotton v. Cooper, Tex.Civ.App., 160 S.W. 597 (360 per cent); State v. Hurlburt, 82 Conn. 232, 72 A. 1079 (650 per cent); Willson v. Fisher, 75 Misc. 382, 135 N.Y.S. 532 (1300 per cent). California conditions are graphically set forth in a recent legislative report. (Assembly Interim Committee Report on Investigation of Small Loans, Journal of the Assembly, 1935, vol. 1, p. 1297.)

The first real start toward legislation to curb the operations of persons making small loans was commenced by the Russell Sage Foundation, which in 1907 undertook to make a scientific study of the problem. In 1916 it issued the first draft of a Uniform Small Loan Law. Six successive drafts have been made, the latest, designated as the Seventh Draft, having been issued recently. The California legislation of 1939, so far as to most of its basic features are concerned, is patterned after the Sixth Draft which was published in 1935. Forty-one states have now recognized the necessity for protecting borrowers of small amounts from imposition and extortion. Of this number 36, including California, have laws substantially similar to one of the drafts of the Uniform Small Loan Law.

Prior to 1905, the legislature of California had laid restriction only upon pawnbrokers. The constitutionality of that act, passed in 1861, was sustained in the case of Jackson v. Shawl, 29 Cal. 267, and later in Ex parte Lichtenstein, 67 Cal. 359, 7 P. 728, 56 Am.Rep. 713. These decisions, in effect, hold that the pawnbroking business is properly subject to regulation under the police power and that legislation directed solely against it is not based upon an unreasonable classification.

In 1909 the legislature enacted the Personal Property Brokers' Act (Stats.1909, p. 969) which defined personal property brokers as those lending money on the security of personal property or wage assignments, and prohibited such persons from charging over 5 per cent per month. Later this amount was reduced 2 per cent. It also required lenders to furnish borrowers with a complete statement of the loan terms and made a violation of the act a crime. These provisions are typical of similar laws enacted in other states. As amended (Stats. 1911, p. 978), the legislation was fully sustained against constitutional objection in Eaker v. Bryant, 24 Cal.App. 87, 140 P. 310, and In re Stephan, 170 Cal. 48, 148 P. 196, Ann.Cas.1916E, 617. In each of these cases the maximum charge provision and also the classification of personal property

brokers as the sole object of legislation was specifically and unqualifiedly upheld.

In 1918 by an initiative measure known as the Usury Law the people of this state limited the total amount which a lender may receive as profit on a loan to a stated maximum and also curtailed the charges and expenses of loan brokers. (Stats.1919, p. lxxxiii.) However, this court held that it does not restrict the lender's right to charge for certain services rendered by him. Wallace v. Zinman, 200 Cal. 585, 254 P. 946, 62 A.L.R. 1341. The legislation enacted by the people was followed by the Personal Property Brokers' Act (Stats. 1931, p. 558) which required those engaged in the business of procuring such loans for borrowers to secure a license and restricted the charges which might be made for them by allowing a maximum interest rate of 3½ per cent per month upon secured loans of $300 or less. The licensing provisions of this act were upheld in the case of In re Halck, 215 Cal. 500, 11 P.2d 389, although the interest rate provisions were later held to be invalid because in conflict with the Usury Law, supra. Beneficial Loan Society, Ltd., v. Haight, 215 Cal. 506, 11 P.2d 857.

Later the constitutional objections sustained by this court were removed by an amendment to the Constitution adopted in 1934 (art. XX, sec. 22), which specifically exempts personal property brokers from the operation of the Usury Law and gives the legislature power to prescribe methods of regulation and rates. This power was exercised by the enactment of the laws now under attack which provide that "no person shall engage in the business of making or negotiating, for himself or another, loans of money, credit, goods, or things in action, in the amount or of the value of three hundred dollars ($300) or less, without first obtaining a license from the Commissioner of Corporations" and that "no licensee * * * shall make any loan of three hundred dollars ($300) or less, and contract or receive thereon interest at a rate exceeding ten per centum (10%) per annum, computed on the unpaid balance of the loan, which said interest shall not be paid, deducted or received in advance, nor compounded." Stats.1939, chap. 953, secs. 4 and 16; chap. 1045, secs. 4 and 16. These statutes also provide for the supervision and examination of the business carried on by persons making such loans.

[4-6] The small loan business is one which under present economic conditions fulfills the need of many people who require a small amount of money to tide them over times of temporary distress. Unquestionably it cannot be subjected to unreasonable regulation. However, a lawful occupation may be regulated for the protection of the public but the degree of such regulation must be commensurate with the evils to be remedied. One of the most common means of regulation is a requirement that persons engaging in a business must obtain a license so to do, and such a requirement has been uniformly upheld when based upon a reasonable classification.

Thus the Supreme Court of the United States, in upholding a statute requiring the licensing of those engaged in private banking, stated that "* * * the power of the state to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached". Engel v. O'Malley, 219 U.S. 128, 137, 31 S.Ct. 190, 192, 55 L.Ed. 128. Also in La Tourette v. McMaster, 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362, the court pointed out that insurance is affected with a public interest, and those engaged in procuring it for the public may be required to secure a license. Such a requirement has also been upheld in California. In re Weisberg, 215 Cal. 624, 12 P.2d 446; Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; In re Bickerstaff, 70 Cal. 35, 11 P. 393; Aaroe v. Crosby, 48 Cal.App. 422, 192 P. 97.

The second count of the complaint charges the violation of the Small Loan Act in that Fuller, as a broker engaged in the business of negotiating loans to be made by a lender, charged an amount in excess of 2½ per cent per month on the unpaid principal balance of a loan of $50. This brings him within the provisions of the act which prohibit an interest charge of more than 10 per cent per annum, and also denies a licensee the right to "contract for or receive any service or expense charges beyond the actual outlay" and limits the aggregate amount of such interest and charges to 2½ per cent per month on loans of less than $100 and 2 per cent on any remainder of an unpaid balance of

principal in excess of that amount. As against this charge of the complaint, the petitioner contends that the provisions of the act restricting the amounts which a lender may collect are unconstitutional and void.

The principal contention of the petitioner in this regard is that the Usury Law, supra, and the 1934 amendment to the Constitution operate as a prohibition upon the power of the legislature to enact the statute he is charged with violating. More specifically, he claims that the Small Loan Act is invalid because in conflict with the Usury Law.

However, an analysis of the earlier legislation shows conclusively that the petitioner's claims are entirely unfounded. The title of the Usury Law, supra, describes it as an act "relating to the rate of interest which may be charged", providing penalties for violations, and repealing acts and parts of acts in conflict therewith. In section 1 of the act, the legal "rate of interest" is fixed at $7 per $100 per annum, but a "rate of interest" not exceeding $12 per $100 per annum may be agreed upon. The following section prohibits anyone from directly or indirectly taking or receiving any greater sum for a loan than at the rate of $12 per $100 per annum; forbids the compounding of interest; and finally declares any agreements in conflict with its provisions shall be void as to any agreement therein contained "to pay interest" and no action "to recover interest in any sum" shall be maintained and the debt cannot be declared due until the full contract period has elapsed.

Other provisions authorize the recovery of treble the amount of interest paid in excess of that allowed by the act, and also make it a misdemeanor to exact more than 5 per cent on sums under $1,000 and 3 per cent on sums over $1,000, in full for all fees, appraisals, and other enumerated charges.

[7] Both the title of the act and its first section refer to "the rate of interest" which may be charged, and speak of interest alone. Section 2 does not, at the outset, refer to "interest" but to "receiv[ing] in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value * * * than at the rate of twelve dollars upon one hundred dollars for one year". But in the following sentence, the people declared that any agreement to pay interest "in conflict with the provisions of this section" shall be null and void. Very probably, the use of the words "money, goods or things in action, or in any other manner whatsoever", were intended to forestall any possible claim on the part of lenders that the receipt of goods, wares, merchandise, or considerations other than money, would not constitute a payment of "interest" within the meaning of the act. Otherwise the words would be meaningless and in direct conflict with the title, which refers only to "interest", and to section 1 of the act where the same maximum amount allowable is referred to as "interest". Accordingly, there is no possible justification for the claim made by petitioner that section 2 of the Usury Law refers to anything other than "interest".

It is true that the latter portion of section 3 of the Usury Law, supra, specifically refers to charges other than interest and purports to limit the amount of such charges. These provisions were, however, held unconstitutional in the case of Wallace v. Zinman, supra, and if the People in adopting the Usury Law intended to limit certain charges other than interest, they did not succeed in so doing. It operates only as a limitation upon the "interest" which may be charged by the lender, and does not exclude, regulate, or limit other charges which may be made in connection with a loan transaction. Haines v. Commercial Mtg. Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A.L.R. 725; Wallace v. Zinman, supra.

These deficiencies in the Usury Law left a large field for the operation of unscrupulous persons who, operating as brokers, could impose whatever charges they saw fit. Unquestionably the practices which developed led the legislature of 1931 to amend the Personal Property Brokers Act, supra, so as to limit the total charges which could be imposed on loans of $300 or less to 3½ per cent per month, and to require all persons engaged in such business to be licensed. The rate provisions of this act were held unconstitutional because in conflict with the 1918 initiative Usury Law, but the court limited its decision in the following significant language: "We are not intending to hold that the Usury Law prevents a classification, as made by the act, of brokers according to the amount involved and the nature of the security taken. * * * Nor are we intending to hold that a statute which allows the legal rate fixed

by the Usury Law and yet limits the service or expense charges to the actual outlay, and not to exceed a definite limit, would be in conflict with other provisions of the Usury Act. The Usury Law does not purport to fix or limit the legitimate expense or service charge that may properly be borne by the borrower". Beneficial Loan Society, Ltd., v. Haight, supra, 215 Cal. at page 517, 11 P.2d at page 861.

[8-10] This construction of the Usury Law recognizes and applies the general rule that the word "interest", while broad enough to cover "bonus", "commission", or any other form of "compensation" paid to the lender for the use of money, does not include brokerage or other compensation paid to a third person, or expense items such as appraisals, recording fees, insurance, or similar charges. Such charges are proper subjects of regulation, and, unquestionably, one purpose of the Small Loan Act was to limit the amounts which may be exacted therefor. The legislation to accomplish this does not conflict in any manner with the Usury Law, which restricts legislative action only as to interest and still leaves the legislature supreme in all other fields of loan regulation.

[11] The effect of the constitutional amendment of 1934 upon the Usury Law was to reduce the maximum permissible interest rate from 12 per cent to 10 per cent, but not to otherwise affect its requirements as to those classes of lenders which were specifically exempted from that regulation. Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252. As to the exempted groups, the legislature was reinvested with the same control over them as it had prior to the enactment of the Usury Law.

[12] But, says petitioner, the Small Loan Act authorizes greater charges than permitted by the Usury Law and the constitutional amendment. This contention is entirely untenable. The act limits interest to the 10 per cent maximum fixed by the Usury Law and the term "interest" includes all amounts received by the lender under any other name as compensation for his own services with the sole exception of amounts received for legitimate items of expense. Such items are not covered by the Usury Law, and in the absence of other legislation would be unlimited. The Small Loan Act simply limits the amount which borrowers may be charged for such items.

[13] Petitioner also claims that the act is unconstitutional since it deprives a lender of the right to collect legal costs authorized by the Usury Law. Agreement with this contention would require a construction that the failure of the Usury Law to limit charges was intended as a prohibition against any limitation being imposed upon charges. The decision of this court in Beneficial Loan Society, Ltd., v. Haight, supra, is a complete answer to this assertion.

[14] Another of petitioner's points is that the penalty provisions of the Small Loan Act conflict with the Usury Law, since they render void contracts for interest and charges made in violation of the act, whereas the penalties of the Usury Law apply only where excessive interest has been actually paid and received. But the penalty provision of the Usury Law voids the interest whether collected or not, while that of the Small Loan Act voids "interest and charges". Since "charges" are not affected by the Usury Law and the legislature still retains full authority and control over "charges", a provision that charges made in violation of its requirements shall be void can not be construed as a violation of the Usury Law, which applies only to interest.

[15] The petitioner also complains that the act discriminates between lenders charging different rates of interest because the maximum limitation on the aggregate amounts which can be charged borrowers does not take into consideration variations in interest charges. He claims that because of this fact the act does not limit "charges" which can be imposed upon borrowers, as these will vary according to the rate of interest charged, and that therefore the provision with reference to the maximum amounts which can be charged borrowers is indefinite and uncertain and allows an arbitrary charge.

To dispose of this contention it is only necessary to point out that the act does not permit or authorize a variation in the "charges" but specifically limits them to "actual outlays", and that any variation in total charges imposed upon borrowers would result only where the "actual outlays" amounted to less than the interest actually charged and the maximum total which could be charged such borrowers under the act. That this might occur as the

result of a voluntary reduction in the rate of interest charged by the lender from the maximum allowed is, of course, obvious, but absolutely immaterial.

[16] Petitioner's claim that the act permits interest in excess of the constitutional limitation is based upon the provision that a month shall be any period of 30 consecutive days, from which he argues that 12 months would be 360 days; that 10 per cent for 360 days is greater than 10 per cent for 365 days, as required by the Constitution; and that the rate provision is therefore void as allowing a greater rate of interest than allowed by the Constitution. This argument is completely answered by the law's provisions.

The first paragraph of section 16 of the act pertains to "interest", and limits interest to "10 per cent per annum", which is the same limitation fixed by the Constitution. The second paragraph limits "charges" which may be imposed in addition to interest, and provides that the aggregate total of interest and charges shall not exceed 2½ per cent per month on the first $100 of any loan and 2 per cent per month on the remainder of such loan. This percentage could, of course, have been fixed at any percentage which the legislature deemed advisable, since, as heretofore pointed out, this operates simply as a limitation upon the amount of "charges" which can be collected in addition to the interest.

The 30-day month provision contained in the third paragraph expressly applies to "charges and interest", so obviously is intended to refer to the basis for computing the 2½ per cent and 2 per cent aggregate charges. There is no legal reason why the legislature, if it saw fit to do so, could not have made these percentages, for example, 3 per cent and 2½ per cent, instead of 2½ per cent and 2 per cent. Its requirement that such charges be computed on the basis of a 360-day year instead of a 365-day year is therefore not in conflict with the constitutional provision.

It is apparently petitioner's contention that the Small Loan Act is violative of the due process and equal protection of law provisions of the federal and state constitutions because it does not uniformly apply to all classes of lenders but creates an unjustifiable and unreasonable classification thereof through (a) application only to the so-called unsecured or non-exempt group of loan operators, (b) application only to loans of $300 or less, and (c) exemption of real estate loans. This contention is without merit.

[17] The basic doctrine underlying the entire field of classification, and with particular reference to the loan business itself, is well expressed in Borden's Farm Products Co., Inc., v. Baldwin, 293 U.S. 194, 55 S.Ct. 187, 192, 79 L.Ed. 281, where the court said: "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary". The same principle has also been recognized in this state in decisions upholding legislation such as that here attacked, Eaker v. Bryant, 24 Cal.App. 87, 140 P. 310; In re Stephan, 170 Cal. 48, 148 P. 196, Ann.Cas.1916E, 617; Ex parte Lichtenstein, 67 Cal. 359, 7 P. 728, 56 Am. Rep. 713.

[18] The Small Loan Act expressly exempts from its operation, banks, trust companies, building and loan associations, industrial loan companies, credit unions, licensed pawnbrokers, non-profit agricultural cooperatives, corporations loaning money pursuant to the Agricultural Credits Act of 1923, 12 U.S.C.A. § 1151 et seq., bona fide conditional contracts of sale involving disposition of personal property when not used for the purpose of evading the act, licensed personal property brokers when transacting the business authorized by such act, and licensed real estate brokers when transacting the business authorized by such act. Bona fide sales made on conditional contracts of sale do not constitute loans of money, and such transactions would not fall within the scope of an act applying to loans. Real estate brokers are subject to the regulation of the real estate commissioner, and the exemption of such brokers applies only when they are transacting business authorized by the Real Estate Act, St.1919, p. 1252. The legislature may reasonably have determined that regulation of such brokers under the Real Estate Act is a sufficient safeguard against improper practices on their part in connection with small real estate loans, or that no abuses existed in the case of real estate loans which required any remedy.

Banks, trust companies, building and loan associations, industrial loan companies and credit unions are all created by special laws and are subject to inspection, supervision and control, which justify their exemption from other forms of regulation. The exemption of licensed pawnbrokers is justified for the same reason, and also because legislation regulating them has been consistently upheld as proper classification. Ex parte Lichtenstein, supra. The same principles are applicable to the exemption of licensed personal property brokers, since legislation applicable to them alone has been upheld as reasonable and proper classification. Eaker v. Bryant, supra; In re Stephan, supra. Moreover, their exemption is not absolute, but applies only to transactions subject to the Personal Property Brokers Act.

Non-profit agricultural cooperatives, and corporations lending money pursuant to the Agricultural Credits Act of 1923 clearly engage in a limited field of business. As to the first group, it is hardly to be expected that non-profit cooperatives would indulge in "loan shark" practices. Accordingly, as this court said in Eaker v. Bryant, supra, "we may reasonably assume that the Legislature has not found any abuse in that business requiring public correction". 24 Cal.App. at pages 93, 94, 140 P. at page 313. The same statement may properly be made as to the remaining group of corporations lending money pursuant to the Agricultural Credits Act of 1923. Also, their operations are subject to the regulation and control of the Farm Credit Administration, which is another reason why they may properly be exempted.

[19] This leaves for consideration the question whether legislation applicable only to loans of $300 or less may be upheld. There is no doubt about the answer.

The propriety and reasonableness of a classification of the loan business, based on size of individual transactions, has been upheld in practically all cases where the matter has been questioned. In re Halck, supra; Koen v. State, 162 Tenn. 573, 39 S.W.2d 283. Nor does such legislation conflict with any provision of the Federal Constitution. Engel v. O'Malley, 219 U.S. 128, 31 S.Ct. 190, 55 L.Ed. 128. Size of transactions is not always an index of the evil to be remedied, but may well provide the basis of classification where the legislature is endeavoring to protect those who borrow small amounts against the rapacity of those who would prey upon ignorance or credulity.

Other assaults upon the act are many and varied, leaving unchallenged practically nothing but the punctuation. Those which have not been discussed are, in general, included within the points passed upon or are so inconsequential as not to merit recognition.

The writ is denied and the petitioner remanded to custody.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; GIBSON, J.

CARTER, J., deeming himself disqualified does not participate in the foregoing decision.



ABELLEIRA et al. v. DISTRICT COURT OF APPEAL, THIRD DIST. et al.*

S. F. 16357.

Supreme Court of California.

April 26, 1940.

Rehearing Granted May 25, 1940.

1. Master and servant ⇐78

Until Employment Commission determines facts upon which right to unemployment benefits depends, it is improper for a reviewing court to consider claims for benefits on their merits. Gen.Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 67–72.

2. Prohibition ⇐11

"Prohibition" never issues to restrain a lower tribunal from committing more error in deciding a question properly before it, since, if lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision subject only to appellate review and not to restraint by prohibition.

See Words and Phrases, Permanent Edition, for all other definitions of "Prohibition".

3. Prohibition ⇐10(1)

"Prohibition" is not confined in its operation to restraining trial courts from acting in original proceedings, but the writ lies also to prevent a lower appellate court from

* Subsequent opinion 109 P.2d 942.

reviewing on appeal a matter over which it has no jurisdiction.

4. Prohibition ⇐10(1)

As respects right to issue prohibition for "lack of jurisdiction", quoted phrase in its most fundamental and strict sense means an entire absence of power to hear or determine the case and absence of authority over the subject matter or the parties, but in its ordinary sense for purpose of determining right to review by certiorari restraint by prohibition or dismissal of an action, a much broader meaning is recognized and may be applied to a case where, though court has jurisdiction over subject matter and parties in fundamental sense, it has no "jurisdiction" or power to act except in particular manner or to give certain kinds of relief or to act without occurrence of certain procedural prerequisites.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction" and "Lack of Jurisdiction".

5. Prohibition ⇐10(1)

The concept of "jurisdiction" as respects issuance of prohibition for lack thereof embraces a large number of ideas of similar character, some fundamental to nature of any judicial system, some derived from requirement of due process, some determined by constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional.

6. Certiorari ⇐28(2)
Prohibition ⇐10(1)

Generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by courts and followed under doctrine of stare decisis, are in "excess of jurisdiction" in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari.

See Words and Phrases, Permanent Edition, for all other definitions of "Excess of Jurisdiction".

7. Constitutional law ⇐275(2)
Master and servant ⇐11

The Unemployment Insurance Act, which contains a complete administrative procedure with provisions for one original determination and two appeals, fulfills every requisite of "due process of law." Gen. Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 67–72.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

8. Mandamus ⇐3(8)
Prohibition ⇐10(2)

The District Court of Appeal had no jurisdiction to issue writ of mandate to Employment Commission restraining payment of unemployment benefits, and hence prohibition would issue from Supreme Court to restrain District Court of Appeal from enforcement of writ of mandate where employers had not exhausted the remedies provided by Unemployment Insurance Act, employers not having appealed to Employment Commission. Gen.Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 67–72.

9. Action ⇐10

The doctrine of "exhaustion of administrative remedies" is that, where an administrative remedy is provided by statute, relief must be sought from administrative body and such remedy exhausted before courts will act.

See Words and Phrases, Permanent Edition, for all other definitions of "Exhaustion of Administrative Remedies".

10. Courts ⇐90(1)

The doctrine of "exhaustion of administrative remedies" is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under doctrine of stare decisis and binding upon all courts.

11. Master and servant ⇐78

The exhaustion of administrative remedies provided by Unemployment Insurance Act is a jurisdictional prerequisite to resort to courts. Gen.Laws 1937, Act 8780d; Gen. Laws Supp.1939, Act 8780d, §§ 67–72.

12. Mandamus ⇐3(8)

The filing of appeal with Employment Commission by employers did not comply with rule of "exhaustion of administrative remedies" so as to authorize District Court of Appeal to issue writ of mandate to commission to restrain payment of unemployment benefits, where appeal was filed after mandate and stay order had issued and appeal was merely a formal step, not intended to have any substantial effect, and commission was then under restraint of court's or-

der and unable to act upon merits of the case. Gen.Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 67–72.

13. Mandamus ⇐3(8)

Employers who failed to exhaust administrative remedies under Unemployment Insurance Act were not entitled to writ of mandate to restrain Employment Commission from paying unemployment benefits on ground that employers would suffer "irreparable injury" because employers would ultimately be required to pay contributions at an increased rate, where employers' contention was purely speculative, act itself offered adequate legal remedy in event that unlawful payment of benefits resulted in unjustified rate of contribution, it did not appear that contributions would be increased by the payments, and under act payments were required to be made regardless of any appeal. Gen.Laws 1937, Act 8780d, § 40; Gen.Laws Supp.1939, Act 8780d, §§ 1, 2, 39, 41, 45.10, 67.

See Words and Phrases, Permanent Edition, for all other definitions of "Irreparable Injury".

14. Master and servant ⇐78

The provision of Unemployment Insurance Act that, if referee affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal thereafter taken, was designed to carry out policy of act of alleviating evils of unemployment, as part of a national plan of social security in which federal and state legislation is coupled; very essence of act being its provision for prompt payment of benefits to those unemployed. Gen.Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 1, 2, 67.

15. Mandamus ⇐3(8)

Employers who failed to exhaust administrative remedies under Unemployment Insurance Act were not entitled to writ of mandate to restrain Employment Commission from paying unemployment benefits on theory that term "appeal" within statutory provision that, if referee affirms initial determination allowing benefits, such benefits shall be paid regardless of any appeal thereafter taken, referred only to appeal to commission, and did not purport to prohibit stay pending review by court, where there was no review proceeding properly pending in a court, since District Court of Appeal which issued mandate had no jurisdiction to take over the proceeding. Gen.Laws Supp.1939, Act 8780d, § 67.

See Words and Phrases, Permanent Edition, for all other definitions of "Appeal".

16. Mandamus ⇐3(8)

Employers who failed to exhaust administrative remedies provided by Unemployment Insurance Act in failing to appeal to Employment Commission were not entitled to writ of mandate restraining payment of unemployment benefits on ground that appeal would be futile in that commission had already decided cases on similar facts against employers' position, since to countenance such view would break down the rule requiring exhaustion of administrative remedies before seeking protection of court. Gen.Laws 1937, Act 8780d; Gen.Laws Supp. 1939, Act 8780d, §§ 67–72.

17. Prohibition ⇐10(1)

As respects right to prohibition, a tribunal generally has jurisdiction to determine its own jurisdiction, but once a tribunal, judicial or administrative, has made such determination of issue and has acted to assume jurisdiction of the cause, the rule no longer has any meaning, since jurisdiction to determine has been fully exercised by determination in favor of jurisdiction over cause and the question is no longer of jurisdiction to determine but of jurisdiction to act, and jurisdiction to act is always a subject of inquiry by a higher court.

18. Prohibition ⇐18

The writ of prohibition is not refused nor held in abeyance because lower tribunal may ultimately realize the error of its assumption of jurisdiction, but the writ is granted at the time act in excess of jurisdiction occurs.

SHENK, J., WASTE, C. J., and CURTIS, J., dissenting.

In Bank.

Petition for writ of prohibition by Frank Abelleira and others against the District Court of Appeal of the State of California, Third Appellate District, the Honorable John F. Pullen and others, Justices thereof, to restrain the respondents from enforcing a writ of mandate and temporary restraining order issued against the California Employment Commission.

Writ issued.

Gladstein, Grossman & Margolis, Richard Gladstein, Aubrey Grossman, Ben Margolis, and George Olshausen, all of San Francisco, for petitioners.

Robert W. Kenny, of Los Angeles, amicus curiae for California State Federation of Labor.

Maurice P. McCaffrey, of San Francisco, and Glenn V. Walls, of Sacramento, amici curiae for California Employment Com'r.

Earl Warren, Atty. Gen., and John J. Dailey, Deputy Atty. Gen., for respondents.

Brobeck, Phleger & Harrison and Gregory A. Harrison, all of San Francisco, for answering parties—intervener—Matson Navigation Co.

Webster V. Clark and Rogers & Clark, all of San Francisco, amici curiae for Associated Farmers of California.

Milton Marks, of San Francisco, amicus curiae for Gantner & Mattern Co.

J. M. Mannon, Jr., Edwin S. Pillsbury, George O. Bahrs, and McCutchen, Olney, Mannon & Greene, all of San Francisco, amici curiae for Brodenson Manufacturing Co.

GIBSON, Justice.

This is a petition for a writ of prohibition, to restrain the respondent District Court of Appeal from taking any steps toward the enforcement of a writ of mandate and temporary restraining order heretofore issued by that court and directed against the California employment commission. For convenience, the term "petitioners" will be used to refer to those who seek the writ of prohibition in the present proceeding; the term "respondent" will refer to the District Court of Appeal; and the term "employers" will be used to refer to those employers who sought and obtained the writ of mandate and restraining order from the District Court of Appeal, as well as to other employers represented by counsel participating in the argument as amici curiae.

Petitioners are individual longshoremen ordinarily employed in the harbor of San Francisco and numbering about five thousand persons. As such workmen they are subject to the provisions of the California Unemployment Insurance Act. Deering's General Laws, Act 8780d; Deering's 1939 Supplement, p. 1697. Under the act a percentage of their earnings is deducted and paid into the unemployment fund, and this money, together with contributions from employers, is used to pay benefits to unemployed workers. The act is administered by a board known as the California Employment Commission, with powers usual to such commissions, including authority to adopt rules and regulation. Sec. 90. Application is made by an unemployed workman and notice thereof is sent to the employer. An initial determination is made by the adjustment unit, which is the lower tribunal. Notice of this determination and its reasons are sent to the applicant and the employers. If payment is ordered, any employer whose reserve account is affected by the payment may intervene and appeal, and payment will be stayed pending said appeal. Sec. 67. A referee is appointed by the commission to hear the appeal, which is conducted in the manner usual to such commission hearings, full opportunity being accorded to produce evidence and examine witnesses. Secs. 67–71. The referee makes written findings and a decision which, unless further appeal is taken, becomes final; but appeal lies to the commission. Secs. 67, 68, 72. This appeal is heard on the record and on any additional evidence produced; oral or written argument may be permitted; and the commission thereafter makes its findings of fact and decision. The commission may also transfer to itself proceedings on any claim pending before the referee, thus affording in some cases an opportunity to expedite a decision by the commission itself. Sec. 72. Section 67 contains a provision reading as follows: "If a referee affirms an initial determination allowing benefits, *such benefits shall be paid regardless of any appeal* which may thereafter be taken, but if such determination is finally reversed no employer's account shall be charged with benefits so paid as to each such determination so reversed." The importance of this provision will hereinafter appear.

During October and November, 1939, widespread unemployment occurred among petitioners. On or about November 10, 1939, they registered for work and made claim for unemployment benefits in accordance with the requirements of the statute. An initial determination was made by the adjustment unit that they were entitled to the benefits, and the employers, intervening, appealed from this determination. A hearing was had before a referee; considerable evidence was introduced and argument heard, following which written briefs were filed. On December 15, 1939, the referee

made his decision affirming the initial determination.

On December 16, 1939, the employers applied to the District Court of Appeal, Third Appellate District, for a writ of mandate and other incidental relief, in a proceeding entitled "Matson Navigation Company v. California Employment Commission". The employers objected to payment of the benefits on the ground that petitioners left work "because of a trade dispute", which, under section 56 of the act, disqualifies employees from receiving unemployment benefits. In their application for mandate the employers also alleged that they intend to and will appeal to the commission; that they have not further exhausted their remedies before the commission because the proposed payment of benefits would violate the act; that in prior decisions the commission has indicated its position against the employers on the issue raised and would decide against them; and that the unemployment fund would be seriously damaged by the allegedly unlawful payments contemplated in this case.

The District Court of Appeal issued an alternative writ of mandate and a temporary restraining order directed to the commission to withhold payment of unemployment benefits. The writ states that "any such payments which may be made * * * are in violation of the provisions of the Unemployment Insurance Act", and orders the commission to refuse to pay as long as the asserted trade dispute is in progress, or to appear and show cause before the court why it has not done so. The restraining order was issued to enforce compliance with the mandate pending a final hearing on the alternative writ. The writ and restraining order having been issued ex parte, petitioners on December 18, 1939, made a motion to dissolve. The motion was argued, but the court submitted it without making any decision thereon at that time.

Subsequently, on December 22, 1939, the employers filed an appeal from the decision of the referee to the commission itself, which appeal is now pending.

On or about December 26, 1939, petitioners applied to this court for a writ of prohibition. On January 5, 1940, we issued an alternative writ. The matter was heard and is here on briefs of counsel, together with a number of additional briefs of amici curiae representing the commission, other employers and parties interested generally in the issues of the case.

The theory upon which the District Court of Appeal acted in issuing the writ of mandate clearly appears from the petition, the writ, and the briefs of counsel. The court, in ordering the commission to cease paying benefits, was undoubtedly of the belief that the commission was acting beyond its statutory powers, and consequently was without jurisdiction to make the payments in question. This is expressly asserted by certain amici curiae appearing for the employers.

The theory upon which the writ of prohibition was sought is that the District Court of Appeal had no jurisdiction to issue the writ of mandate prior to completion of the administrative proceedings, and that petitioners had no plain, speedy or adequate remedy otherwise. See Code Civ. Proc., sec. 1103, and authorities discussed infra.

[1] It must be understood at the outset that the merits of the controversy between the original parties, involving the interpretation of the "labor dispute" proviso in the Unemployment Insurance Act, are not before us. The important question is not *what* should be the decision on that point, but rather *how* the decision should be made. In the normal course the commission would make it, and thereafter judicial review, if appropriate, might be sought by either employers or employes. The employers, in departing from this normal procedure, and asking for a judicial review before completion of the administrative proceeding, rely upon assumptions of fact not supported by any record in this court. They seek to justify their action by charging that the determination in favor of petitioners is in violation of the law. But there has not, as yet, been any such final determination by the commission. That body has power to review the evidence previously presented before the referee, and also to take new evidence and make new findings, approving or disapproving those of the referee. It has not yet determined the facts upon which the right to benefits depends, and until it does so, it is improper for a reviewing court to consider the claims on their merits. The issue actually before us does not concern the rights of petitioners or their employers, nor the scope of the Unemployment Insurance Act. The question is whether boards and commissions, charged with the administration of a statute, may carry on their administrative proceedings to completion before being subjected to ju-

dicial review. The importance of that issue can hardly be overestimated, since a curtailment of administrative jurisdiction usually means an enlargement of the duties of the courts in a field in which the courts traditionally are reluctant to enter.

1. *"Lack of jurisdiction" as a basis for writ of prohibition.*

The first inquiry in this case must, of course, be as to the nature and meaning of "jurisdiction"; and here three possible sources of confusion must be eliminated.

First is the argument of the employers that the District Court of Appeal has general original jurisdiction to issue writs of mandate. This is not disputed, nor is the power of the court to review a final decision of the commission in issue. Whether the commission's decision as to the payment of benefits is subject to any judicial review, or whether it can be reviewed by mandate, are questions beyond the scope of this proceeding. The writ herein was issued before any final decision of the commission was rendered, and the question before us now is whether the court could properly interfere with the uncompleted administrative proceeding.

[2] Second is the nature of a writ of prohibition, which never issues to restrain a lower tribunal from committing more error in deciding a question properly before it. If the lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision, subject only to appellate review and not to restraint by prohibition. Hence, in examining the authorities, we must conclude that in those situations in which a writ of prohibition was issued, the particular action restrained was one beyond the jurisdiction of the court to take.

[3] Third is the question whether this court has power to restrain or otherwise control the action of the District Court of Appeal. There can no longer be any doubt on this point. The writ of prohibition is not confined in its operation to restraining trial courts from acting in original proceedings; it lies also to prevent a lower appellate court from reviewing on appeal a matter over which it has no jurisdiction. Shriver v. Superior Court, 48 Cal.App. 576, 582, 192 P. 124; Commonwealth v. Yungblut, 159 Ky. 87, 166 S.W. 808; 50 C. J. 668, sec. 25. This court has in fact issued prohibition directed against the District Court of Appeal in two comparatively recent cases. Fay v. District Court of Appeal, 200 Cal. 522, 254 P. 896; People v. District Court of Appeal, 193 Cal. 19, 222 P. 353; see, also, Stout v. Farwell, 111 Cal.App. 31, 32, 295 P. 47.

We now proceed to a consideration of the meaning of the term "jurisdiction" in its relation to the granting of a writ of prohibition. The term, used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition. At best it is possible to give the principal illustrations of the situations in which it may be applied, and then to consider whether the present case falls within one of the classifications.

[4] Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, and absence of authority over the subject matter or the parties. See, generally, 14 Am.Jur. 363, sec. 160. Familiar to all lawyers are such examples as these: A state court has no jurisdiction to determine title to land located outside its territorial borders, for the subject matter is entirely beyond its authority or power. See Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074. A court has no jurisdiction to adjudicate upon the marital status of persons when neither is domiciled within the state. See Restatement, Conflict of Laws, sec. 111; Ryder v. Ryder, 2 Cal. App.2d 426, 37 P.2d 1069. A court has no jurisdiction to render a personal judgment against one not personally served with process within its territorial borders, under the rule of Pennoyer v. Neff, 93 U.S. 714, 24 L.Ed. 565. See Doherty & Co. v. Goodman, 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097, discussing modern exceptions to the rule. A court has no jurisdiction to hear or determine a case where the type of proceeding or the amount in controversy is beyond the jurisdiction defined for that particular court by statute or constitutional provision. See Cambra v. Justice's Court, 4 Cal.2d 445, 49 P.2d 1121. Other examples of lack of jurisdiction in this fundamental sense will readily occur.

But in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations. For the purpose of determining the right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdic-

tion over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. Thus, a probate court, with jurisdiction of an estate, and therefore over the appointment of an administrator, nevertheless acts in excess of jurisdiction if it fails to follow the statutory provisions governing such appointment. Texas Co. v. Bank of America, 5 Cal.2d 35, 39, 53 P.2d 127. The Superior Court may have jurisdiction over a cause of action and the parties to a suit for libel, but in the case of non-residents, a bond for costs is required by statute, and unless such bond is filed, it is without jurisdiction to proceed, and will be restrained by writ of prohibition. Shell Oil Company v. Superior Court, 2 Cal.App.2d 348, 37 P.2d 1078; see, also, Carter v. Superior Court, 176 Cal. 752, 757, 169 P. 667. A court with jurisdiction over a cause may hear and determine it and give judgment, but it cannot award costs in a situation not provided by statute. Michel v. Williams, 13 Cal. App.2d 198, 56 P.2d 546. The Superior Court may have jurisdiction over a particular cause, but a disqualified judge may not sit and hear it if objection to his qualifications is raised, and prohibition will lie to prevent him from trying it. Hall v. Superior Court, 198 Cal. 373, 387, 245 P. 814. Where an injunction is sought against enforcement of a public statute, the court, despite its general equitable powers, has no jurisdiction to issue it. Loftis v. Superior Court, 25 Cal.App.2d 346, 352, 77 P.2d 491; Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845. A court may have jurisdiction to grant a new trial after motion based upon proper statutory grounds, but has no jurisdiction to make the order unless the moving party has given his notice of intention within the prescribed statutory time. See Peters v. Anderson, 113 Cal.App. 158, 298 P. 76. The court has power under section 473 of the Code of Civil Procedure to set aside its judgment or order on motion where it was entered against a party through inadvertence, excusable neglect, or mistake; but that power is wholly lost at the end of the six months' period prescribed by statute. Estate of Hunter, 99 Cal.App. 191, 196, 278 P. 485. An appellate court may have power to hear and determine a particular case on appeal, but is without jurisdiction to do so unless the procedural step of notice of appeal within the prescribed statutory time is taken. Aregood v. Traeger, 94 Cal.App. 227, 270 P. 1002. And if the notice is given before judgment is actually rendered, the premature appeal will be dismissed (Aspegren & Co. v. Sherman, Swan & Co., 199 Cal. 532, 250 P. 400), or a lower appellate court may be prevented from hearing it by writ of prohibition. Shriver v. Superior Court, 48 Cal.App. 576, 582, 192 P. 124. After reversal of a judgment with directions to the lower court, it has jurisdiction to enter judgment, but is limited by the directions of the Appellate Court and is without jurisdiction to permit amended pleadings to raise new issues; hence prohibition will lie to prevent it from retrying the case. Lial v. Superior Court, 133 Cal.App. 31, 23 P.2d 795. The same is true where the Superior Court, in an appeal from a justice's court on questions of law alone, attempts to try the cause de novo. Sour v. Superior Court, 1 Cal.2d 542, 36 P.2d 373.

On a number of occasions the courts of this state have recognized the conflicting senses in which the term "jurisdiction" is used, and have emphasized the point that in applications for prohibition or certiorari, the broader meaning is involved. In our own recent decision, Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, 112, we said: "* * * some confusion exists with reference to what constitutes an excess, and what constitutes an error, in the exercise of jurisdiction. However, it seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess." In Spreckels S. Co. v. Industrial Accident Commission, 186 Cal. 256, 260, 199 P. 8, 9, where the commission made an award larger than the statute authorized and certiorari was sought, the court said: "The difficulty arises from the different shades of meaning which the word 'jurisdiction' has. As sometimes used, it means simply authority over the subject-matter or question presented. In this sense the Commission undoubtedly had jurisdiction in this case and its award was not without jurisdiction on its part. But the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of some-

thing in excess of the authority possessed." See, also, Weintraub v. Superior Court, 91 Cal.App. 763, 769, 267 P. 733; State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 107 S.W. 487, 491, 15 L.R.A.,N.S., 963, 123 Am.St.Rep. 468, 14 Ann.Cas. 198, reviewing authorities on prohibition and quoting from Appo v. People, 20 N.Y. 531: "* * * The writ lies to prevent the exercise of any unauthorized power in a case or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction."

[5, 6] The foregoing observations, while by no means a complete description of the term, nevertheless, serve as a warning against a too restricted meaning. The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules, developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, insofar as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari. And, as a practical matter, accuracy in definition is neither common nor necessary. Though confusion and uncertainty in statement are frequent, there is a surprising uniformity in the application of the doctrine by the courts, so that sound principles may be deduced from the established law by marshalling the cases and their holdings in this field.

[7, 8] 2. *The requirement of exhaustion of administrative remedies.*

Lack of jurisdiction in the District Court of Appeal to issue its writ of mandate is clearly established when the foregoing principles are considered in connection with a settled doctrine of administrative law. The Unemployment Insurance Act, summarized above, contains a complete administrative procedure, with provision for one original determination and two appeals, fulfilling every requisite of due process of law. Until that administrative procedure has been invoked and completed, there is nothing that the District Court of Appeal or any other court may review; it cannot interfere in the intermediate stages of the proceeding. The employers have no standing to ask for judicial relief because they have not yet exhausted the remedies given them by the statute. They still have their appeal to the commission, which appeal has not yet been decided adversely to them, and prior to the prosecution of this appeal they have no right to demand an extraordinary writ from a court.

[9] This is the doctrine of "exhaustion of administrative remedies." In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. The authorities to this effect are so numerous that only a few of the more important ones need be cited here as illustrations See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 [National Labor Relations Board]; Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 [rate orders]; Porter v. Investors' Syndicate, 286 U.S. 461, 468, 52 S.Ct. 617, 76 L. Ed. 1226 [investment commissioners and permit of investment company]; United States v. Sing Tuck, 194 U.S. 161, 24 S.Ct. 621, 48 L.Ed. 917 [immigration and the powers of the secretary of labor]; Gorham Manufacturing Company v. State Tax Commission, 266 U.S. 265, 45 S.Ct. 80, 69 L.Ed. 279 [tax board]; Red River Broadcasting Co. v. Federal Communications Commission, 69 App.D.C. 1, 98 F.2d 282, 284; Western Powder Mfg. Co. v. Interstate Coal Co., D.C., 5 F.Supp. 619, 621; Hegeman Farms Corporation v. Baldwin, 293 U.S. 163, 172, 55 S.Ct. 7, 79 L.Ed. 259 [liquor control board]; United States Navigation Co. v. Cunard S. S. Company, 284 U. S. 474, 52 S.Ct. 247, 76 L.Ed. 408 [shipping board]; De Pauw University v. Brunk, D. C., 53 F.2d 647, 652; Palermo Land & Water Co. v. Railroad Commission, D.C., 227 F. 708; Hammerstrom v. Toy Nat. Bank, 8 Cir., 81 F.2d 628 [tax board]; American Bond, etc., Co. v. United States, 7 Cir., 52 F.2d 318; Monocacy Broadcasting Co. v. Prall, 67 App.D.C. 176, 90 F.2d 421; Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160, 174, 47 S.Ct. 553, 71 L. Ed. 978; St. Clair Borough v. Tamaqua, etc., Ry. Co., 259 Pa. 462, 103 A. 287, 289, 5 A.L.R. 20; Corstvet v. Bank of Deerfield, 220 Wis. 209, 263 N.W. 687, 697;

Earl Carroll Realty Corp. v. New York Edison Co., 141 Misc. 266, 252 N.Y.S. 538, 543; 48 Yale L.J. 981; 51 Harv.L.Rev. 1251; 35 Columb.L.Rev. 230; 12 N.Y. Univ.L.Q.Rev. 393; 28 Mich.L.Rev. 637; 28 Cal.L.Rev. 129, 151, 154, 162. The California cases have consistently applied this settled rule. See Teeter v. Los Angeles, 209 Cal. 685, 290 P. 11; Collier & Wallis v. Astor, 9 Cal.2d 202, 70 P.2d 171; San Joaquin, etc., Co. v. Stanislaus County, 155 Cal. 21, 27, 99 P. 365; Dawson v. Los Angeles County, Cal.Sup., 98 P.2d 495.

[10, 11] The rule itself is settled with scarcely any conflict. It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. We are here asked to sanction its violation, either on the ground that a valid exception to the rule is applicable or that despite the uniformity with which the rule has been applied, it may be disregarded by lower tribunals without fear of prevention by the higher courts. This last point cannot be too strongly emphasized, for the rule will disappear unless this court is prepared to enforce it. To review such action of a lower court only on appeal or petition for hearing would permit interference with the administrative proceeding pending the appeal or hearing, with the effect of completely destroying the effectiveness of the administrative body. The writ of prohibition can alone operate surely and swiftly enough to prevent this unfortunate result; and only if we recognize that the rule is jurisdictional will it be uniformly enforced. Bearing in mind the analysis of jurisdiction which has heretofore been made, and examining the authorities dealing with the rule, we are necessarily led to the conclusion that exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.

In Myers v. Bethlehem Shipbuilding Corporation, supra, an application was made to the Federal District Court to enjoin the National Labor Relations Board from holding a hearing, but the employer applicant did not comply with the board's procedure. The United States Supreme Court annulled a preliminary injunction despite the employer's contention that the board had no authority over it because it was engaged in interstate commerce. The court declared that to uphold the employer's contention would be in effect to "substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance". [303 U.S. 41, 58 S.Ct. 463, 82 L.Ed. 638.] The court then went on to say: "The contention is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter." The opinion of the court exhaustively cites the controlling authorities, and a footnote points out that "the rule is one of judicial administration—not merely a rule governing the exercise of discretion".

In United States v. Sing Tuck, supra, petitioner alleged that he was a citizen seeking to return to the United States. An immigration inspector decided against his claim of citizenship, and he failed to follow the statutory provision for appeal to the secretary of labor, seeking instead a writ of habeas corpus. The court denied relief, declaring (194 U.S. page 167, 24 S. Ct. page 622, 48 L.Ed. 917) that the act "points out a mode of procedure which must be followed before there can be a resort to the courts". The opinion then states that even though it be contended that the administrative officers are acting without jurisdiction, "it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way".

In Gorham Manufacturing Company v. State Tax Commission, supra, it was held that a suit against the New York Tax Commission to enjoin collection of a tax alleged to be invalid and levied under an unconstitutional statute was properly *dismissed* for failure of plaintiff to avail itself of the administrative remedy provided by the statute for revision and correction of the tax. The court said (266 U.S. page 269, 45 S.Ct. page 81, 69 L.Ed. 279): "A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax, cannot thereafter be heard by a judicial tribunal to assert its invalidity."

In Red River Broadcasting Company v. Federal Communications Commission, supra, a broadcasting company appealed to the courts from a decision of the com-

mission granting a permit for the construction of another station. The appeal was *dismissed* on the ground that appellant had failed to exhaust its administrative remedies and hence could not invoke the jurisdiction of the courts. The opinion, citing numerous cases, states (69 App.D.C. 1, 98 F.2d page 284): "It is a well-settled rule of judicial administration that no one is entitled to judicial relief until he has exhausted all prescribed, applicable, administrative remedies. Generally, the rule is stated as being conclusive of the rights of one who prematurely seeks judicial review, without intimation or suggestion that any judicial discretion is involved in its application."

In Porter v. Investors' Syndicate, supra, [286 U.S. 461, 52 S.Ct. 620, 76 L.Ed. 1226], it was said that "the legislative process remains incomplete" until the administrative remedy is exhausted.

In Western Powder Manufacturing Company v. Interstate Coal Company, supra [5 F.Supp. 621] the court declared that it "has no jurisdiction of such controversies until the administrative remedies have been exhausted".

This court recently gave the rule its full force in Collier & Wallis v. Astor, supra. In that case the Private Employment Agency law required that certain controversies be submitted to the labor commissioner subject to later appeal to the superior court. Plaintiff sued on a contract coming within the scope of the statute, and defendant objected that no determination by the commissioner had been made prior to commencement of the action. We sustained the objection, saying (9 Cal.2d page 206, 70 P.2d page 174): "The provision of section 19 of the Private Employment Agency law providing for a reference to the labor commissioner of controversies arising under said act for hearing and determination by such official being a valid legislative enactment, any action brought in the Superior Court without first making said reference and securing said determination, is prematurely brought and cannot be maintained."

[12] The mere filing of the appeal with the commission, after the mandate and stay order had issued, was not a fulfillment of the requirements of the rule. It was purely a formal step, not intended to have any substantial effect, for the commission was then under the restraint of the court's order, and unable to act upon the merits of the case. The courts have considered this type of evasion and have held that the rule of exhaustion of remedies is not complied with by the mere filing of an appeal; the remedies are not exhausted until the appeal is fully prosecuted. Consequently the filing of the appeal with the commission is no more a compliance with the rule than the participation in the original hearing before the Adjustment Unit, of the first appeal before the referee. See Southland Industries v. Federal Communications Commission, 69 App.D.C. 82, 99 F.2d 117; Chicago Great Western R. R. Co. v. Basham, 249 U.S. 164, 167, 39 S.Ct. 213, 63 L.Ed. 534. Thus, in Southland Industries v. Federal Communications Commission, supra, where the petitioner applied to the court while his petition for rehearing before the commission was pending and undecided, the court said [69 App.D.C. 82, 99 F.2d 120]: "Upon the filing of its appeal in this court —its petition for rehearing being then undisposed of—appellant occupied the anomalous position of asking the Commission for administrative relief, and at the same time asking the court for judicial relief from the anticipated decision of the Commission. See Vincent v. Vincent, 3 Mackey 320, 322, 14 D.C. 320, 322; Chicago Great Western R. Co. v. Basham, 249 U.S. 164, 167, 39 S.Ct. 213, 63 L.Ed. 534; Doyle v. District of Columbia, 45 App.D.C. 90; Burnet v. Lexington Ice & Coal Co., 4 Cir., 62 F.2d 906. 'Two courts cannot have jurisdiction in the same case at the same time.' Lasier v. Lasier, 47 App.D.C. 80, 83. See Andrews v. Virginian Ry. Co., 248 U.S. 272, 39 S.Ct. 101, 63 L.Ed. 236. As appellant elected to petition for a rehearing, the Commission retained jurisdiction; and as it failed to act on the petition its decision has never become a final one from which an appeal could be taken. See Voorhees v. John T. Noye Mfg. Co., 151 U.S. 135, 14 S.Ct. 295, 38 L.Ed. 101; Kingman & Co. v. Western Mfg. Co., 170 U.S. 675, 18 S.Ct. 786, 42 L.Ed. 1192; Northern Pacific R. Co. v. Holmes, 155 U.S. 137, 138, 15 S.Ct. 28, 39 L.Ed. 99; Harrison v. Magoon, 205 U.S. 501, 27 S.Ct. 577, 51 L.Ed. 900. Consequently, this court is without jurisdiction."

[13, 14] 3. *The employers' assertion of irreparable injury.*

The employers seek to avoid the operation of the rule, however, by the contention that they would suffer irreparable injury if the administrative hearing were per-

mitted to proceed and its orders made effective without judicial interference at this time. The cases they cite are those dealing with rate orders of regulatory commissions, where the administrative body imposes a confiscatory rate on a public utility. Continued operation of the business at the rate imposed pending the appeal may in some instances be so unprofitable as to amount to a destruction of the business, and therefore a taking of property without due process of law. The courts in these cases issue injunctions to stay the enforcement of the new rate until a final determination of its validity, in order to protect the constitutional rights of the petitioning utilities. In brief, these decisions establish the right to equitable relief to protect the property rights of a petitioner from irreparable injury immediately threatened by a void administrative act. The soundness of this proposition cannot be questioned, but it has no relevancy here.

What injury do the employers show? They say that they will suffer in the event unauthorized payments are made to unemployed workers, because their accounts will be charged with such payments, and their reserve under section 39 of the act will be thereby decreased, with the ultimate result that they may in 1941 pay contributions at an increased rate. In examining this contention, we must remember just what the employers are trying to do. They are attempting to prevent payment of public funds in which they have no direct interest, by a body specially charged with the duty of making such payment. We may concede that they are aggrieved parties entitled to demand judicial review. But the question is not whether they are aggrieved to the extent necessary to gain standing on appeal or review. The question is whether the payment of benefits at this time constitutes such an immediate and irreparable injury as to warrant the drastic step of interfering with an uncompleted administrative proceeding, in defiance of an established rule of jurisdiction. To this question there are several decisive answers.

In the first place, their whole contention is purely speculative. The maximum contribution which they can be required to pay under the statute is 2.07 per cent. This cannot be increased, and the extent of their possible injury would therefore be the loss of a hoped for lower rate under the so-called merit rating provision of the statute. This provision enables employers with a favorable employment experience to obtain a slightly lower rate of contribution, when their account on the commission books shows an excess of contributions over benefits paid. See, secs. 39, 40, 41. But the narrow range in which the contribution rate fluctuates can be affected by a variety of circumstances and by numerous instances of unemployment. It cannot be determined at the present time whether this particular order of payment would, in the light of all the occurrences of the past year and any other period involved, actually result in a changed rate. See, 88 Univ. Pa.L.Rev. 137, 142.

The second answer to this contention is that the act itself offers an adequate legal remedy in the event that unlawful payment of benefits results in an actually unjustified rate of contribution. At the time contributions are due the employer may pay them under protest and sue for the recovery of the part illegally exacted. Sec. 45.10.

Third, it is provided in section 67 of the act that in the event that any payments of benefits are found to be erroneous, the particular employer's account shall not be charged with them. This being so, it is not clear how his contributions can be increased by the payments, since the factor determining the rate is made inapplicable in such event.

The fourth answer is more fundamental; the mandate contravenes the express provision of section 67 that "if a referee affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken * * *." This is one of the most significant statements in the act. In substance it provides that when the initial determination has been reviewed and approved by the intermediate appellate authority (the referee), no further delay in *payment* shall be permitted even though the issues may be still further considered in a subsequent appeal. It was designed to carry out the policy declared in section 1 of alleviating the evils of unemployment, as part of a national plan of social security in which federal and state legislation is coupled. Sec. 2. The very essence of the act is its provision for the prompt payment of benefits to those unemployed. See, 88 Univ.Pa.L.Rev. 137, 139. Any substantial delay would defeat this purpose and would bring back the very evil sought to be avoided. The legislature, recognizing the im-

portance on the one hand of avoiding improvident payments without due consideration of the right thereto, and the danger on the other hand of withholding the payments for long periods through the slow processes of appeal to the commission and perhaps eventually to the courts, took a middle course. It provided for a preliminary appeal or review of the first determination where payments were ordered. This appeal, ordinarily decided in a short period of time, carries with it a stay. But when this second decision has also been made in favor of the applicants, the benefits begin, with protection, as already noted, for the employer in the event of later reversal.

The proceeding instituted by the employers ignores this statutory objective, and attempts to do precisely what the statute forbids. Their position is that the challenge in a court of law of any of the numerous factual and legal determinations which the referee must make in any decision to pay benefits, is sufficient cause for the statute to cease operating. They believe that to continue payments where the propriety thereof has not yet been settled by the courts is an invasion of their legal rights. But in truth there is nothing unusual in the provision, which is in force in some thirty-six of the states. The legislature has concluded on the basis of normal experience that the large majority of the administrative orders will be proper, and that to permit these justifiable and necessary payments to be postponed for long periods would defeat the objectives of the act. The courts have upheld similar provisions in workmen's compensation acts, where the statutes required payments of compensation after stay orders of limited duration, despite the pendency of proceedings on appeal or review. In Employers' Mutual Insurance Company v. Industrial Commission, 65 Colo. 283, 176 P. 314, an employer's insurance company sought to enjoin enforcement of a commission award until the court could pass upon the legal questions. This was denied, and on appeal the court said (page 316 of 176 P.): "* * * the judgment of the Commission in favor of a claimant is prima facie evidence of his right to recover. Procedure under the act is summary in character in order to furnish immediate aid to injured employees, and a careful reading of the statute as a whole leads to the conclusion that it was the intention of the legislature that payment of these weekly allowances should not be stayed. Indeed, to hold that such payments can be enjoined pending judicial review would in effect practically nullify one of the prime objects and purposes of the law." And in Bannister v. Shepherd, 191 S.C. 165, 4 S.E.2d 7, 12, the South Carolina Industrial Commission made an award of compensation, from which the insurance carrier gave notice of appeal to the Supreme Court, meanwhile refusing to make the payments ordered. The statute provided that an appeal from an award of the commission should operate as a supersedeas for thirty days only, and thereafter the employer should be required to make payments until the issue was finally determined. The insurance carrier contended that if it were forced to pay and ultimately obtained a reversal, there would be no way to recover the payments erroneously made, and therefore the statute violated its constitutional rights. The court called attention to the rule that there is no right to supersedeas pending an appeal except where expressly authorized by statute; pointed out that the legislative purpose was to prevent the long delays incident to an appeal by an insurance carrier seeking to escape payment; and observed further that the Workmen's Compensation Act "is a form of social legislation passed primarily for the benefit of the employee, and to prevent the burden of injured employees becoming charges upon society". The opinion finally concludes: "The Legislature has in clear and convincing language provided that an appeal shall only act as a supersedeas for a period of thirty days, whether or not this was a wise decision * * * it is not the province of this Court to say."

The foregoing cases demonstrate the weakness of the argument that because a commission may make an occasional error in ordering some payment out of a public or semipublic fund, the courts must have the power to stay any and all payments during the lengthy period of judicial review. The legislature has concluded that it is wiser to have a system of unemployment compensation operating with a possible small percentage of error, than to have a system not operating at all. The legislative power to make such provision is unquestioned; the statutory language cannot be misunderstood; and for the courts that is the end of the matter.

[15] To these arguments the employers answer that the statute does not in terms apply to the present case. Their

theory is that the term "appeal" in section 67 must be given a restricted interpretation, to refer only to an appeal to the commission, and that it therefore does not purport to prohibit a stay pending a review by a court. Parenthetically it may be pointed out that the employers have already appealed to the commission, and while that appeal is pending the order to cease payments violates the statute. But this inconsistency need hardly be stressed, for the entire argument begs the question. The issue is *whether there is a review proceeding properly pending in a court.* As we have already shown, the District Court of Appeal has no jurisdiction to take over the proceeding, unless some valid exception to the rule of exhaustion of remedies could be established; and the employers, by way of proving such an exception, assume the very point in issue, namely, the pendency of a valid proceeding before the District Court of Appeal to review the merits of the administrative determination. It is impossible to explain away section 67 by such reasoning as this.

[16] 4. *The assertion that appeal would be futile.*

One final argument of the employers to justify disregard of the administrative remedy may be noticed. They assert that the commission has already decided cases on similar facts against their present position, and therefore that an appeal in the instant case would be fruitless. This is, indeed, the slender thread upon which their entire case hangs. But again their position is unsound in principle and unsupported by the better authorities, for it was early perceived that to countenance this view would break down the rule of exhaustion of remedies. In substance the contention is that if they learn upon hearsay or by analogy that the administrative board may take a certain action, the board may be ignored and its action treated as already taken. We should all be very much surprised, no doubt, to find such an assertion made in the judicial field. One might attempt, for example, to bring an original suit in the Supreme Court on the theory that the local superior judge was possessed of a particular opinion opposed to the views of the plaintiff, but he would receive scant consideration. The whole argument rests upon an illogical and impractical basis, since it permits the party applying to the court to assert without any conclusive proof, and without any possibility of successful challenge, the outcome of an appeal which the administrative body has not even been permitted to decide. This argument, though successful in a few cases, has been rejected by the weight of authority. In Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159, 209, 49 S.Ct. 282, 289, 73 L.Ed. 652, the court said that orderly action could not be defeated "by alleging an intent to deny the relief sought." And in Red River Broadcasting Co. v. Federal Communications Commission, supra, the opinion states: "Appellant seeks further to excuse its failure, affirmatively to seek administrative relief, by contending that, even if it had attempted to do so, its request would have been denied; consequently, that its attempt would have been a futile and useless gesture. We cannot assume that consequence. If under such circumstances relief had been sought and denied, then there would have been a basis for appeal. * * * It cannot be heard to complain in this court that there was danger of refusal when it made no effort to do so." See, also, United States Nav. Co. v. Cunard S. S. Co., 284 U.S. 474, 488, 52 S.Ct. 247, 76 L.Ed. 408; United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 272, 51 S.Ct. 376, 75 L.Ed. 1025.

It should be observed also that this argument is completely answered by those cases which apply the rule of exhaustion of remedies to rehearings. Since the board has already made a decision, if the argument of futility of further application were sound, then surely this is the instance in which it would be accepted. But it has been held that where the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have made. See Palermo Land & Water Co. v. Railroad Commission, supra; Carlson v. Railroad Commission, 216 Cal. 653, 655, 15 P.2d 859; Red River Broadcasting Co. v. Federal Communications Commission, supra; McCardle v. Board of Commissioners, 195 Ind. 281, 144 N.E. 877, 878.

5. *Jurisdiction to determine jurisdiction.*

The final contention is advanced that though all of the above conclusions may be entirely correct, and that in consequence the District Court of Appeal has no jurisdiction to hear and determine the merits of the case, nevertheless it has power *to hear and determine the question whether it has jurisdiction.* If by this statement it is

meant that the court had jurisdiction to determine whether the employers had exhausted their remedies before the commission, the record itself is a conclusive answer. The employers have affirmatively alleged their failure to exhaust their remedies before the commission, and their entire argument is devoted to an attempt to excuse such failure. On this point there is no issue presented, but only an admitted fact. If, on the other hand, the statement means that the court had jurisdiction to determine whether it had jurisdiction of the merits of the cause, it is indeed a strange argument. Stated plainly, the proposition is that a court may temporarily interrupt any pending proceeding, administrative or judicial, and hold that proceeding in abeyance while it decides whether it had any power to interfere in the first place; *and during all this time it is immune from any restraint by a higher court.* If that is true as applied to this case, then there is no control over unauthorized, arbitrary assumptions of judicial power except the slow process of appeal or petition for hearing. We cannot, of course, lightly accept such a destructive doctrine, and it must be rejected unless compelled by the strongest logic and precedent. But upon careful study and examination of the authorities cited, we find neither.

[17] The proposition, stated simply, is that a tribunal has jurisdiction to determine its own jurisdiction. This is a truism, and, subject to certain implicit limitations, is ordinarily a correct statement of law. It has its origin mainly in the cases holding that a court has inherent power to inquire into jurisdiction of its own motion, regardless of whether the question is raised by the litigants. See 15 C.J. 851, 852, secs. 170, 171; 14 Am.Jur. 368, sec. 168; Morris v. Gilmer, 129 U.S. 315, 325, 9 S.Ct. 289, 32 L.Ed. 690. It rests also upon the theory that until the court determines that it has jurisdiction and does some act in consequence, there can be no injury to the party who denies its jurisdiction. See Noland v. Superior Court, 26 Cal.App.2d 708, 80 P.2d 76. It means only that the trial court or lower tribunal or body to which the question is submitted has such jurisdiction to make the first preliminary determination—not a final one; and no interference is permitted until it does decide the matter one way or the other. Until it acts to assume or refuse jurisdiction over the merits no one is entitled to complain.

But once the tribunal, judicial or administrative, has made this determination of the issue, and has acted to assume jurisdiction of the cause, the rule no longer has any meaning. *The jurisdiction to determine jurisdiction has been fully exercised* by a determination in favor of jurisdiction over the cause; the question is no longer of jurisdiction to *determine*, but of jurisdiction to *act*. And jurisdiction to act is always a subject of inquiry by a higher court. The cases cited by the employers declare well-established law and are in accord with this basic distinction. For example, in Noland v. Superior Court, supra, the superior court made an order to show cause in a custody proceeding. Petitioner appeared at the hearing and moved to dismiss the order for lack of jurisdiction. The motion was submitted, and while pending and undecided, petitioner sought a writ of prohibition from the District Court of Appeal. The writ was denied. Chester v. Colby, 52 Cal. 516, in which a demurrer raising the jurisdictional point was pending and undetermined, is to the same effect. In neither case had the lower court taken any action in the cause at the time prohibition was sought; it was simply considering whether or not it had jurisdiction to act.

[18] The situation presented in the instant case is entirely different. If the District Court of Appeal, in response to the employers' application and petitioners' objection thereto, *had taken under consideration* the question *whether it had jurisdiction to issue the writ of mandate*, we would have no reason to interfere pending its determination thereof. But the District Court of Appeal did more than this; it acted. It did not merely deliberate upon the question whether it should intervene in the administrative proceeding; it did intervene. The issuance of the writ of mandate with its stay was a positive assumption of jurisdiction, for it displaced the prior jurisdiction of the commission, and rendered that body powerless to proceed. To say that the District Court of Appeal, left alone, may ultimately reach the same conclusion as we do here, and therefore should not be restrained, is no longer an answer. The writ of prohibition is not refused nor held in abeyance because the lower tribunal may ultimately realize the error of its assumption of jurisdiction; it is granted at the time the act in excess of jurisdiction occurs. This very point was cogently stated by the court in Kil-

burn v. Law, 111 Cal. 237, 242, 43 P. 615, 617: "It is said that the objection that the complaint does not state a case of which the court has jurisdiction is in the nature of a demurrer, and that the superior court has jurisdiction to consider all such questions, and they cannot be made the ground for a writ of prohibition. *This point cuts too deep, and, if sustained so broadly, would deprive this court of all power to issue writs of prohibition in cases where a lower tribunal is exceeding its jurisdiction.*" And in Brougham v. Oceanic Steam Nav. Co., 2 Cir., 205 F. 857, 859, the court spoke in similar vein: "It is sometimes said that every court has jurisdiction to determine its own jurisdiction. This is partly true and partly untrue. A court must as an incident to its general power to administer justice have authority to consider its own right to hear a cause. But the mere decision by a court that it has such right when it does not exist does not give it authority. A court by moving in a cause assumes authority but the assumption does not confer it."

The controlling test of the correctness of the employers' theory must necessarily be found in its practical operation. We have already referred to the cases which correctly apply it during the court's deliberation, and up to the time it acts. If it goes further, as the employers contend, we should expect to find some suggestion to that effect in the authorities. But all the California cases dealing with this situation have reached exactly the opposite result. In each case a commission or administrative officer assumed jurisdiction of a cause, and a superior court thereafter sought to take jurisdiction of the same cause. Under the theory urged here, if the court had jurisdiction to determine its jurisdiction, no higher court could stop this interference by prohibition, and the question whether the interference was proper would have to await an appeal. But in every instance the appellate court issued a writ of prohibition to restrain the lower court from interfering with the administrative proceeding.

Thus, in Goodyear, etc., Co. v. Hanby, 111 Cal.App. 382, 295 P. 562, an employee received an award from the Industrial Accident Commission and later sued in the superior court to enforce compliance therewith. It was held that the cause was within the jurisdiction of the commission, that therefore the court had no jurisdiction, and that a writ of prohibition should issue to prevent the trial. In Vallejo Bus Co. v. Superior Court, 19 Cal.App.2d 201, 65 P.2d 86, the Railroad Commission made an order permitting a utility to sell stock. The superior court gave a preliminary injunction. It was held that the court acted beyond its jurisdiction in thus interfering with the commission by such restraining order, and a writ of prohibition was issued to prevent the court from doing so. In Lee v. Superior Court, 191 Cal. 46, 214 P. 972, the Industrial Accident Commission, in a proceeding involving a nonresident minor, appointed a guardian ad litem to handle the award. The probate court sought to appoint a guardian of the estate. It was held that the commission's prior jurisdiction could not be usurped by the probate court, and that prohibition should issue to prevent its interference. Finally, in the recent decision in Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107, the lower court sought to interfere by injunction with an administrative proceeding commenced by the Building and Loan Commissioner. This court issued a writ of prohibition to prevent such interference, saying (page 579 of 14 Cal.2d, page 116 of 96 P.2d): "We believe that the trial court in the present case has acted and is acting in excess of its jurisdiction * * *. We have heretofore held that the statute authorized the commissioner to appoint necessary assistants and it appears that the proceedings of the trial court are preventing the exercise of the authority thus conferred upon him."

It thus appears that under established principles of legal procedure the District Court of Appeal was without jurisdiction to issue its writ of mandate, and that petitioners are entitled to a peremptory writ of prohibition. The employers' application was founded upon an asserted right to judicial interference with an administrative proceeding before it became final, and hence impliedly claimed a right to interfere in the middle or the beginning, or even before any such proceeding was commenced. This attitude challenges judicial practices of long standing. The courts have repeatedly recognized the necessity of placing the numerous and complex problems arising under statutes of the type involved herein in the hands of expert bodies, familiar with the subject-matter through long experience. They have pointed out that to permit the initial consideration of these matters by the courts would not only preclude the efficient operation of the acts, but

would overwhelm the courts with cases of a technical, specialized character, and seriously impair their capacity to handle their normal work. See Myers v. Bethlehem Shipbuilding Corp., supra; United States v. Sing Tuck, supra; United States Nav. Co. v. Cunard S. S. Co., supra; Federal Communications Commission v. Pottsville Broadcasting Co., 60 S.Ct. 437, 440, 443, 84 L.Ed. 656; Armstrong v. United States, 8 Cir., 16 F.2d 387, 389. The observation of the United States Supreme Court in Federal Communications Commission v. Pottsville Broadcasting Co., supra [60 S.Ct. 443], is a timely reminder: "It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government." We can with safety and assurance follow the traditional policy of the courts in this respect, remaining ready to review any final improper action, but permitting the administrative body initially to decide its myriad problems unhindered.

Let a peremptory writ of prohibition issue restraining the respondent District Court of Appeal from taking any steps toward the enforcement of its writ of mandate and temporary restraining order heretofore issued and directed against the California Employment Commission.

We concur: CARTER, J.; HOUSER, J.; EDMONDS, J.

SHENK, Justice (dissenting).

I dissent.

The sole question presented in this proceeding in prohibition is whether the District Court of Appeal has the power to decide a certain controversy pending before it. That question is not whether the employees affected are or are not entitled to unemployment benefits, but whether the petitioners in the mandamus proceeding pending before the District Court of Appeal have stated a case which that court has jurisdiction to entertain and determine. In my opinion that court has that power and to deny it by the issuance of a peremptory writ of prohibition is to deny the right of our citizens to seek redress in the courts against threatened unlawful action on the part of an administrative board. For it necessarily follows that if the District Court of Appeal has no power to decide the matter presented to it, this court likewise has no such power and the administrative board may then proceed in the matter in controversy arbitrarily and without the judicial restraint which is universally recognized to be necessary in the proper application of administrative law.

The case presented to the District Court of Appeal is one calling for a judicial determination of the powers of the board under the statute of its creation, and on admitted facts. Particularly in the mandamus proceeding pending in that court the question is whether it is not the legal duty of the California Employment Commission, of its own motion, if need be, and contrary to its alleged intention, to set aside, pursuant to section 72 of the act, the decision of the referee affirming the initial determination allowing benefits, and in any event to disallow such benefits and thus prevent the alleged illegal payments from the unemployment fund.

In the mandamus proceeding, the District Court of Appeal was called upon to decide two principal questions:

First, whether under the facts found by or under the authority of the commission, the claimants for payments from the unemployment fund were eligible to receive the benefits. Section 56 of the act provides: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: (a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

It is contended in the mandamus proceeding that the claimants, petitioners here, are not eligible for benefits under the foregoing section and under the facts found by, as distinguished from the conclusions of, the commission's referee. The question of the legal duty of the commission under the law and the facts was there squarely presented for that court's determination. It is significant that in another mandamus proceeding in the same District Court of Appeal, filed about the same time as the proceeding now prohibited by this court but not interrupted by any order of this court, the District Court of Appeal assumed jurisdiction of a similar controversy and after hearing directed the issuance of a peremptory writ of mandamus to compel the employment commission to disallow unemployment benefits to employees who had

left their work because of a trade dispute and were therefore ineligible to receive benefits. Bodinson Manufacturing Company v. California Employment Commission, Cal.App., 101 P.2d 165. The precise question of eligibility under the law upon similar allegations of fact was raised and decided in that proceeding as is raised in the proceeding now subjected to the writ of prohibition by the majority decision of this court. In the Bodinson case, as in the pending mandate proceeding here involved, it was alleged that on the facts found by the referee benefit payments from the unemployment fund would be made to claimants who were ineligible under the act to receive them unless the court should intervene in protection of the fund. I can conceive of no good reason why the District Court of Appeal should not be permitted to decide the issue so presented. The claimants take the position that the decisions of the commission allowing and directing the payment of benefits are beyond judicial review. Indeed, on oral argument counsel for the commission expressed this same view. It cannot be true that this is the attitude of the members of the commission, who are public officers acting as trustees of a public fund which now contains an enormous amount of money collected from the employers and employees of the state for a specific purpose, namely, for the relief of employees who have been subjected to involuntary unemployment and who are eligible under the law to receive benefits. If the commission persists in payment to those who are ineligible to receive benefits, as is alleged in the pending mandamus proceeding, approximately a half million dollars will be unlawfully paid out of a fund whose beneficial and lawful administration was mistakenly anticipated in the litigation which resulted in declaring the constitutionality of the act under which the commission was created and is functioning. Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595.

To hold that a commission set up by a statute of this state with the highly important and responsible duties of the employment commission is not amenable to judicial process would be to constitute the commission an autocratic body whose functioning is uncontrolled by any consideration except its own whim and caprice. Such of course is not the law of this state, nor of any other jurisdiction, state or federal. In this state the District Court of Appeal has constitutional and statutory authority to direct public officers to perform their duties under the law. Const. art. VI, sec. 4b; secs. 1084–1097, Code Civ.Proc. That power is coextensive with the same power reposed in this court except that the decision of that court is subject to review by his court by appropriate order of transfer. It is contended that only under section 56a of this act are the petitioners herein ineligible to receive the claimed benefits, but section 67 also prescribes that benefits shall be paid only to claimants who are eligible to receive them. To deny the District Court of Appeal the right and power to decide whether the petitioners herein are or are not eligible under the statute and the admitted facts would be to deliberately shut our eyes to an alleged arbitrary, flagrant and unlawful assumption of power by the employment commission.

In my opinion there is not the slightest doubt that a justiciable controversy within its jurisdiction has been presented to the District Court of Appeal and that the issues there tendered present for determination also the question whether the petitioners before that court had exhausted their statutory remedies before the commission. This is the second principal question involved in the pending mandamus proceeding.

The majority opinion holds that the District Court of Appeal is without jurisdiction because the mandamus proceeding was prematurely brought in that the petitioners therein had not exhausted their remedies before the commission. It is noted that the adjustment unit of the division of unemployment compensation in the department of the commission granted the application of the employees, petitioners herein, for the payment of benefits. Certain of their employers appealed from the determination of the adjustment unit under section 67 of the act. The commission designated a referee to hear the appeal pursuant to section 69. On that appeal the referee found the facts. The petitioners in the District Court of Appeal claim that those facts showed conclusively and as a matter of law that the claimants were ineligible to receive the benefits. But the referee concluded that the claimants were eligible to receive benefits and affirmed the initial determination of the adjustment unit. Section 72 of the act provides: "Any party to a decision by a referee may appeal

to the commission from such decision. The commission may on its own motion affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence. * * *"

The majority say the District Court of Appeal has no jurisdiction in the mandamus proceeding because the petitioners had not taken and prosecuted to a final conclusion an appeal from the decision of the referee to the commission under section 72 of the act. Section 67 of the act provides for an appeal from an initial determination and then provides: "If an appeal is duly filed benefits with respect to the period prior to the final decision on appeal, shall be paid only after such decision, except as hereinafter provided." Then follows the exception which is the crux of this phase of the present controversy. It reads: "If a referee affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such determination is finally reversed no employer's account shall be charged with benefits so paid as to each such determination so reversed."

The main opinion decides as a matter of law that an employer must take and pursue to conclusion this last appeal to the commission before he may seek redress from the courts, notwithstanding the presence of an immediately enforceable order for alleged illegal expenditures from the unemployment trust fund. It is clear to me that a bona fide controversy is presented in the mandamus proceeding on the question whether the remedy provided by the statute for an appeal to the commission is an adequate statutory remedy as required by law, inasmuch as the benefits must be immediately paid notwithstanding the pendency of such appeal. It is of course well established that when the legislative department has set up an administrative board to ascertain the facts and to take action thereon and has provided in the statute for hearings, rehearings, appeals and other proceedings before the board prior to its final decision, an interested party must exhaust his administrative remedies before he may resort to the courts for a redress of his grievances. But it is equally well settled that the statutory remedies before the board must be both appropriate and adequate. See Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352. To provide for an appeal to the commission from a decision of the referee would certainly appear to be appropriate. But whether the appeal to the commission provided for by this particular statute is adequate, under the circumstances presented to the District Court of Appeal, is a judicial question. The argument against the adequacy of the remedy provided by the final appeal to the commission is that since the benefits must be paid immediately upon affirmance by the referee, and notwithstanding the pendency of such appeal to the commission from the order of affirmance, the subject matter of the court controversy, namely, the alleged illegality of the payments by reason of powers usurped by the commission expressly prohibited by the act, has evaporated and the question has become moot; that is, unless the court may intervene to prevent the alleged illegal payments from the trust fund, the express mandate of the statute will be violated and the unlawful action of the board placed beyond judicial scrutiny and control; that power reposed in an administrative board does not constitute it an autocratic body to the extent that it may, uncontrolled and with impunity, exercise its power contrary to the provisions of the act which created it; that it is well settled that "whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision". (Federal Radio Commission v. Nelson Bros. Co., 289 U.S. 266, 276, 53 S.Ct. 627, 632, 77 L.Ed. 1166, 89 A.L.R. 406; Federal Communications Commission v. Pottsville Broadcasting Co., 60 S.Ct. 437, 440, 84 L.Ed. 656); that prima facie the petition for the writ of mandamus before the District Court of Appeal presents a case of a threatened enforcement of an order on the part of the commission which will violate the express legislative mandate which is a prerequisite to valid payments within the rule repeatedly announced by the Supreme Court of the United States; that the so-called remedy by appeal to the commission from the order of affirmance of the referee is just as inadequate and futile as would be a statu-

tory right of appeal from a judgment for money where a stay pending appeal is expressly denied the appellant, and with a further statutory mandate that notwithstanding the pendency of the appeal the money must be paid, and the judgment satisfied; that it is no valid answer to this argument that the statute provides that in the event the commission on appeal should reverse the order of the referee "No employer's account shall be charged with benefits so paid", for the reason that the employer as a contributor to the trust fund has an additional interest in preserving the integrity of that fund as against illegal expenditure and dissipation thereof contrary to the express purposes of the act.

The foregoing arguments are addressed to the merits of the controversy pending before the District Court of Appeal and are mentioned for the purpose of indicating that there is unquestionably a question of law presented to that court in a matter in which it has jurisdiction of both the parties and the subject matter under the Constitution and laws of this state.

We concur: WASTE, C. J.; CURTIS, J.



39 Cal.App.2d 62

ROBERTSON v. SUMMERIL.

Civ. 2251.

District Court of Appeal, Fourth District, California.

May 10, 1940.

Rehearing Denied June 5, 1940.

Hearing Denied July 9, 1940.

1. Trusts ⇐92½

A "constructive trust" is created by operation of law and need not be supported by a writing. Civ.Code, § 852.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

2. Trusts ⇐110

Evidence that son, in order to provide his mother with regular income, conveyed realty to mother who orally agreed to reconvey to son before or at time of mother's death, that mother subsequently conveyed the realty to her daughter, and that daughter first held the realty in recognition of the son's right thereto, but subsequently claimed realty as her own and refused to convey it to the son, established "constructive trust" in favor of son who was entitled to a conveyance of the realty from the daughter. Civ.Code, § 852.

3. Limitation of actions ⇐102(1), 103(1)

Where son, in order to provide his mother with regular income, conveyed property to mother, who orally agreed to reconvey to son before or at time of mother's death, and mother conveyed the property to her daughter, who at first held the property in recognition of the son's right thereto but subsequently claimed it as her own, son's action against daughter to establish right to property and to require daughter to convey it to son, which was started in about one month from time daughter repudiated her trust and for the first time claimed property as her own, and within five years from time the daughter acquired title from the mother, was not barred by limitations.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by J. E. Robertson against Alys Lyon Summeril to establish that defendant held title to realty in trust for the plaintiff, and to compel defendant to execute the trust by conveying the property to the plaintiff. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed, and attempted appeal from order denying motion for new trial dismissed.

Joseph Anderson, of San Francisco (Francis Gill and Howard E. Gawthrop both of San Francisco, of counsel), for appellant.

Edward Brody, of Los Angeles, and Harvey, Johnston & Baker, of Bakersfield, for respondent.

MARKS, Justice.

Plaintiff brought this action to establish that defendant held title to certain property in Bakersfield, California, as trustee in trust for him, and to compel defendant to execute the trust by conveying the property to him. Judgment went for plaintiff and defendant has appealed.

Plaintiff and defendant are brother and sister. They were the son and daughter

of Alice L. Robertson. Defendant, a widow with two children, lived with Mrs. Robertson until shortly before the death of the latter in March, 1933. Defendant and her children were supported by her mother for a number of years out of income principally furnished by plaintiff.

Mrs. Robertson was left a widow in 1922 or 1923. She received an income from the estate of her deceased husband until about 1926, by which time the administrator had misappropriated all the assets of the estate. Thereafter she was dependent on her children, principally plaintiff, for her support.

Plaintiff was operating manager for a motor freight line which kept him on the road constantly. He was on twenty-four hour service each day. He tried to make it a practice to send his mother a check for her living expenses on the first of each month but occasionally failed to do so until later in the month by reason of being called away. This caused Mrs. Robertson financial embarrassment.

The property here in question was owned by plaintiff and was leased to an oil company on a long term lease. The rental, $100 per month for the first five years, and $125 per month for the last five years of the term, was made payable on or about the first of each month. Plaintiff discussed with his mother the question of providing her with a regular monthly income so that she might not be embarrassed by his failure to send her his checks promptly. He offered to deed the Bakersfield property to her if she would agree to reconvey it to him if and when the administrator repaid the $15,000 which he had misappropriated, or, if that money was not repaid, to see that the property was reconveyed to him at the time of her death. Mrs. Robertson agreed to these terms and the Bakersfield property was conveyed to her. The administrator made no restitution and Mrs. Robertson received the rents until her death and retained title to the property until March 3, 1933. She paid plaintiff nothing for the property. Defendant was fully informed of all these facts within a short time after December 30, 1931, the date of the deed conveying the property to Mrs. Robertson.

On March 3, 1933, Mrs. Robertson was seriously ill in a hospital. She died on March 21, 1933. On March 3d defendant took a deed to the hospital and had Mrs. Robertson execute it. This deed conveyed the Bakersfield property to defendant. It was recorded on March 11th and defendant received the rents from the property, at least until this action was instituted.

After defendant had possession of this deed she told plaintiff that Mrs. Robertson had deeded the property to her. Plaintiff then told defendant: "There is nothing I can do about it. The condition my mother is in is more important to me and we will talk about that later." Plaintiff paid his mother's doctor and hospital bills and funeral expenses.

Shortly after Mrs. Robertson's death plaintiff asked defendant to convey the Bakersfield property to him. Defendant replied that she hoped plaintiff would permit her to keep the property for a time so that she and her children would have some means of support; that she expected to receive $10,000 from a Mr. Comer and asked to keep the property until that sum was paid her. Her request was granted. She received the money from Mr. Comer in March, 1935, and plaintiff again asked her to convey the property to him. The record shows that defendant replied; "that she wanted to wait if I would let her until she could get a little more money, until she would actually make a reconveyance, and she said 'I feel it is right around the corner.' Q. And what did you say to that? A. I said if it will help you a little while longer, but please get busy and let us bring it to a close".

Between March, 1935, and May, 1937, plaintiff frequently asked defendant to reconvey the property to him. She found various excuses to postpone the actual conveyance but at no time asserted her ownership of the property and upon each request agreed to reconvey upon the happening of some future event. Several of these conversations were had in the presence of disinterested witnesses who detailed them during the trial. In May, 1937, defendant for the first time claimed the property as her own and refused to convey it to plaintiff. This action was commenced on June 23, 1937. No written evidence of the trust was signed by either Mrs. Robertson, defendant or plaintiff.

Defendant urges two principal grounds for reversal of the judgment: That the trust is void because it was not evidenced by a writing (Sec. 852, Civil Code; Barr v. O'Donnell, 76 Cal. 469, 18 P. 429, 9 Am.St. Rep. 242; Tillaux v. Tillaux, 115 Cal. 663,

47 P. 691; Smith v. Mason, 122 Cal. 426, 55 P. 143; Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543); and that plaintiff's cause of action is barred by the statute of limitations.

[1] The cited authorities support the proposition that there can be no express trust created by a parol agreement. Those authorities are not controlling here because we are not concerned with an express but with a constructive trust. Such a trust is created by operation of law and may have its origin in parol and need not be supported by a writing. In a factually similar case the Supreme Court said:

"The subject of involuntary trusts, defined as a trust created by operation of law (section 2217), usually called constructive trusts, is again dealt with in section 2224 of the Civil Code. Its provisions show clearly that trusts by operation of law are left untouched by sections 847, and 857 and clauses 1 and 2 of section 852 [Civil Code]. Section 2224 describes the involuntary trust comprehensively as follows: 'One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person *who would otherwise have had it.*' If the intention had been to prevent involuntary trusts where the violation of an express promise to convey constitutes the foundation—the fraud by which the thing is gained, the last clause should have been written, 'for the benefit of the person *from whom it was gained.*' As it stands, it means the person who would have had it, but for the fraud or other wrongful act whereby it was gained. In cases of involuntary trusts, such as that here involved, the fraud consists of the betrayal of confidence by refusing to carry out the parol trust induced by that confidence. Brison v. Brison, 90 Cal. [323], 335, 27 P. 186. If the confidence by which the thing was gained had not been betrayed, the person to whom the promise ran, the one who was to receive it ultimately, would be the 'person who would otherwise have had it.' It necessarily follows that the mere fact that the broken promise, constituting one of the elements whereby an involuntary trust is created, is a promise to convey land, either to the original owner or to a third person, is not a valid objection to the recognition and enforcement of such involuntary trust at the suit of the person who was intended by the donor to be the beneficiary. No conditions, other than those stated in section 2224, are necessary. If those conditions exist, the involuntary trust arises, although the transaction was entirely oral, and consequently void as an express trust under sections 852, 1091, and 1624 [Civil Code], and although the means of gaining the thing was the making of an oral or written promise to convey to some other person, or reconvey to the donor." Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430, 432. See, also, Hayne v. Hermann, 97 Cal. 259, 32 P. 171; Taylor v. Morris, 163 Cal. 717, 127 P. 66; Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Smith v. Lombard, 201 Cal. 518, 258 P. 55; Allen v. Meyers, 5 Cal.2d 311, 54 P.2d 450; Hillyer v. Hynes, 33 Cal.App. 506, 165 P. 718; Taylor v. Bunnell, 77 Cal.App. 525, 247 P. 240.

[2] While defendant contradicted much of the evidence which we have summarized, the conflict thereby created was resolved against her. There is ample evidence supporting the findings, and under the rules announced in the cases we have cited, that evidence supports the conclusion that defendant held the property under the terms of a constructive trust with plaintiff as the beneficiary and should execute that trust by conveying the property to him.

[3] There is no merit in the argument that plaintiff's cause of action is barred by the statute of limitations. The action was started in about one month from the time defendant repudiated her trust and for the first time claimed the property as her own, and well within five years from the time she acquired title to it. Under these circumstances the action was not barred by the statute of limitations. Bradley Bros. v. Bradley, 20 Cal.App. 1, 127 P. 1044; Hillyer v. Hynes, supra; Cohn v. Goodday, 191 Cal. 615, 217 P. 756.

The judgment is affirmed. The attempted appeal from the order denying the motion for new trial is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

39 Cal.App.2d 10

SPATH v. SEAGER.

Civ. 11295.

District Court of Appeal, First District, Division 1, California.

May 8, 1940.

1. Evidence ⇐471(2)

Testimony that witness thought that recording of transfer of royalty interest was notice to everybody was inadmissible as being a "conclusion" upon a legal matter.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

2. Appeal and error ⇐1054(3)

In suit to quiet title to overriding royalty interest, witness' testimony over objection that he thought a record of transfer of royalty interest was notice to everybody should not have been admitted but its admission was not reversible error where court's findings were not predicated upon objectionable testimony.

3. Mines and minerals ⇐79(1)

In suit to quiet title to overriding royalty interest, where purchaser of interest permitted the interest to remain in seller's name on books of oil company and purchaser did not by positive action or failure to act attempt to conceal fact that she was owner, finding that purchaser did not at any time by any act or omission hold out or represent seller to be owner of royalty interest was not error.

4. Appeal and error ⇐1176(1)

Where finding of trial court was not substantiated by the evidence, Court of Appeal under statute ordered finding to be amended to correspond to evidence. Code Civ.Proc. § 956a.

5. Quieting title ⇐49

In suit to quiet title to overriding royalty interest created by an assignee of sublease where neither an order of cancellation of purported transfer nor a decree for specific performance was sought, judgment directing that within 30 days after notice of entry thereof plaintiff should execute and deliver to defendant a release of all claim in and to the property was not warranted.

6. Quieting title ⇐44(1)

Burden was upon party seeking to quiet title to overriding royalty interest against prior purchaser to show that she purchased such interest in good faith.

7. Quieting title ⇐44(1)

Where annual income from overriding royalty interest was equal to three-fifths of sum paid by party seeking to quiet title against prior purchaser, inference that good faith was lacking was permissible.

8. Appeal and error ⇐996

A reviewing court will not interfere with a judgment of the trial court based upon reasonable inferences drawn from the evidence.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action to quiet title by Hattie Spath against Harriet H. Seager wherein defendant filed a cross-complaint. From a judgment for the defendant and cross-complainant, plaintiff appeals.

Reversed in part and affirmed in part.

L. D. Uhlman, of Long Beach, for appellant.

Charles Mitschrich, of Los Angeles, for respondent.

WARD, Justice.

An action to quiet title upon issues raised by the complaint, the answer thereto, a cross-complaint and the answer to the cross-complaint. The pleadings are in the ordinary and usual form except that the answer to the cross-complaint pleads an estoppel. In rendering judgment in favor of defendant and cross-complainant, the court directed plaintiff and cross-defendant to execute and deliver to the former a release of all claim in the property involved. Plaintiff and cross-defendant appealed.

The facts of the case are as follows: Prior to the controversy here involved, the Selile Oil Company, in one of whose wells John N. Hoffman was the owner of a certain one per cent overriding royalty, made an assignment for the benefit of creditors, John A. Alford being named as one of the trustees. On October 30, 1934, Hoffman sold and assigned his interest in the Selile well to defendant herein for $1,150. The conveyance was recorded the same day in the office of the county recorder. Hoffman represented to defendant that a change in ownership on the books of the company

would result in additional expense to her, so, during a period of approximately eight months, Hoffman collected the dividends and sent his personal checks for the amount to defendant. On May 31, 1935, the above-mentioned trusteeship terminated and the property was retransferred to the Selile Oil Company. It was thereafter operated by the Atlantic Oil Company, which continued to pay the royalties. During this entire period, the royalty ownership remained on the books of the company in Hoffman's name. In January, 1936, defendant wrote to John A. Alford requesting that the checks be paid her direct, but the letter was not answered, nor was the request complied with. On January 15th, Hoffman transferred the holding to B. J. Mense for a consideration of $300. Two days later, Mense sold the interest to plaintiff Spath for $400. The Spath transfer was recorded with the county recorder, but no investigation was made to ascertain whether any previous transfer by Hoffman had been recorded. The reasonable cash value of the royalty interest was no less than $750.

The court found that defendant never at any time, by any act or any omission to act, held out or represented Hoffman to be the owner of the interest in controversy; that Hoffman collected certain dividends which he did not turn over to defendant but retained for his personal use; that Mense collected certain dividends following the transfer from Hoffman to him; that neither Mense nor Spath were innocent purchasers in good faith for a valuable consideration, without notice, of the interest each successively claimed adversely to defendant, and it decreed that within thirty days after notice of entry of judgment plaintiff execute and deliver a release of all claim in the interest involved in the action.

[1, 2] The son of plaintiff, who had acted as her agent in the transfer, testified that he had as many as ten interests of similar nature which he "always recorded" until advised, subsequent to this transaction, that it was necessary to record. Respondent's counsel asked the following question: "At that time you thought a record—an instrument of that kind recorded was a notice to everybody—". Over objection that it called for the conclusion upon a legal matter, an affirmative answer was given. The objection should have been sustained. However, the question and answer were not prejudicial to the rights of the parties and would not warrant a reversal, and might have been referred to on appeal without special consideration, but for the fact that appellant calls attention to a portion of a finding: "* * * and neither of them made any examination of the records of the County Recorder to ascertain whether or not assignment of such interest they were acquiring were of record in said office". This finding need not be predicated upon the objectionable testimony, as it appears in another part of the transcript that the son, as plaintiff's agent, made no investigation at the recorder's office "as to the condition of the title".

[3] The gist of one finding attacked by appellant is that defendant never at any time, by any act or omission, held out or represented Hoffman to be the owner of such interest. A reasonable inference may be drawn from all of the evidence that such was the fact. While it is true that defendant permitted the interest to remain in Hoffman's name, she did not by positive action or by failure to act, attempt to conceal the fact that she was the owner.

[4] This brings us to a discussion of the second finding attacked, namely, that defendant by letter informed John A. Alford, "who was a trustee" of the company, that she owned "said interest" and requested that all dividends accruing thereon should not thereafter be paid to Hoffman but should be paid to her direct. The sending of the letter is an indication that defendant did not intend to hold out Hoffman as the apparent and ostensible owner. Unfortunately, however, for defendant, at the time the letter was mailed Alford had relinquished his duties as a trustee. If the finding may be construed as a determination that defendant did in fact notify the company, we cannot discover any evidence in the record of the letter ever having been delivered to an authorized representative of the company. To that extent the finding is not substantiated by the evidence and should be amended. Under the provision of the Code of Civil Procedure, section 956a, it is ordered that finding numbered V be amended by inserting on the last line thereof: "It is not true that the said letter was received by Selile Oil Co., or its successor Atlantic Oil Company."

[5] In the judgment, the court directed that within thirty days after notice of entry thereof, plaintiff execute and deliver

to defendant a release of all claim in and to the property. The complaint prays for neither an order of cancellation of the purported transfer (Angus v. Craven, 132 Cal. 691, 64 P. 1091), nor for a decree for specific performance. Killey v. Wilson, 33 Cal. 690. The purpose of the suit was to quiet title. This was attained by the following declaration in the judgment: "* * * that all adverse claims of said plaintiff and cross-defendant Hattie Spath, and all persons claiming or to claim the property hereinafter described, or any part thereof, through or under said plaintiff and cross-defendant, are hereby adjudged and decreed to be invalid and groundless; that the defendant and cross-complainant, Harriet H. Seager, be and she is hereby adjudged and decreed to be the lawful owner of [the property involved in the suit]." Boldemann Chocolate Co. v. Price, 5 Cal.2d 200, 53 P.2d 946.

On the trial, consideration seems to have been given to the contention of respondent that she was protected by virtue of the recordation of the assignment. This question is not vital on appeal and is therefore not decided.

It has been held that certain assignments of oil royalties create interests in real property. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Standard Oil Co. of California v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797; Dabney-Johnston Oil Corp. v. Walden, 4 Cal. 2d 637, 52 P.2d 237. The assignments involved in these cases deraigned from the landowner. In the present case, however, the royalty interests transferred were created by an assignee of a sublease. Despite the holding in Black v. Solano Oil Co., 114 Cal.App. 170, 299 P. 843, the nature of the latter class of royalty interests in particulars affecting the right to recordation would seem to be an open question in view of the decision in Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 64 P.2d 1081.

[6-8] The court found that Mense and plaintiff Spath were not innocent purchasers for a valuable consideration from Hoffman. The burden was on plaintiff, irrespective of recordation of the assignment to her, to show that she acted in good faith. She did not testify. By silence, and refraining from offering proof of an issue raised by appellant, there was a tacit admission of bad faith. Appellant was represented by her son who had considerable experience in the purchase of royalty interests and "had as much as ten interests of that nature on the hill". The evidence showed that the royalty paid annually approximated four-fifths of the purchase price paid by Mense to Hoffman, and three-fifths of the sum paid by appellant to Mense. From these suspicious circumstances an inference may be drawn that good faith was lacking. A reviewing court will not interfere with the judgment of a trial court based upon reasonable inferences drawn from the evidence. Under all the facts and circumstances, the plea of estoppel was not substantiated.

That part of the judgment "that within 30 days after notice of the entry of judgment said Hattie Spath execute and deliver to said Harriet H. Seager, under her hand and seal, duly acknowledged, a release to said Harriet H. Seager of all claim in and to said one (1%) per cent interest in the property involved in this action, and hereinbefore described" is reversed. In all other respects, the judgment, based upon the findings as amended, is affirmed, respondent to recover costs.

We concur: PETERS, P. J.; KNIGHT, J.



39 Cal.App.2d 70

WRIGHT v. FARMERS AUTOMOBILE INTER-INSURANCE EXCHANGE et al.

Civ. 2290.

District Court of Appeal, Fourth District, California.

May 10, 1940.

Hearing Denied July 9, 1940.

1. Appeal and error ⇐1002

Automobile owner's denial that written statement correctly set forth the facts as stated by him to insurance adjuster and owner's assertion that it did not contain all of such facts presented a question of fact on conflicting evidence and finding of jury thereon could not be disturbed on appeal.

2. Insurance ⇐514½

Automobile liability insurers were entitled to rely upon denials and allegations in verified answer of insured and were justified in defending action against insured in reliance upon truth of those allegations and in

belief that they would be supported by testimony of insured, as respects violation of co-operation requirements.

3. Insurance ⇐146(1)

Insured and insurers were bound by clear provisions of automobile liability policy.

4. Insurance ⇐514½

Where verified answer of automobile owner alleged that occupant did not object to manner in which owner was driving, and denied that owner was driving at an excessive speed but owner upon trial testified that accident occurred as he was going down a slight grade and that he could not make turn because he was going too fast, and that just before accident occupant asked him to slow down, owner was guilty of violating co-operation clause of automobile liability policy and prejudice would be presumed so as to preclude recovery by occupant from insurers.

GRIFFIN, J., dissenting.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by A. C. Wright against the Farmers Automobile Inter-Insurance Exchange and others based on a judgment obtained by plaintiff against one Sellers for injuries sustained while riding in an automobile driven by Sellers, and on a policy of indemnity insurance which had been issued to Sellers. Judgment for plaintiff, and defendants appeal.

Reversed.

Hearing denied; CARTER, J., dissenting.

W. H. Stammer, of Fresno, for appellants.

Martin C. Thuesen, of Fresno, for respondent.

BARNARD, Presiding Justice.

The plaintiff herein was injured while riding in an automobile driven by one Sellers. In a former action this plaintiff recovered judgment against Sellers, which has become final. Wright v. Sellers, 25 Cal.App.2d 603, 78 P.2d 209, 213. Thereafter, this action was brought, based upon that judgment and a policy of indemnity insurance which had been issued to Sellers by these defendants. A jury returned a verdict in favor of the plaintiff, and the defendants have appealed from the judgment and from an order denying their motion for judgment notwithstanding the verdict.

The main contention of the appellants is that the insured (Sellers) violated certain terms of the policy in that he failed to cooperate with them in the preparation and trial of the action, that he failed to give them the fullest information obtainable with respect to the facts surrounding the accident, and that he concealed or misrepresented material portions of those facts. The facts involved on this appeal are fully set forth in a dissenting opinion filed herewith, and need not be here repeated.

[1] It may be first conceded that there is a conflict in the evidence with respect to the correctness and effect of the statement signed by the insured at the request of the insurance adjuster. Sellers denied that this statement correctly set forth the facts as stated by him to the adjuster and testified that it did not contain all of such facts. In that regard a question of fact was presented on conflicting evidence, and the finding of the jury thereon may not be disturbed on appeal.

[2] A different situation is presented, however, by the denials and allegations of the answer which was signed and verified by the insured, taken in connection with the testimony which he gave at the trial of the former action. An answer was prepared in accordance with the facts contained in the original statements made by the insured. Sellers refused to sign this answer until certain changes were made and at that time made some modification of his statement of facts. Another answer was then prepared in accordance with the facts as then stated by him, which Sellers signed and verified, and which was filed. Regardless of any question which might have existed with respect to statements of fact as previously made by Sellers, there was and is no room for misunderstanding with respect to the statement of facts then made by him and set forth in the answer which he verified. If we disregard the various conflicting statements made by Sellers as to the speed of his automobile at the time of the accident, the fact remains that he alleged upon his oath that the respondent herein had not remonstrated or objected to the manner in which he was driving his automobile, and denied that he was driving the same at an excessive rate of speed or that the automobile swerved

from the road or overturned because of his speed or because of any conduct upon his part. There can be no escape from the legal effect of the statements thus solemnly made by the insured and upon which the insurance carriers were entitled to rely. The verified answer speaks for itself, and there is and can be no question in the evidence with respect to whether those representations of fact were actually made by the insured to his insurers. If those allegations of the answer had been true the insured would have had a substantial defense in the prior action. The insurance carriers were entitled to rely upon those denials and allegations of the answer and were justified in defending the former action in reliance upon the truth of those allegations and in the belief that they would be supported by the testimony of the insured.

[3, 4] It is equally true that there is no conflict in the evidence with respect to the exact testimony which was given by Sellers in the trial of the former action, as shown by the evidence in this case. He there testified that the accident happened as he was going down a slight grade traveling between 60 and 65 miles an hour; that he came to a turn; that he "couldn't make the turn" because he "was going too fast"; that "practically immediately" before the accident Wright asked him to slow down; that he told Wright not to worry, "I know this road"; and that he did not slow down. It was largely upon his testimony that this court affirmed the judgment against Sellers. Wright v. Sellers, supra. In that case we said: "He was familiar with the road. In the face of remonstrances on the part of plaintiff, he drove his car at almost seventy miles an hour into a curve. He said himself that the speed was so great that he could not hold his automobile on the paved portion of the road."

In this testimony the insured materially changed his version of the facts in connection with the accident as theretofore given by him to these appellants and incorporated in the verified answer which he filed in the other action. This evidence was in direct conflict with the allegations of the answer and it effectually destroyed any hope of a judgment in favor of Sellers in that action.

As there is no conflict whatever in the evidence with respect to what was denied and alleged in the answer and concerning the facts as testified to by Sellers at the trial of the former action, it cannot be said that there is any conflict in the evidence with respect to the issue raised in that connection, namely, whether the insured, without misrepresentation, furnished the fullest information obtainable to the insurer and rendered to the insurer all cooperation and assistance in his power. An exactly opposite situation appears without conflict. If Sellers' testimony on the witness stand was not the truth, he was certainly not cooperating. If it was the truth he violated the cooperation clause of the policy by concealing the real facts from the insurer up to the very moment he testified, thus causing the insurer to go to trial under an absolute misapprehension of what the facts were. This could not be other than prejudicial.

We may say here as we said in Margellini v. Pacific Automobile Ins. Co., 33 Cal. App.2d 93, 91 P.2d 136, 138: "* * * there was a violation on the part of the assured of the cooperation clause contained therein which we think brings this case within the principles of the recent case of Valladao v. Fireman's Fund Indemnity Co. [13 Cal.2d 322], 89 P.2d 643, 646, and which bars a recovery on the part of the respondent. In that case it was pointed out that it is now definitely settled in this state that in an action of this character the injured person stands in no better position than the assured with respect to the effect of a violation, on the part of the latter, of a cooperation clause in the policy; that a condition of a policy requiring the cooperation and assistance of the assured in opposing a claim made, or an action brought, by an injured party is material to the risk and of the utmost practical importance; that without such cooperation and assistance the insurer is severely handicapped and may be precluded from making any defense; and that the insurer is entitled to know from its assured the true facts concerning the accident, in order that it may determine for itself whether to contest or attempt to settle the claim."

Except perhaps in the degree of the false swearing of the insured, we cannot distinguish this case from Valladao v. Fireman's Fund Indem. Co., 13 Cal.2d 322, 89 P.2d 643, 649, where, in quoting from the opinion of the trial judge, it was said: "A co-operation clause binds the insured to the exercise of good faith and when he speaks concerning the facts of the accident it must be to tell the truth. To wilfully

misstate or conceal facts in such a case is clearly not cooperation or assistance; it is exactly the opposite. Was it, then prejudicial? I see no escape from the conclusion that under all the circumstances here prejudice naturally, inherently and necessarily existed. The insurance company had taken a formal position as to the facts from which it could not recede without great disadvantage. The answer bearing all the forms of verification was on file. * * * When the true facts were disclosed, the company had to exactly reverse its position with regard to essential facts and virtually proclaim their parties and chief witnesses to be liars and wholly unworthy of belief. Practically its only props were struck from under it. Better a great deal that there had been an absolute refusal to tell the facts at all than that it should have been deceived into taking a false position and then suffering the disadvantage and detriment of confessing it, thereby utterly destroying the credibility of the principal witnesses to the facts upon which it relied in defense. I am of the opinion that damage and prejudice inheres in and must be presumed to exist in such a case. Hence it is a matter of law and not of fact; a problem for the court and not for the jury."

In our opinion, the failure of Sellers to cooperate with the insurers in the defense of the prior action was an established fact with respect to which there was no conflict in the evidence. The insured and the insurers were bound by the clear provisions of their contract. Bachman v. Independence Indem. Co., 214 Cal. 529, 6 P.2d 943. This failure to cooperate and misrepresentation or concealment of facts on the part of the insured were a violation of the insurance contract, and prejudice must be presumed as a matter of law under the rules announced in the cases above cited.

The judgment and order appealed from are reversed.

I concur: MARKS, J.

GRIFFIN, Justice.

I dissent.

Stripped of immaterial verbiage, these are the essential facts: On April 17, 1936, respondent filed an action against Milton Sellers, and on January 14, 1937, a judgment was rendered in that case in favor of respondent and against Sellers in the sum of $1,250 and costs. That judgment has now become final. On August 3, 1938, respondent filed this action against appellants on a policy of indemnity insurance insuring Sellers against legal liability imposed upon him resulting from the operation of the automobile in which respondent was injured. Appellants admitted the policy of insurance but denied liability thereunder and alleged that the terms and conditions of the policy had been violated by Sellers in that he had failed to give to them the fullest information obtainable concerning the accident, had failed to cooperate with them in the preparation and trial of said action, and had colluded and conspired with respondent to secure a judgment against himself which appellants would have to pay. The action against appellants was tried before a jury and the above-mentioned judgment resulted. Appellants now appeal upon the claimed ground that the undisputed evidence demonstrates as a matter of law that they were entitled to a judgment in their favor, and upon the further claimed ground that the court committed prejudicial error in ruling upon the evidence and in instructing the jury.

The details of the injury and the facts appertaining to the accident were once before presented to this court for consideration and are fully related in Wright v. Sellers, 25 Cal.App.2d 603, 78 P.2d 209. For the sake of brevity we will not repeat them here.

The accident happened on February 26, 1936, and on February 28, 1936, the assured gave a report of the accident to a Mr. McGurl, who was then employed by appellants as a claims adjuster. The report was taken at Sellers' home while he was in bed suffering from a broken leg and numerous cuts and bruises. Sellers gave McGurl an outline of the facts and then McGurl asked questions of Sellers. McGurl then wrote what he claimed was a correct synopsis of how the accident happened. Each page of the statement was signed by Sellers. Sellers and his brother, testifying as witnesses for respondent at the trial, stated that Sellers did not read the statement and that the statement did not contain the entire conversation. Appellants argue that neither of them testified that Sellers had not made the statements made in the report and that neither of them testified to any fact stated to McGurl which was not contained in the report. This argument is not entirely supported by the evidence for we find from an ex-

amination of the record that Sellers testified that the writing did not contain a complete and full statement of what he said to the adjuster. The evidence discloses that he told Mr. McKnight, his counsel, that he could not sign the answer proposed by him for the reason that "at that time I told him that I was going faster than he had in the answer, between—oh, 55 miles an hour or faster, and as far as Mr. Wright not losing any time, I said I could not sign an affidavit to that effect because I knew he had lost time, and as far as Mr. Wright not being injured, I said I could not swear to that because I knew he had been injured, and if he would change these three things I'd be more than glad to sign it." The testimony, further related, is: "Q. Did Mr. McKnight say anything to you about the statement you made to the adjuster? A. Yes, sir. At that time he said, 'How does it happen that you now testify to the fact that you were going faster than you did in your statement?' He said, 'I have that statement here.' At that he got the statement and read it and when he said in the statement, 50 miles an hour, I said, 'That is not what I said at the time the statement was taken.' I said then 55 miles an hour or faster."

The written signed statement given to appellants by Sellers reads in part as follows:

"* * * My name is M. K. Sellers. * * * I was driving from Fresno to Placerville to get my wife and child who were staying up there. I had asked Art Wright, * * * who is a patrolman on the Fresno Police force, to go with me for the ride. * * * We had been driving about 50 or 55 m. p. h. all during the trip. The road at this point was oiled about 20 feet wide. It was level and not rough. We were driving on a straight of way. About 6:15 p. m. when I was about 100 to 150 feet south of a curve in the road, about a 10 degree curve to the left, no more, I slowed down 2 or 3 miles an hour, and was going then about 50 m. p. h. or a little less. I was just ready to make this turn when the car hit a chuck hole in the road which I had not seen. I felt the jolt, the car started to go sideways, then went sideways and turned over about 4 times. * * * At no time on the trip had Art Wright complained of my driving. * * *

"I have read the above four-page statement and it is true."

Respondent testified at the trial of this case and stated that "he was not himself" when the statement was being taken by McGurl. The signed statement of Wright, dated February 28, 1936, reads in part as follows:

"* * * About 6:15 we were going north on Plymouth Road about 2 or 3 miles north of the town of Plymouth. We were going about 55 or 60 miles an hour. * * * I looked at Milt and said something to him. He was watching the road. Just at this time something happened. I was not looking at the road so I do not know what started it, but the car swerved sideways to the left and then started to turn over. * * * I think we hit a small slide out on the road, but I am not sure. * * * I had not complained at any time about his driving. He is a good driver. Sixty miles an hour was not too fast for that road because it is a good road at that place. * * * Milt had driven well all the way on that trip. * * *

"I have read the above three-page statement and it is true."

After taking these statements McGurl reported their contents to appellants and advised them to close the case inasmuch as the facts disclosed no liability on the part of Sellers for the accident. Suit was filed by respondent against Sellers on April 17, 1936.

Wright alleged in his complaint that Sellers drove his automobile in excess of 55 miles an hour with a reckless disregard of probable consequences, and that as a result thereof the automobile swerved from the road and overturned. An answer of Sellers to the complaint was drawn by a Mr. McKnight, his attorney, in accordance with the information previously furnished in the statement by Sellers. McKnight called Sellers on the telephone to ascertain the exact speed to allege in the answer. The conversation was as follows (Testimony of Mr. McKnight):

"I told him that Mr. Wright had alleged in the complaint that he was driving—had been driving his automobile in excess of 55 miles an hour, that I had his statement in which he had stated that he had been driving at less than 50 miles an hour and that it was very important to have the exact speed that he thought he was driving so that we could allege it in his answer, and asked him what that speed was. Mr. Sellers told me that the complaint was right,

that he had been driving 55 miles an hour, maybe a little more. I told him that I had read his statement which he had given to the company, which stated that he had been driving less than 50 miles an hour, and asked him if he could explain the discrepancy. Well, he said he had slowed down a little bit just before the accident happened, but that he was driving 55 miles an hour."

During the preparation of the answer Sellers challenged the written report to the company by stating that Wright had mentioned his speed prior to the accident and when the statement to the effect that Wright had at no time complained of his driving was read to him, he explained that respondent had not objected to his driving, but had simply mentioned his speed. The verified answer signed and filed, denied that he, Sellers, was driving in excess of 55 miles an hour, or that he was driving at an excessive rate of speed, or that the automobile swerved from the road or overturned because of his speed or any conduct on his part, and alleged that respondent failed to remonstrate or object to the manner in which the defendant conducted himself in the operation of his automobile.

In the preparation of the answer Sellers refused to sign the answer as prepared. He stated then that he knew Wright was injured; that he had lost time from his work; and would not deny these allegations in the complaint. He then objected to the allegation in the answer to the effect that Wright had at no time objected to the manner in which he was driving his automobile and stated that "Mr. Wright did not object to any conduct or did not object to the manner in which I was driving but did mention my speed." Counsel then explained to Sellers that he did not know the extent of the injuries or the amount of time lost and he would therefore deny those allegations on information and belief. Counsel then filed the answer denying the allegations as heretofore related.

On September 29, 1936, Mr. Stammer, counsel for appellants, took respondent's deposition, and although respondent Wright, in his complaint, had placed Sellers' speed "in excess of 55 miles an hour", and although it was claimed that he had said in his statement of February 28th that he had not at any time complained about Sellers' driving and that the speed was not too fast for the road, he testified in his deposition that Sellers was driving between 60 and 65 miles per hour, and that he had objected to this speed on two different occasions. On January 12, 1937, the day before the trial of Wright v. Sellers, supra, McKnight again discussed the facts with Sellers in connection with respondent's deposition. McKnight took notes of that discussion and those notes were read into evidence at the trial of the present case. At that time Sellers, it was claimed, told McKnight that he was driving 55 to 60 miles per hour but did not believe that speed dangerous; that respondent Wright complained of his speed on two occasions; that he could not say what caused the accident and did not know what caused the car to go out onto the shoulder; and that respondent never blamed him for the accident. McKnight also testified that he told Sellers at that time "about what would happen under his policy if he insisted on changing his story, and I asked him at that time if he had ever talked to either Mr. Wright or Mr. Thuesen * * * or about the case in any way; and he said he had discussed the facts with Mr. Wright" but that he never had discussed what his testimony was going to be in the case. Sellers said "Well, he thought the insurance company should pay (Wright) something because he was injured." Wright also testified that he had never discussed with Sellers what his testimony was going to be.

At the trial of Wright v. Sellers, supra, respondent Wright further testified that he looked at the speedometer just before the accident and that it registered nearly 70 miles per hour. When called to the witness stand by respondent under section 2055 of the Code of Civil Procedure, Sellers testified that he was driving about 60, from 60 to 65 miles per hour; that Wright asked him to slow down and he did; that he was driving around 60 to 65 miles per hour after he left Plymouth and just prior to the accident Wright asked him to slow down, but he did not do so; that he was unable to keep the automobile on the paved portion of the road because he "was going too fast". Thus it will be observed, as argued by appellant, that at the trial of the case respondent stated the speed to be nearly 70 miles per hour as against "in excess of 55 miles per hour" as alleged in his complaint, and testified that he objected to that speed on two occasions as against his claimed statement on February 28th that he had never complained at any time about Sellers' driving, that Sellers was a good driver and had driven well all the way, and

that his speed was not too fast for that road. It is to be further noted that Sellers, at the trial, testified that he was driving from 60 to 65 miles per hour as against his disputed signed statement of February 28th that he was driving less than 50 miles per hour; and that respondent objected to his speed on two occasions as against his first claimed statement that respondent had made no complaint of his driving, and that the accident occurred because he was driving too fast, as against his denial in his answer that the accident occurred because of his speed and his previous statement that the car turned over when he hit a chuck hole in the road which he had not seen. The testimony of Sellers was given just before the noon recess on the first day of the trial. At recess McKnight explained to Sellers that the company would no longer accept liability under the policy on account of his conduct, statements and testimony related. Appellants served Sellers with a formal reservation of rights. Sellers thereupon spoke to respondent's attorney and was told by him that he could not advise him one way or the other. Afterwards Sellers asked counsel for appellants herein to go on with the trial, apparently under the reservation of rights. It does not appear that any attempt was made to collect the judgment against Sellers because he had no "money with which to pay it".

It has been recently stated that as a general rule where the uncontradicted evidence shows that an assured fails and refuses to give to his insurance company in good faith a frank, fair and honest disclosure of material facts connected with the accident, he is guilty of a failure to cooperate, and if that uncontradicted evidence shows a substantial and wilful breach by the assured of the material cooperation clause of the policy it is presumed as a matter of law to be prejudicial. Valladao v. Fireman's Fund Indemnity Co., 13 Cal. 2d 322, 89 P.2d 643; Margellini v. Pacific Automobile Ins. Co., 33 Cal.App.2d 93, 91 P.2d 136. The insurer is entitled to know from its assured the true facts (of which he may have knowledge) underlying an accident and upon which the insured person bases his claim in order that it may determine for itself, in the light of such information, whether it should contest or attempt to settle the claim. It is generally established that what constitutes cooperation (or lack of it) on the part of the assured, within the meaning and effect of a cooperation clause, is ordinarily a question of fact. This is so because a dispute normally exists as to the actual statements of the assured in the premises or because of the existence of an uncertainty as to the intent or motive underlying his statements or conduct.

The policy of insurance upon which this action was brought contains the following provisions:

"4-A: Upon the occurrence of an accident or claim covered by the policy involving bodily injuries or death to persons * * * the insured shall forthwith give written notice thereof, with the fullest information obtainable at the time, to the Home Office. * * * The insured shall at all times render to the Exchange all cooperation and assistance in his power. * * The entire policy shall be void if the insured or his agent has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or, if the insured or his agent shall make any attempt to defraud the Exchange, either before or after the loss."

The facts and circumstances under which the insurer may rightfully claim lack of cooperation and assistance, or the concealing or misrepresentation of material facts and circumstances concerning the subject of the insurance in all cases cannot be measured by any legal standard or weighed by any set of legal scales. In applying the rule, consideration must be given to the facts and circumstances of each case as presented. It is true that in Valladao v. Fireman's Fund Indemnity Co., supra, the Supreme Court sustained the judgment of the trial court which held that the wilful misrepresentation to the insurer of the identity of the operator of the truck involved in the accident constituted a breach of the cooperation clause of the policy. And this court in Margellini v. Pacific Automobile Ins. Co., supra, where it appeared that the insured's wife, who drove the automobile involved in the accident and who was already covered by the policy, not only failed to make a report of the accident but concealed her whereabouts despite repeated and prolonged efforts to locate her, and there was a failure on the part of the insured and his wife to cooperate with defendant by making a fair and frank disclosure of such information as they possessed concerning the accident, held that there was a breach of the cooperation clause of the policy. And in

Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13, the failure of the insured to testify, under the circumstances there related, was held to be a breach of the condition. See, also, Purefoy v. Pac. Automobile Indemnity Exch., 5 Cal.2d 81, 53 P.2d 155, and cases cited. On the other hand, we find in Panhans v. Associated Indemnity Corp., 8 Cal.App.2d 532, 47 P.2d 791, the failure of the insured to attend the trial under the circumstances there related did not constitute, as a matter of law, a breach of the cooperation clause which was prejudicial, and the trial court was affirmed in so holding. The facts and circumstances related in Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172, and Norton v. Central Surety & Ins. Co., 9 Cal.App.2d 598, 51 P.2d 113, are somewhat similar to the facts in the instant case. In those cases the speed of the car was stated to be 55 miles per hour and the driver was attempting to negotiate a curve in the road under very dangerous conditions resulting in injury to the guest. The facts there set forth were held to constitute wilful misconduct and the acts of noncooperation of the insured involved his failure to appear at a specified time to review the facts of the case with counsel for the insurance company and his general conduct after an altercation with him, and the insured's apparent desire on the trial of the action that his guest should recover. The judgment against the insurer was sustained and the court held that the evidence was sufficient to support the implied findings of the jury and the trial court that the insured did not violate the duty imposed upon him. We, therefore, are confronted again with what was heretofore denominated a "borderline case". From the evidence before us it is clear that Sellers made timely objection to the insurer's counsel of the rate of speed set forth in the statement prepared by the insurance adjuster, and claimed that his speed at the time of the accident was "55 miles per hour or faster". Based upon the findings of the jury I am impelled to accept the interpretation that the jury therefore believed that the original statement in reference to the speed of the car was not the statement made to the adjuster.

The insured's statement prior to trial that he was going "55 miles an hour or faster", and his testimony at the trial that he was driving "about 60 miles an hour, between 60 and 65" may not have indicated to the jury any particular material variance. The original signed statement of Sellers related that the guest had not complained of his driving. He informed counsel for the insured that the statement was incorrect in this, that although he did not complain, "he did mention his speed".

Regardless of personal views of the weight of the evidence and the correctness of the jury's determination, we should be bound by the time-honored rule that in reviewing the facts of a case, when there is some dispute or conflict, an appellate court must accept those as true which tend to support the verdict and judgment, and must resolve all conflicts in the evidence in favor of the successful party in the lower court. Wright v. Sellers, supra. Guided, therefore, by this rule, the jury could have concluded that the statement of Sellers as to the rate of speed and the fact that Wright had not complained of his driving, was an erroneous recordation of what he actually told the insurance adjuster. The evidence would justify the conclusion, then, that in fact he did tell him he was traveling "in excess of 50 miles an hour" and that he did "mention his speed". I am satisfied that the evidence appearing in the record is legally sufficient to support the conclusions of the jury and trial court that the alleged acts and omissions complained of either were not substantial variances or were of such a nature as did not operate to appellants' prejudice, in preparing or defending the case, or otherwise.

The written statement of Wright, no doubt, was or could have been used to impeach his testimony, but under the contract of insurance there was no legal obligation of respondent Wright to cooperate with the insurer. His statement of the accident and any change in his testimony would therefore be immaterial to appellants' defense as alleged unless a conspiracy could be shown. The jury resolved any conflict in the evidence on this charge in favor of respondent and against appellants and there is evidence to support the finding. It is our duty on appeal to indulge in all reasonable inferences to support the findings and judgment. Medberry v. Olcovich, 15 Cal.App.2d 263, 59 P.2d 551, 60 P.2d 281.

Appellants endeavored to attack the judgment and finding of the jury in Wright v. Sellers, supra, by attempting to show in the instant case that Sellers, as a matter of fact, was not guilty of wilful misconduct.

They read Sellers' testimony given at the former trial, which was received in evidence, and then attempted to read to the jury a certified copy of the opinion of this court in that case, which was stipulated into evidence along with the entire transcript and record. The finding of wilful misconduct by the jury in Wright v. Sellers, supra, was conclusive as to that question alone. The reasons given by this court on appeal for sustaining the verdict and judgment in Wright v. Sellers, supra, although set forth in the opinion, were not material to the cause on trial in the instant case. Although the copy of the decision was received in evidence, under the circumstances related, it was otherwise established that the judgment in the case of Wright v. Sellers, supra, was affirmed on appeal. Therefore the trial court was not obliged, in the orderly conduct of the trial, to listen to counsel read immaterial matters to the jury which would not tend to prove or disprove any of the issues involved. I would therefore conclude that the trial court committed no error in so ruling.

Finally, appellants complain of the failure of the trial court to give their instruction to the jury which was to the effect: "That the judgment in the case of Wright v. Sellers, supra, was only an adjudication between the plaintiff and Mr. Sellers that Mr. Sellers was guilty of wilful misconduct under the facts as they were testified to at that trial, and as against the defendants in this case that judgment is not an adjudication that Mr. Sellers was actually guilty of wilful misconduct in the driving or operation of his automobile. * * * Therefore, if you are convinced from the evidence produced in this case that Mr. Sellers was not actually guilty of wilful misconduct and that the judgment in the case of Wright v. Sellers, supra, resulted from lack of cooperation on the part of Mr. Sellers or from collusion between Mr. Sellers and Mr. Wright, then you may find that the conduct of those parties prejudiced these defendants in the trial of that action." (Citing sections 1908 and 1910, Code Civ.Proc.)

The court, however, did give the following instruction in reference thereto: "* * The law under which the policy was issued, and the policy itself, give a right of action against the defendant insurance companies herein to plaintiff herein, subject to any legal defense. In this action the correctness of the judgment in the damage suit cannot be questioned."

This was followed by the following instructions: "You are instructed that the judgment in the case of Wright v. Sellers, supra, introduced in evidence herein is not an adjudication of the liability of the defendant in this case under the policy issued by it to Milton K. Sellers. The judgment in Wright v. Sellers, supra, determined only that the plaintiff here was entitled to recover from Milton K. Sellers the sum of $1250.00, and his costs of suit. Performance of the policy, which is the subject matter of this action, was not an issue in the action of Wright v. Sellers, supra. You are, therefore, not bound in your deliberations as to the performance or nonperformance of the insurance contract by the judgment in Wright v. Sellers, supra, but you are to determine the issue of performance or nonperformance of the contract upon all of the evidence introduced in this action."

And after reading the section of the policy heretofore quoted reciting the conditions under which the policy would be void, the court gave the following: "If you find from the evidence that said M. K. Sellers did fail and refuse to cooperate with the defendants and to assist defendants in the preparation and trial of said action, and that he concealed and misrepresented material facts and circumstances concerning the accident, and that this conduct on his part was wilful and intentional and constituted a material breach of the contract or insurance resulting in prejudice to the defendants, then your verdict in this case should be in favor of the defendants. * * *"

And further stated: "If you find from the evidence that M. K. Sellers and plaintiff, with intent to defraud said defendant * * * did collude and conspire together and agree to conduct themselves in the preparation and trial of said action, and to testify in said action, so as to secure a judgment therein in favor of the plaintiff against said M. K. Sellers, and that pursuant to said collusion, conspiracy and agreement, said plaintiff and said M. K. Sellers did conduct themselves in such a manner that plaintiff did secure said judgment against said M. K. Sellers, and that such conduct on the part of said parties constituted a fraud against the defendants and was a material breach of the contrac of insurance, resulting in prejudice to the

defendants, then your verdict in this case should be in favor of the defendants. * * *"

The court further instructed: "* * * You are not to give a verdict in favor of the defendants, unless you find by a preponderance of the evidence that M. K. Sellers failed deliberately or negligently in some material and substantial regard to do the things required to be done by him, and that such failure resulted in prejudice to the rights and interests of the insurance companies. No merely formal or technical breach of the policy by M. K. Sellers would give the right of cancellation to the insurance companies, unless it caused or was liable to cause substantial prejudice to the rights of the insurance companies."

It is argued that these instructions placed upon appellants the burden of proving substantial prejudice, and left to the jury the power to determine whether an actual failure to give a true report to appellants or to cooperate in the trial resulted in prejudice to appellants and that under the facts presented, prejudice must be presumed and even under the contradicted facts, the insurer was not obliged to affirmatively show that prejudice resulted from a breach of the cooperation clause. It is therefore contended that if a showing of prejudice is not required, and prejudice is to be presumed, the above instructions given by the court are in error. In view of the expression by the court in Valladao v. Fireman's Fund Indemnity Co., supra, "In declining to now definitely determine whether the insurer must make a showing of prejudice resulting from breach of the cooperation clause by the assured, we do so for reasons similar to those announced in Purefoy v. Pacific Auto. Indem. Exch., 5 Cal.2d 81, 87, 53 P.2d 155, 158," a consideration of the challenged instructions becomes important.

It seems to me that the question whether the fact that the insured in his report varied his speed a matter of 5 to 10 miles at a given point from that related on the witness stand constituted a misrepresentation of a material fact under the circumstances should be left to the determination of the jury. This same rule would likewise apply to the variance between the statements and the testimony that he had "mentioned his speed" and that on two occasions he had objected to his speed. It should likewise follow that where, under the evidence, it cannot be determined as a matter of law that some material and substantial prejudice resulted, the question then becomes a matter for the determination of the jury under proper instructions.

In Panhans v. Associated Indemnity Corp., supra, the court upheld an instruction to the effect that in order to relieve itself of responsibility under the policy the insurer must show that the breach, if any there was, affected a material condition of the policy, and that the breach operated to the substantial prejudice of the insurance carrier. A petition for hearing by the Supreme Court was denied. Likewise, in Norton v. Central Surety & Ins. Co., supra [9 Cal.App.2d 598, 51 P. 2d 114], the court stated: "The issue of whether there has been a lack of co-operation on the part of the insured sufficient to constitute a breach of the policy is one of fact [citing cases]; and it appears to be well settled that the violation by an insured of the conditions of a clause of a policy such as the one here involved is not a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby. [Citing cases.] Furthermore, the burden of proving the affirmative of both of the above issues [breach plus substantial prejudice] is obviously on the insurer."

There was a substantial conflict in the evidence as to whether there was a lack of cooperation, also, a conflict as to whether appellants could have been prejudiced. There was ample evidence, both positive and inferential, to sustain the finding of the jury. Therefore, in the present case, the implied adverse findings of the jury on said issues, as well as those by the trial court in ruling on the motion for new trial, should be conclusive on this appeal.

There is no merit in the remaining points made by appellants, including those relating to the instructions.

In my opinion the judgment should be affirmed.

KESSLER v. CUDAHY PACKING CO. et al.

Civ. 11090.

District Court of Appeal, First District, Division 2, California.

April 25, 1940.

Rehearing Denied May 21, 1940.

Hearing Denied June 24, 1940.

1. Negligence ⇐32(1), 66(2)

The owner or occupant of realty is liable for injuries sustained by an invitee from a danger known to the owner or occupant and not to invitee, but there is no liability for injuries from dangers that are obvious or as well known to invitee as to owner or occupant.

2. Trial ⇐260(8)

In invitee's action for injuries sustained in fall from steps on defendant's premises, where, at defendant's request, instructions were given relieving defendants of liability if invitee had actual notice of danger, or if danger was obvious, or if danger might have been seen by reasonable diligence, and instruction embodying all elements in one paragraph was not requested, it was not error to refuse instruction that when perilous instrumentality is known to owner or occupant and not to person injured, recovery is permitted, but there is no liability for injuries from dangers that are obvious and as well known to person injured as to owner or occupant.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Isaac Kessler against the Cudahy Packing Company and others for injuries resulting from a fall from a set of steps on defendant's premises. From a judgment for the plaintiff, named defendant and Louis Arata appeal.

Affirmed.

M. Anderson Thomas and Don Carlos Barrett, both of San Francisco, for appellants.

Nichols & Richard and Kessler & Kessler, all of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for personal injuries caused from falling from a set of steps on defendants' premises. These steps were hung on movable metal brackets at the top with the bottom resting upon the ground. They were maintained for the benefit and use of the employees of the plant, but were frequently used by customers instead of the regular stairway provided for them. Plaintiff was one of such customers who used the portable steps because they were more convenient in reaching his parked automobile. Two witnesses called by him testified the steps were wobbly and unsafe and had been in that condition for several months before the accident. One testified that he had always used them with fear because of their condition. The plaintiff then took the stand in his own behalf and denied this testimony, stating that he had used the steps three or four times a week for several months before the accident, that they appeared solid, and that he had not noticed at any time that they were wobbly or shaky. The jury must have believed the latter testimony when they rendered their verdict holding the defendants liable. We cannot say that it is wholly incredible when the trial judge, who heard all the evidence, let the verdict stand.

[1] The issue raised by appellants is the error in the modification of their proposed instruction whereby the court struck out the portion reading: "When the perilous instrumentality is known to the owner or occupant and not to the person injured, a recovery is permitted, but there is no liability for injuries from the dangers that are obvious or as well known to the person injured as to the owner or occupant."

The proposed instruction was a correct statement of the law and should have been given. The rule is stated in 20 Ruling Case Law, pages 56 and 57, as follows: "The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them. * * * The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. * * * And, hence, there is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant."

California cases in accord with this rule are Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 560, 296 P. 76; Shanley v. American Olive Oil Co., 185 Cal. 552, 555, 197 P. 793; Blodgett v. B. H. Dyas Co., 4 Cal. 2d 511, 512, 50 P.2d 801; Alexander v. Wong Yick, 25 Cal.App.2d 265, 267, 77 P.2d 476.

The respondent, though failing to concede the rule, replies that the omitted portion of the proposed instruction was covered by other instructions given. Attention is directed to that reading: "He (the owner) is not liable for injuries to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care by the invitee." Also to the portion of the instruction reading: "If you find that Mr. Kessler stepped on the steps without using ordinary care to observe their condition, then this constituted contributory negligence on his part."

[2] The respondent argues that this instruction cured the asserted error. The appellants say that the instructions are hopelessly inconsistent and misleading. Both sides indulge in speculation as to what part, if any, of the instructions were followed by the jury. The appellants cite Chidester v. Consolidated People's Ditch Co., 53 Cal. 56; Noce v. United Railroads, 53 Cal.App. 512, 200 P. 819, and Gaster v. Hinkley, 85 Cal.App. 55, 258 P. 988, all reversing judgments because of conflicting instructions upon material issues. Respondent cites Alloggi v. Southern Pac. Co., 37 Cal.App. 72, 173 P. 1117; Silveira v. Siegfried, 135 Cal.App. 218, 26 P.2d 666, and Callet v. Alioto, 210 Cal. 65, 290 P. 438, in support of his argument that whenever the law is correctly stated in some portion of the instructions the conflict with other portions should be disregarded as nonprejudicial. We know of no rule or standard by which an appellate court can determine as a matter of law that a jury did or did not permit itself to be misguided by an erroneous instruction and counsel have not cited any authorities which would give light on that subject. The cases herein referred to are completely out of harmony if the two instructions are in direct conflict—the one stating the correct rule of law, the other the incorrect. But, a careful reading of the instructions as a whole, together with those proposed by appellants and either modified or given substantially as requested, satisfies us that the conflict is more fancied than real. At appellants' request the trial court endeavored to give the jury the three elements above noted which would have relieved them from legal liability—actual notice of the danger by the invitee, obvious danger which should have been seen, and danger which might have been seen by reasonable diligence and care. In the instruction appearing on page 481 of the transcript, given at appellants' request, the court covered the last two elements; in that appearing on page 523 the element of actual knowledge was covered. If the appellants had desired all these elements mentioned in one paragraph of the instructions they should have prepared their requests accordingly. But when instructions are proposed which cover separately several elements of a material rule of law we do not know of any authority requiring the trial judge to reedit and reconstruct the various proposals and combine them into one or more paragraphs so that all elements of the rule, and all its exceptions, are given to the jury at the same time or in the same paragraph. Counsel may avoid confusion in that respect by composing the proposed instructions in the desired manner.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



39 Cal.App.2d 67

PEOPLE v. NICHOLSON.

Cr. 395.

District Court of Appeal, Fourth District, California.

May 10, 1940.

1. Criminal law ⇐1202(6)

An information, alleging that accused was tried and convicted of burglary in the superior court of Los Angeles county, that judgment was pronounced upon him on a specified date under which he served a term in the state prison, and also that he was tried and convicted of burglary in the superior court of San Diego county, that judgment was pronounced upon him on a specified date, under which he served a term of imprison-

ment in the state prison, sufficiently alleged, as basis for sentence as an habitual criminal, that prior charges against accused were separately brought and tried and that his periods of confinement were separate. Pen. Code, § 644.

2. Criminal law ⇐1202(5)

Verdicts, as basis for sentence as an habitual criminal, were not incomplete because finding that each charge of prior conviction was true without finding further that accused had served separate terms in the state prison under those convictions. Pen. Code, §§ 644, 1158.

3. Criminal law ⇐1202(3)

Evidence in support of sentence as an habitual criminal established that accused had served separate terms under prior convictions. Pen.Code, §§ 644, 1158.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

E. V. Nicholson was convicted of burglary and sentenced as an habitual criminal, and he appeals.

Affirmed.

Francis C. Mackall, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse and Bayard Rhone, Deputy Attys. Gen., for respondent.

MARKS, Justice.

By an amended information defendant was charged with the crime of burglary and with two prior convictions of burglary under which he had served sentences in the state penitentiaries. Defendant pleaded not guilty, not guilty by reason of insanity, and denied the prior convictions. He was found guilty of burglary in the second degree, and sane. The jury also found that he had suffered the two prior convictions. He was sentenced as an habitual criminal. The only questions presented on this appeal are under that portion of the sentence.

[1] Defendant urges that the amended information is defective in that it fails to charge in so many words that he had been "previously twice convicted upon charges separately brought and tried" and that he had "served separate terms therefor in any state prison". Sec. 644, Pen.Code. This contention is without merit. The pleading alleges that defendant was tried and convicted of the crime of burglary in the superior court of the county of Los Angeles; that judgment was pronounced upon him in that court on December 21, 1922, under which he served a term in the state prison. It also alleges that he was tried and convicted of the crime of burglary in the superior court of San Diego county; that judgment was pronounced upon him in that court on October 28, 1924, under which he served a term of imprisonment in the state prison.

These allegations satisfy the quoted portion of the code section. As it was alleged that he was tried in separate counties at different times and served a prison term under each sentence pronounced in each county, it follows that it was sufficiently alleged that the charges against him were separately brought and tried and that his periods of confinement were separate. See People v. Nicholson, 34 Cal. App.2d 327, 93 P.2d 223.

[2] Defendant complains because, in the verdicts of the jury, it was found that each charge of a prior conviction was true without finding further that he had served separate terms in the state prisons under those convictions. The contention is without merit. The verdicts satisfy the requirements of section 1158 of the Penal Code. People v. McKinley, 2 Cal.2d 133, 39 P.2d 411.

[3] It is next contended that there is no evidence that defendant had served separate terms under his prior convictions. The evidence to the contrary is conclusive. Duly certified copies of the records of his convictions in Los Angeles and San Diego counties, together with the records of his confinements in San Quentin and Folsom prisons, were produced in evidence. It was proved that the finger prints on these records were those of defendant.

The prison record shows that defendant was received at San Quentin on December 21, 1922, was given a three year term and was released on parole on December 21, 1923; that he was received at Folsom on October 28, 1924; that he completed serving his term under his first sentence on April 21, 1925; that he continued in that prison and served his term under his second sentence. This evidence clearly shows that he served separate terms under his two prior convictions. In re Brady, 5 Cal. 2d 224, 53 P.2d 945.

The judgment and the order denying defendant's motion for new trial are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

38 Cal.App.2d 703

YOSHIKO YAMAUCHI v. O'NEILL et al.

Civ. 11133.

District Court of Appeal, First District, Division 2, California.

May 3, 1940.

Hearing Denied July 1, 1940.

1. Automobiles ⇐155

A customer in store, who, pursuant to customary practice, left store through rear entrance and driveway which store proprietor had right to use under his lease was an "invitee" rather than a "licensee", as respects right to recover for injuries suffered when struck by another lessee's truck.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee" and "Licensee".

2. Negligence ⇐32(1)

The rule that the only duty owed to licensee is to refrain from wilful or wanton conduct is applicable only to the duty owed with respect to the condition of premises, or, as it is sometimes expressed, to cases involving only "passive negligence" as distinguished from "active negligence."

See Words and Phrases, Permanent Edition, for all other definitions of "Passive Negligence" and "Active Negligence".

3. Automobiles ⇐155

The negligent operation of a moving vehicle in a place where operator has good reason to expect the presence of licensees constitutes "active negligence" as distinguished from "passive negligence," and hence operator of vehicle, whether the licensor or some other person, owes the duty to exercise ordinary care, not merely to refrain from wilful or wanton conduct.

4. Automobiles ⇐155

Where customer of store was struck by truck in driveway after emerging from rear entrance of store, customer could recover for truck driver's failure to exercise ordinary care, irrespective of whether she was an invitee or a licensee.

5. Trial ⇐251(8)

In action by store customer for injuries suffered when struck by truck after emerging into driveway from rear entrance of store, refusal to submit the immaterial issue of whether customer was an invitee or a licensee was not error.

6. Automobiles ⇐244(3)

Evidence *held* to establish negligence in backing delivery truck out of driveway, so as to authorize recovery by customer of nearby store who was struck by truck while in driveway.

7. Appeal and error ⇐1170(9)

Where evidence and admitted facts establish that truck driver was guilty of negligence which was the proximate cause of plaintiff's injuries, alleged error in instructions on negligence was not prejudicial, and judgment for plaintiff must be affirmed. Const. art. 6, § 4½.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Yoshiko Yamauchi against J. F. O'Neill and another, doing business as Broadway Creameries, and another, for injuries suffered when struck by delivery truck. From a judgment on a verdict for plaintiff, defendants appeal.

Affirmed.

Bronson, Bronson & McKinnon, of San Francisco, and O'Keefe & O'Keefe, of Redwood City, for appellants.

J. E. McCurdy, of San Mateo, and J. W. Coleberd, of So. San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought damages for personal injuries sustained through the negligence of defendants when a delivery truck owned by defendants O'Neill, doing business as Broadway Creameries, and operated by defendant, McNally, their employee, struck and ran over plaintiff. A trial by jury was had and plaintiff recovered judgment in the sum of $3,000. Defendants appeal from said judgment.

The main issue discussed in the briefs is that of the status of plaintiff at the place of the accident, which accident occurred in a driveway leading into a court in the center of a business block in the city of San Mateo. Plaintiff was a customer of M. Daba & Co., one of the business houses in said block and she claims that her status was that of an invitee at the place of the accident. Defendants claim that plaintiff's status was that of a mere licensee. It therefore appears appropriate to summarize the evidence bearing upon said issue.

The entire business block, including the driveway and court, was owned by the Wisnom Company, which company leased the stores on the ground floor and some apartments on the second floor to various tenants. The block was bounded on the east by B street and on the south by First avenue. M. Baba & Co. leased the store on the corner of B street and First avenue. This store had a frontage amounting to approximately 28 feet on B street, and the store of the defendants had approximately the same amount of frontage immediately to the north of the Daba store on B street. The front entrances of both stores, which were the main entrances thereto, were located on B street. The side of the Daba store ran approximately 80 feet along First avenue to the driveway in question. This driveway was approximately 10 feet wide and was covered for approximately 30 or 35 feet by the second story of the building as it ran in a northerly direction to the open court in the center of the block. The Daba store had a rear entrance on the driveway and the defendants' store had a rear entrance on the court. The above-mentioned front and rear entrances constituted the only entrances to these two stores. The other stores had rear entrances on the court and there was also a rear entrance to the apartments from the court.

The driveway and court were customarily used in common by all of the tenants and those persons having business dealings with said tenants. The lease of the defendants was admitted in evidence and it leased to said defendants their store "together with the right to use in common with other tenants of said lessor, the present driveway and alley way * * * for the purpose of obtaining ingress and egress from the demised premises, provided * * * that such driveway use shall be so limited and controlled by them so as not interfere with the rights of other tenants of the said lessor to use the said driveway for the purpose of the business which the lessor may permit them to conduct thereon".

The driveway was used mainly for delivery purposes but it also appears that some of the tenants and the customers of the tenants made use thereof in going to and coming from the stores. Plaintiff had been a customer of M. Daba & Co. and its predecessor in the same location for many years prior to the accident. Plaintiff conducted a laundry on the south side of First avenue at a point approximately opposite the driveway and it was her custom to enter the Daba store by the rear entrance located on the driveway. The manager of the lessor testified to the use of the driveway by the customers of the lessees and Mr. Daba testified that his customers, to the extent of an average of about 10 every day, entered his store from the driveway. Mr. Daba further testified that there had never been any barricades or chains across this driveway and that it had been open at all times for the use of anyone who wanted to go in or out. There were signs at the entrance to the driveway reading "Go Slow" and "Blow Your Horn".

Turning to the events of the day of the accident, the testimony shows that plaintiff had crossed First avenue to the driveway and had entered the Daba store through the rear entrance and was in the act of returning to her place of business over the same route and was walking in the driveway toward the street when she was struck from the rear by defendants' panel delivery truck as it was backing out of the driveway. When plaintiff entered the rear door of the Daba store she noticed defendants' truck standing at the rear of defendants' store and she again noticed it at the same place as she left by said rear door. Said truck was headed north; the engine was not running; and plaintiff saw no one in the vicinity of the truck. The defendant McNally testified that he went out, got in the car, started the motor, put it in reverse, backed out, heard the plaintiff scream and stopped the car. He testified that he did not see plaintiff prior to the accident and it appears entirely probable that he was in the car ready to start it at the time that plaintiff emerged into the driveway from the Daba store. The construction of the panel delivery truck prevented him from obtaining a direct view of the driveway to the rear from the driver's seat and his only means of obtaining any view to the rear was by means of a rear view mirror supported on a bracket or prong on the left side of the truck. This mirror, however, afforded only a view of the left or west side of the driveway, it being impossible to obtain a view therein of the remaining portion of the driveway, including that portion in which plaintiff was walking. Said defendant admitted nevertheless that he proceeded to back said truck out through the driveway without sounding his horn or giving any warning to persons who might be endangered by this movement. Plaintiff did not see or hear the truck as it approached from the rear and she was

struck down and run over while walking on the east side of said driveway at a point about six feet north of the sidewalk on First avenue.

[1, 2] Defendants' main contention is that "Under the evidence plaintiff was at best a licensee and consequently the only duty owed was to refrain from any wilful or wanton conduct." We find no merit in this contention. It assumes that plaintiff was "at best a licensee". In our opinion this is an erroneous assumption as we believe that the uncontradicted evidence shows that plaintiff was an invitee rather than a licensee. We deem it unnecessary, however, to discuss this question at any length for even if it be assumed that plaintiff was a licensee, rather than an invitee, we believe that defendants' conclusion is based upon a general rule of law which has no application to the facts before us.

[3] The rule upon which defendants rely finds expression in many of the authorities but it is limited in its application to cases dealing with the duty owed to a licensee with respect to the condition of the premises or, as sometimes expressed, to cases involving only passive negligence as distinguished from active negligence. The authorities may not be entirely in accord in determining what constitutes passive negligence and what constitutes active negligence but there can be no doubt whatever that the negligent operation of a moving vehicle in a place where the operator has good reason to expect the presence of licensees constitutes active negligence as distinguished from passive negligence. Under such circumstances the duty owed by the operator of the moving vehicle to a licensee, whether such operator be the licensor or any other person, is not merely the duty to refrain from wilful or wanton conduct but is the duty to exercise ordinary care.

The distinction is clearly drawn with respect to cases involving active negligence in Lucas v. Walker, 22 Cal.App. 296, at page 301, 134 P. 374, 376, 379, where the Court said:

"A licensee under such circumstances is entitled to recover for any injury to himself, in the absence of contributory negligence upon his part, resulting from the active negligence of the licensor, and such licensor is responsible in damages for any overt act of negligence, though the same be neither willful nor wanton.

"The cases cited by the appellant in support of the proposition to the effect that a mere licensee can recover only for willful or wanton injury are all cases where the plaintiff was either a trespasser or mere licensee, and was injured solely by reason of the unsafe condition of the premises and without any active, or overt act of, negligence committed against him by the occupant or owner of the premises. [Citing authorities.]"

The same distinction is made in Herold v. Mathews Paint House, 39 Cal.App. 489, 179 P. 414, 416, in which the court cited with approval the case of Lucas v. Walker, supra, and said, "That rule, however, does not apply to a case where the licensee is upon the premises of a defendant, and is injured by an overt act of negligence committed against him by the defendant. Where the injury results from such an act, the licensor is responsible."

The above-mentioned cases are in line with the great weight of authority as shown by the cases collected in an annotation entitled, "Liability to trespasser or bare licensee as affected by distinction between active and passive negligence" found in 49 A.L.R. at page 778. There is also the recent case of Babcock v. Nolton, Nev., 71 P.2d 1051, at page 1054, in which the court said, "There is no evidence of willful or wanton negligence on the part of appellant's employee in backing the truck against respondents' car, but the evidence sustains lack of due care on his part, resulting in active negligence, for which appellant is liable. The great weight of authority is to the effect that a person guilty of active negligence, as distinguished from passive negligence, is liable for resulting injury to a licensee."

The foregoing authorities sufficiently distinguish most of the cases cited by defendants. Defendants also cite and rely upon Hamakawa v. Crescent Wharf etc. Co., 4 Cal.2d 499, 50 P.2d 803; Lindholm v. Northwestern Pac. R. R. Co., 79 Cal.App. 34, 248 P. 1033, and Kirkpatrick v. Damianakes, 15 Cal.App.2d 446, 59 P.2d 556. Perhaps it is appropriate to refer briefly to these cases. The Hamakawa case was decided upon the ground that the plaintiff was upon a portion of the premises "where he had no right to be and where the defendant did not know, and had no reason to expect, him to be at the time he was injured". 4 Cal.2d at page 503, 50 P.2d at

page 805. The Lindholm case was decided upon the ground that the plaintiff was on a portion of the premises "where [he] was neither invited nor expected to go". 79 Cal.App. at page 39, 248 P. at page 1035. That case distinguishes Lucas v. Walker, supra, and Herold v. Mathews, supra, stating that the last-mentioned cases were decided "upon evidence that the licensor was or had good reason to be aware of the presence of the licensee in the place of danger". 79 Cal.App. at page 40, 248 P. at page 1035. The Kirkpatrick case was decided upon the ground that plaintiff was a trespasser being on the premises without any permission, express or implied. Furthermore, it does not appear that the driver in that case was aware of the presence of the plaintiff or had any reason to expect plaintiff to be at the place where she was injured.

[4, 5] In the case before us plaintiff was in no sense a trespasser. She was admittedly either an invitee or a licensee and she was injured by the active negligence of defendants at a place where defendants had good reason to expect the presence of invitees and licensees. Under these circumstances, we believe the question of whether plaintiff was an invitee or licensee was wholly immaterial for in either case defendants owed to plaintiff the duty to exercise ordinary care in the operation of the delivery truck and could be held liable for their breach of that duty. See Pomponio v. New York, N. H. & H. R. R. Co., 66 Conn. 528, 34 A. 491, 32 L.R.A. 530, 50 Am.St.Rep. 124, cited with approval in Lucas v. Walker, supra, 22 Cal.App. at page 302, 134 P. at page 377. From what has been said, it follows that there is no merit in defendant's contentions that the trial court erred in denying their motion for a nonsuit and their motion for a directed verdict. These motions were based upon the claim that there was no evidence of wilful or wanton conduct and therefore no evidence of any breach of duty toward plaintiff. It further follows that there was no error in refusing to submit to the jury the question of whether plaintiff's status was that of an invitee or a licensee as that issue was an immaterial issue.

Defendants further contend that the trial court erred in the giving and refusing of certain instructions to the jury. This contention involves several instructions relating to the issue of negligence. Our reading of these instructions leads us to the conclusion that there may be merit in the claim that the trial court committed error but we are still confronted with the question of whether the claimed error resulted in prejudice to the defendants.

[6, 7] It is not claimed that the evidence was insufficient to sustain the implied finding of negligence and in our opinion the evidence conclusively showed such negligence. As we view the record, the case was not a close one but on the contrary, we believe that the only reasonable conclusion which could have been drawn from the admitted facts was that the defendant driver was guilty of negligence which was the proximate cause of plaintiff's injuries. Under such circumstances, it cannot be said that the claimed error in the instructions relating to negligence was prejudicial and it is our duty to affirm the judgment by virtue of the mandate found in section 4½ of article VI of the Constitution.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



HARNED v. WATSON.*

Civ. 12424.

District Court of Appeal, Second District, Division 2, California.

May 2, 1940.

Hearing Granted July 1, 1940.

Breach of marriage promise ⇐18, 35

In action for breach of promise to marry, wherein defendant contended that his promise to marry was contingent upon happening of a future event, and that the contingency was neither pleaded nor proven, and that trial court confused jury when instructing it, judgment for the plaintiff was reversed.

MOORE, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

* Subsequent opinion 110 P.2d 431.

Action by Amy Harned against Harry W. Watson for breach of promise to marry. From an adverse judgment, the defendant appeals.

Reversed.

Michael F. Shannon, Thomas A. Wood, and Charles W. Wolfe, all of Los Angeles, for appellant.

Cantillon & Glover and Thomas B. Sawyer, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for breach of promise to marry defendant appeals.

Divested of romantic and non-essential incidents, the pertinent facts are:

In 1935 plaintiff, a divorcee forty-five years of age, became acquainted with defendant, who was living with his wife, to whom he had been married for almost forty-five years. Defendant's wife died in July, 1936. Thereafter defendant met plaintiff and told her of his bereavement. Plaintiff sympathized with him and invited him to share her companionship. This association ripened into a close friendship, both parties being constantly in each other's company. In November, 1936, defendant asked plaintiff to marry him, which proposal plaintiff accepted. In January, 1937, they had a disagreement and their engagement was broken. This engagement, upon mutual agreement, was renewed June 3, 1937. No date, however, was set for the marriage, the marriage date having in each instance that the subject was discussed by the parties been made by defendant contingent upon the happening of some future event, the plaintiff testifying on this point as follows:

"Q. But every time he discussed the question of marriage he always made the date of the marriage contingent upon his straightening out his finances and his other things, did he not? A. Yes, he did."

"Q. Did he ever mention any particular date that you would be married upon? A. I wouldn't say an exact date, but just as soon as he got his affairs fixed up; he thought it would be around the first of October."

September, 1938, in discussing their date of marriage defendant told plaintiff that he did not feel that he was able to marry her immediately, whereupon she told defendant she "was through", unless he married her at once. This defendant declined to do and plaintiff refused to associate with him thereafter. She filed the present action November 3, 1938.

Defendant relies for reversal of the judgment, among others, on the following grounds:

First: Defendant's promise to marry plaintiff was contingent upon the happening of a future event, the happening of which contingency was neither pleaded nor proven.

Second: The trial court confused the jury when instructing the same to the prejudice of defendant.

The first proposition is tenable and is governed by the following established principles of law:

(1) In an action for breach of promise to marry, the general rules applicable to all contracts apply (see 4 Cal.Jur. [1921] 455).

(2) A promise to marry may be conditional upon the happening of a future event and no liability attaches to the promise until the contingency upon which the promise has been predicated occurs (see 11 C.J.S. (1938), Breach of Marriage Promise, p. 775, § 7; 8 Amer.Jur. (1937) 853, § 11).

This fundamental rule of contracts is well expressed in Pierce v. Merrill, 128 Cal. 464, 470, 61 P. 64, 65, 79 Am.St.Rep. 56, as follows:

"The intention of the parties, as it is to be derived from the language used, is to control in the construction of a contract, and this rule applies to time of performance as well as to all other matters; and when the time of performance is expressed, as it is here, in plain, unambiguous terms, the court will not presume that some other time was intended."

Loath as we are to clutter up the already too voluminous reports with unnecessary quotations from prior decisions, and bearing in mind the timely admonition of the present president of the American Bar Association, the Honorable Charles A. Beardsley, that judges in writing opinions are in effect sending telegrams collect to the members of the profession,[1] we are nevertheless constrained, because of the pertinency thereof, to quote the language of Mr. Justice McLaughlin in Bailey v. Brown, 4 Cal.App. 515, 88 P. 518, wherein

1 Vol. XXVI, No. 1, American Bar Association Journal, January, 1940, page 4.

he so aptly expresses the reason for the rule of law just announced in a case in which defendant's promise to marry plaintiff was contingent upon the death of plaintiff's mother. At page 518 of 4 Cal.App., 88 P. at page 519, he says:

"How could a contract to marry exist when the promisor might never be under a present obligation to marry the promisee, or vice versa? If this good mother should live to a very ripe old age, as mothers sometimes do, no human could tell what might happen. Either of the parties might be waiting for the other, harp in hand,[2] beyond this vale of tears, or both might pine away and die before this promise of future connubial bliss could ripen into a cause of action enforceable in earthly courts. Then, too, age creeps on all apace, and, if the contingency which could make this promise quick with life, as a legal obligation, performable presently, was delayed through many weary years, waning desire and ripened judgment might prompt the parties to acknowledge the wisdom of that rule of public policy which forbids long-continued restraint upon marriage, and frowns upon a contract tantamount to an indefinite postponement thereof. And, if the roseate dreams of youth survived the blasting frosts of age, decrepitude, mental or physical incapacity, infirmities due to weight of years might be urged as defenses not now available to this defendant."

In the instant case, as set forth above, plaintiff's own testimony disclosed that defendant's promise to marry her was "contingent upon his straightening out his finances". There is a total absence of either pleading or proof in the present case that this contingency has occurred.

Therefore, applying the aforementioned rules of law, the contingency upon which defendant's promise was predicated not having occurred, defendant has not breached his contract with plaintiff and there is no liability on his part to her.

The second proposition is likewise tenable. During the course of the trial the following incidents occurred:

(1) In denying plaintiff's motion for nonsuit the trial judge said, "There is a lot of haziness in this thing; it is foggy."

(2) The trial judge instructed the jury as follows:

"You are instructed that in this case there is no evidence that will justify the giving of punitive or exemplary damages and that therefore, no such damages can be found by you."

"You are instructed that in this action plaintiff alleges that on or about the 15th day of November, 1937, the defendant, Harry Watson, seduced her under a promise of marriage.

"You are instructed that there is no evidence in this action to sustain such an allegation; therefore, you must find that there is no proof of seduction under promise of marriage."

After reading the foregoing instructions the trial judge told the jury to disregard them and then said:

"However, in instructing you to disregard this instruction, together with defendant's offered instruction No. 18 just read to you, I do not mean to convey the idea that you should or should not find that punitive or exemplary damages should be allowed by you in case you find for the plaintiff. This is a matter of your determination under all the instructions given herein."

(3) After the jury had deliberated for several hours, they returned into the courtroom and requested that the instructions immediately following those which the court had stricken out be reread. The judge reread certain instructions and then the following occurred:

"A Juror: You said at that part about there not being proof of promise of marriage, then told us to disregard that. And there was some instruction following that.

"The Court: There is no use of reading that. Do you want me to read what statement to disregard?

"A Juror: No, but something follows that.

"The Court: What follows that is what I read over here; that refers to both of these instructions that I told you to disregard.

"A Juror: That clears it up."

It is evident from the foregoing that the jury was confused by the court's instructions, since the jurors stated that the court had told them that there was no proof of promise of marriage and had then instructed them to disregard such statement.

[2] In all probability the learned justice had he been writing his opinion in this modern streamlined age, would have inserted in lieu of "harp in hand" "trident in hand".

A reading of the instructions of the court discloses that the court did not in fact tell the jury that there was no proof of a promise of marriage but that there was no proof of *seduction* under promise of marriage. However, the jury being confused, it is very probable that, since the jury believed the judge had instructed them that there was no proof of a promise of marriage and then instructed them to disregard such statement, they believed the judge was in effect saying that there was proof of a promise of marriage, which obviously would be prejudicial to defendant.

In view of our conclusions it is unnecessary for us to discuss defendant's other contentions, which we believe to be sound, that there was no proof or basis for punitive damages.

For the foregoing reasons the judgment is reversed.

I concur in the judgment: WOOD, J.

MOORE, Presiding Justice.

I dissent.

Defendant appeals from a judgment after verdict whereby the jury awarded the plaintiff $2,000 actual damages and $8,000 exemplary damages on account of the breach of an alleged agreement of the defendant to marry the plaintiff.

The grounds of appeal are: (1) that the contract was contingent and the contingencies had not occurred at the commencement of the action; (2) that plaintiff cannot recover damages for seduction without proof of her chastity at the time of the seduction; (3) that the court erred in instructing the jury on seduction without stating that the person damaged was chaste at the time of the seduction, and where there was no evidence of her chastity; and (4) that the court erred in permitting plaintiff, over objection, to testify that she submitted to sexual intercourse with defendant in reliance upon his promise of marriage.

In substance, the complaint alleges that about November 1, 1936, at defendant's request, plaintiff promised to marry defendant but that no definite time for the marriage was fixed, that she is still ready and willing to marry defendant; that after said promise to marry, the defendant seduced plaintiff about November 15, 1937, by means of his said promise and of plaintiff's reliance thereon; that on June 3, 1937, plaintiff requested defendant to fulfill his said agreement but he then deferred the marriage until certain business transactions of defendant were completed; that they discussed their marriage from time to time; that about September 1, 1938, they agreed that said marriage should take place immediately after September 12, 1938; that upon her demand on September 17th that he marry her, defendant declined and refused to do so; that between November 15, 1936, and September 17, 1938, she gave to defendant all of her love, care, attention and services and looked after, managed and cared for him; during which period plaintiff was deprived of an opportunity to marry some one else, to her actual damage in the sum of $250,000. She asked that punitive damages be assessed in the sum of $25,000.

At the time of her alleged engagement plaintiff was about forty-five years of age and defendant was seventy. She operated a millinery business in her home on Cloverdale avenue, Los Angeles, where she earned an average of $200 per month. She met defendant in 1935 at a social function. After the decease of his wife, defendant visited the plaintiff at her said home, renewed their acquaintance, and following frequent visits together, their relations attained to a mutual affection. In November, 1936, they mutually confessed their love and became engaged. They visited the homes of mutual friends where they were received with respect and honor. He spent much time in defendant's home and she lost much of her trade because defendant was in the way. He was there in the evenings and he was there in the mornings until 10 o'clock; he often spent the night. Their romance suffered a disturbance in January, 1937, and they walked their separate ways until about June 3 of the same year, when, after mutual apologies, they discussed marriage and renewed their engagement.

The attentions given plaintiff by defendant, following said reengagement, were constant and affectionate. During the summer of 1937 they accompanied a couple on their honeymoon and enjoyed a trip on the Russian river for about six days. In September, 1937, defendant suggested that plaintiff rent another apartment which would be suitable for them after their marriage and that she quit her millinery work. Together they found the apartment, selected the furniture and planned for their marriage to take place after the defendant's son should have arrived from the East. About the 1st of October, while

they were furnishing their future home, defendant asked leave to move in and abide with plaintiff while awaiting the arrival of his son and at the same time he placed the wedding ring of his own mother upon plaintiff's finger as a token of his plighted faith and "to seal the bargain".

From the date of the ring incident until September 17, 1938, plaintiff and defendant occupied said apartment. During the period of their illicit relations, the question of marriage was frequently discussed but as often postponed. Various reasons were assigned: once he was awaiting his son's arrival; then he wanted to get his affairs straightened out; he had mortgages out that he desired first to collect; he owed money at the bank which he desired first to pay. It was the cleaning up of all of his business transactions that he made contingencies that must occur prior to his fixing a definite date for the wedding.

Although defendant admits the acts of sexual intercourse during the period they lived together, and, in addition thereto, stated that he had acts of intercourse with her in the fall of 1936, while she resided in the Cloverdale apartment, he denied all of her testimony that he promised to marry her. He admitted telling her that he loved her. He accompanied her to church and took communion by her side; he introduced her to his children and to his intimate friends; he escorted her to his clubs; sent presents to his friends with cards bearing her name and his; wrote her letters of endearment; praised her for her sweetness and her beauty; gave her passes to the races; purchased furniture for their apartment and supplied her table. Witnesses testified as to his outspoken intentions to marry her.

She became impatient at his procrastination, telling him that she could not continue to live thus illicitly; that if he would not marry then, she was through with such life. On September 17th, he abandoned her apartment and shortly thereafter she brought this action.

I. The contract to marry was not contingent. It is true that, on a number of occassions following the resumption of their engagement in June of 1937, defendant made excuses that he had business transactions which he must consummate prior to their wedding; that he was trying to get them straightened out so that he would be in a position to travel after his marriage. It is true that, in answering one of many questions, she testified that every time he discussed the question of marriage, he always made the date contingent upon his consummating some purpose, business or otherwise. In view of his numerous excuses which she had recited to have been made by him, her momentary confusion was understood by the jury. Notwithstanding her tolerance of his pleas for delay, yet his proposal, her acceptance, his wedding ring, his attentions, his compliments, his social engagements with her as his chief delight, his declarations of intention to wed her, his attendance at church with her, his kneeling with her at communion—these facts clearly evinced to her a sincere purpose and justifiably left no doubt with the jury that there was an agreement to marry. It is not customary to fix the wedding date at the time of engagement. That is a detail usually left to the determination of the bride. But the fact of an agreement to marry was determined by the jury and the evidence was sufficient to justify the finding. After he had proposed a marriage, she justifiably concluded that her acceptance and his continued devotion to her would result in nuptial ties. An engagement implies that the wedding shall occur within a reasonable time. 4 R.C.L. 147. Under the circumstances the jury must have believed that his excuses and delays were mere instalments of his breach of the contract.

In view of the evidence, the finding by the jury that defendant agreed to marry plaintiff is abundantly supported. Murphy v. Davis, 19 Cal.App.2d 316, 65 P.2d 917. If conflicts appear in her testimony, which consumed three days of the trial, it was the function of the jury and the trial court to reconcile her statements, and, unless manifestly without support, the findings of the jury should not be disturbed. Whitaker v. Whitaker, 137 Cal.App. 396, 30 P.2d 538; Parker v. Herndon, 19 Cal.App. 451, 126 P. 183. Defendant has repeated his arguments and cited many authorities to show that an obligation to act upon the happening of a contingency is unenforceable before the contingency has occurred. But since the contract was free from contingencies, said arguments and authorities are beside the question.

II. A more serious problem is presented by that part of the judgment whereby plaintiff was awarded $8,000 as exemplary damages. Punitive damages in a sum four times the amount determined as the actual damages is excessive, and for that reason

alone, that part of the judgment should have been set aside in the event of plaintiff's refusal to accept a reduction. 8 R.C. L. 681. If a lady has been wronged to the extent of $2,000 by a breach of a promise to marry her, then the promissor's conduct in living with and supporting her for a year is not such as to warrant so severe a penalty.

But this case did not warrant punitive damages. Demands for exemplary damages are justified only in cases of seduction. In order to render an act of cohabitation by a chaste woman seduction, it must have been accomplished by the false promises or other deception of the seducer. It must consist of such acts, wiles or persuasions as will overcome the resistance of a female who is not disposed voluntarily to yield her virtue. Carter v. Murphy, 10 Cal.2d 547, 563, 75 P.2d 1072, 1080. If a mature woman engages in a sexual act voluntarily, she shows no right to recover. She is not in the position of an unsophisticated girl of normal impulses who may be the easy victim of the blandishments of her charmer.

In the case of this plaintiff, we have no such inexperienced girl. She had passed through the phase of matrimony and knew full well the consequences of extra-marital intimacies. She had attained the age of forty-five years, when the intellect controls and when she did not contend against the violence of biological forces that overwhelm her sister of immature years. Not only was she freed from the temptations that beset her youthful days but she had her own experiences and a wide knowledge of the experiences on the part of others to give her pause. She was fortified by long considered and often repeated moral concepts and by the prevailing conventions that abhor laxity in sex behavior. Between her and a man twenty-five years her senior "the struggle would not have been so unequal, and she would have been held to a stricter responsibility". Carter v. Murphy, supra. Plaintiff could not have been seduced because of these protective forces. She acted upon her own judgment and was guided by her own intellectual processes. With a long business experience behind her, she moved only after calculating the cost. With her this was no sudden descent of a charming Lothario. She had associated with this septuagenarian for a year and with feline cunning had observed his gradual approach to the critical moment when a change in their lives must occur. After their outings, their tete-a-tetes, her listening to his honeyed praises, their social whirl, his gift of the ring and all—he, expressly not ready to lead her to the altar, proposed that, without celebrating a marriage, they live together as man and wife. It was an occasion fraught with both social and economic values. It could not have failed to convey to her mind its momentous import. After he had definitely deferred a marriage to an indefinite day, if she opposed his program because it was contrary to her principles, her soul would have cried in anguish at the sordid prospect he presented. At the time of their engagement, his expectancy was less than eight and one-half years. While a disparity in their ages was a fact that should have caused her to hesitate even at an engagement, yet with time to reflect before her leap, she deliberately chose a status that could offer nothing but sorrow. There is no inference that can be reasonably drawn from her ready acceptance of his pre-hymeneal offer except her desire for the prospective amours or her zeal for economic gain, or social prestige or all of these things. She could not have been controlled by an ardent love or by his promise. She had in mind his speech of procrastination made on June 3d, and, at every discussion thereafter "it was always hinging upon his finances". His delays were warnings that flared like red rockets from the sky and still she yielded. Before the Ides of November, she took this man of three-score-and-ten into her home in defiance of the moral code and now offers the sole excuse that he had promised to marry her. Thus, for a year she fed upon his bounty and shone amongst his friends. Only after he had definitely repudiated his promise to marry did the scene pall upon her. It is not reasonable to believe that she was seduced from her lofty state of virtue by the promise of defendant to marry her. While her body may have been chaste, her avid desires directed her course and she chose her fate with a clear vision. It thus appears that there was not sufficient evidence to warrant the assessment of $8,000 punitive damages or any damages on the theory of the seduction of the plaintiff.

Inasmuch as the instructions and the ruling complained of related to the issue of seduction and punitive damages, we deem it unnecessary to discuss them.

It should be the order of this court that the judgment appealed from be modified by reducing the amount thereof from $10,000 to $2,000, and, as thus modified, affirmed.

38 Cal.App.2d 700

JOHNSTONE et al. v. JOHNSON et al.
Civ. 6254.

District Court of Appeal, Third District, California.

May 2, 1940.

1. New trial ⇐9

Where there are several issues of fact presented in a case which are distinct and separable in their nature, the court may grant a new trial as to one issue and deny motion for new trial as to others.

2. New trial ⇐170

When a motion for new trial is granted as to one issue and denied as to other issues, the order opens for re-examination the issue which is ordered retried only and as to other issues there is to be no new trial.

3. New trial ⇐70

The trial court, in the exercise of a sound discretion, may grant a motion for new trial on the ground of insufficiency of evidence.

4. Appeal and error ⇐977(3)

A reviewing court will not interfere with an order granting a new trial on ground of insufficiency of evidence except where it manifestly appears that such discretion has been abused.

5. Appeal and error ⇐1172(1)

In lessees' action against lessors for eviction from hotel premises, where most of evidence introduced had to do with financial relations between parties and was not only conflicting, but was so intermingled with evidence on other issues as to constitute one problem, order granting new trial on issue of damages, after verdict for lessees, was affirmed, but denial of new trial on other issues was reversed for retrial of all issues, since issues were not so separable that question of damages could be determined without examination of entire relationship between parties.

Appeal from Superior Court, Yuba County; J. O. Moncur, Judge.

Action by R. D. Johnstone and another against J. W. Johnson and others, for eviction from the possession of certain leased premises. Verdict for plaintiff. From an order denying motion for new trial except as to single issue regarding damages and as to that granting the motion, defendants appeal.

Order granting new trial as to damages affirmed, and order as to all other issues reversed and cause remanded for a new trial.

Butler, Van Dyke & Harris, of Sacramento, and Manwell & Manwell, of Marysville, for appellants.

McAllister & Johnson, of Sacramento, A. C. McClellan, of Hanford, Erling S. Norby, of Marysville, and Ivan C. Sperbeck, of Sacramento, for respondents.

PER CURIAM.

Plaintiffs, as lessees, brought this action alleging that they had been evicted from the possession of certain leased premises known as the Peach Bowl Hotel, and praying for general and exemplary damages. Defendants denied generally all of the allegations of the complaint, and in a separate defense set forth the service of a notice to vacate or to pay rent.

The action was tried before a jury and a verdict of $700 damages was returned in favor of plaintiffs. Plaintiffs then moved for a new trial upon various grounds, among others, that the verdict in the sum of $700 was, according to the evidence, inadequate and given under the influence of prejudice.

Upon the hearing an order was made denying the motion for a new trial, except as to the single issue as to the amount of damages, and as to that, the motion was granted upon the ground the evidence was insufficient to sustain the verdict. From that order this appeal was taken by the defendants and lessors.

It is now the contention of respondents, the lessees and plaintiffs in the action, that there were two separable issues presented to the jury; the first, the wrongful eviction from the premises, and secondly, the damages suffered. They also contend these issues were so clearly separable that a new trial could be had as to either issue, and as the record now stands a new trial could be confined to a hearing on the question of damages alone.

[1, 2] There is no doubt that where there are several issues of fact presented in a case, which are distinct and separable in their nature, that the court may grant a new trial as to one issue and deny the mo-

tion as to others, and that when such a new trial is granted it opens for reexamination the issue which is ordered only, and as to other issues there shall be no retrial. Henslee v. Fox, 25 Cal.App.2d 286, 77 P.2d 307; Estate of Everts, 163 Cal. 449, 125 P. 1058.

[3, 4] Also, there can be no question but that the trial court, in the exercise of a sound discretion, may grant a motion for a new trial on the ground of insufficiency of the evidence, and a reviewing court will not interfere with such an order except where it manifestly appears that such discretion has been abused.

We have examined the transcript in this cause, and cannot say after such examination that the court abused its discretion in granting the new trial. Whether or not, however, respondents were entitled to damages in excess of the amount for which they were given judgment, or to any damages at all, is not so clear, nor can we say the issues are so separate and distinct that the question of damages may be determined without at the same time examining the entire relationship between the parties.

[5] Most of the evidence introduced at the trial had to do with the financial relations between the parties. This testimony was not only conflicting but so intermingled with the evidence on other issues as to constitute one problem. The testimony of plaintiffs indicates a profit for the hotel and bar but a loss on the operation of the cafe, but they admit they were in arrears in the rent over $1,000 beside other indebtedness, as well as for a note of some $400 due lessors for stock in trade, fixtures, etc.

In July, 1937, a lease was entered into, fixing the terms of the lease and the payments due thereunder. Among other things, it was agreed that after deducting certain sums each month from the returns of the hotel, all surplus was to be applied upon the purchase price. Apparently shortly after the execution of this agreement trouble arose as to the application of the returns from the hotel and it was agreed a third party was to take over the moneys, paying certain fixed charges and render an accounting each month. This agreement was not carried out, at least to the satisfaction of the lessors, and a notice to terminate the lease was given. It is plain that the so-called interference by lessors in the business of lessees was largely with the consent of the lessees, and was in an attempt to work out the balance due on the rent. Although respondents claim they were possessed of a valuable lease, the entire record does not seem to bear out the contention. They were financially involved, and to show such, the entire evidence should be presented upon a retrial.

It is necessary, therefore, that the order granting a new trial as to the single issue of damages alone be affirmed, but the order as to all other issues be reversed, and the cause remanded for a new trial. Each party to pay his own costs on appeal. It is so ordered.



REIF v. SCHUMACKER et al.
Civ. 10982.

District Court of Appeal, First District, Division 2, California.
May 1, 1940.

Rehearing Denied May 21, 1940.

Hearing Granted June 27, 1940.

1. Commerce ⇐27(7)

In determining whether switchman injured in fall from top of box car was engaged in "interstate commerce", test was whether switchman at time of injury was engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

2. Commerce ⇐27(7)

Switching operations within railroad yard which include the movement of a car later assigned to interstate transportation are purely local and intrastate, as respects switchman's right to maintain an action for injuries resulting from fall from top of car.

3. Master and servant ⇐265(1)

In switchman's action for injuries sustained in fall from top of box car, burden was on switchman to show that at time of injury, he and his employer were engaged in interstate commerce, since the status of interstate employment goes to the jurisdiction of the court.

4. Master and servant ⇐265(1)

As respects switchman's right to maintain an action for injuries sustained in fall from top of box car, interstate status of employment cannot be presumed or inferred from fact that employer is engaged generally in interstate commerce, but presumption is that while in the use and operation of its railway within state, the employer was engaged in intrastate commerce.

5. Appeal and error ⇐927(7)

Where trial court in switchman's action for injuries instructed jury that as matter of law switchman was engaged in interstate commerce at time of his injury, and refused instruction to effect that it was necessary to find switchman was engaged in interstate commerce before he could recover, court's action was in effect a directed verdict on a special and material issue, and evidence would be viewed in light most favorable to railroad on appeal.

6. Master and servant ⇐276(1)

Evidence showing only that switching crew to which injured switchman belonged made up a local train, and that at an undisclosed time after switchman's injuries the train left the yards carrying a car containing interstate merchandise, but not showing when or how the car was attached to the train, or who put it there, was insufficient to show that switchman was engaged in "interstate commerce" at time of injuries so as to give court jurisdiction of the action.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by George K. Reif against Thomas Schumacker and Sidney M. Ehrman, trustees of the Western Pacific Railroad Company, a corporation, for injuries incurred in the course of plaintiff's employment as a switchman. From a judgment for the plaintiff, defendants appeal.

Reversed.

Prior opinion, 99 P.2d 593.

Edwin V. McKenzie, Ernest I. Spiegl, Arthur B. Dunne, Duncan Low, and Dunne & Dunne, all of San Francisco, for appellants.

Clifton Hildebrand, of Oakland, and Goodman & Brownstone, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendants appeal on a bill of exceptions from a judgment for plaintiff following a verdict for $20,000 for injuries incurred in the course of his employment as a switchman for the Western Pacific Railway. The defendants are trustees of the employer railroad corporation, pursuant to the provisions of section 77 of the National Bankruptcy Act, 11 U.S.C.A. § 205, and are sued in that capacity.

The plaintiff was injured when he fell from the lead end of a string of twelve box cars which were being pushed by an engine in the course of switching operations in the company's yard at Portola, Calif. At the time of the accident plaintiff was walking along the top of the lead car preparing to set the brakes when the cars came to a stop. Application of the brakes on the engine caused the slack in the line of cars to run out, and this caused the lead car to stop suddenly, and plaintiff thereupon lost his balance and was thrown or fell from the car.

The appellants raise numerous grounds for a reversal, but since the parties are in accord that there can be no recovery unless appellant and respondent were, at the time of the injury, engaged in interstate commerce, we will limit the opinion to a discussion of that issue.

[1-4] The test of the employment which determines the status of the employee in an action of this kind is "was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it". Shanks v. Del., Lack. & West. R. R., 239 U.S. 556, 558, 36 S.Ct. 188, 189, 60 L.Ed. 436, L.R.A.1916C, 797; Chicago & N.W. R. Co. v. Bolle, 284 U.S. 74, 52 S.Ct. 59, 76 L.Ed. 173. Switching operations within the company's yard which include the movement of a car later assigned to interstate transportation are purely local and intrastate. Scott v. I. A. C., 9 Cal.2d 315, 318, 70 P.2d 940. And, since the status of the interstate employment goes to the jurisdiction of the court, the burden of proof is on the employee to show that, at the time of the injury, he and his employer were engaged in interstate commerce. Rice v. Baltimore & O. R. Co., 6 Cir., 42 F.2d 387; McCoy v. Southern Pacific Co., 29 Cal.App.2d 16, 20, 83 P.2d 970. The interstate status may not be presumed or inferred from the fact that the employer is

engaged generally in interstate commerce; the presumption is that while in the use and operation of its railway within the state the employer was engaged in intrastate commerce. Johnson v. Southern Pacific Co., 199 Cal. 126, 131, 248 P. 501, 49 A. L.R. 1323.

[5] At the request of respondent the trial court withdrew from the jury the question whether the parties were engaged in interstate commerce at the time of his injuries, instructed the jury that as a matter of law they were so engaged, and refused all appellants' proposed instructions to the effect that it was necessary to so find before respondent could recover. This was in effect a directed verdict on a special and material issue, and hence the evidence must be viewed in the light most favorable to the appellants. Estate of Lances, 216 Cal. 397, 14 P.2d 768; Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579.

Respondent was a regular employee of a switching crew stationed at the Portola yards. The crew went to work at 11:59 p. m., June 29, 1937; at 6:35 a. m. of the 30th the respondent was injured; the shift on which he was employed ended at 8 a. m. of that day. Sometime during the period before midnight of the 30th of June a train, designated the Keddie local, left Portola carrying a freight car which contained shipments stipulated to have been interstate commerce. The parties agree that the injuries occurred during switching operations in the freight yard for the purpose of replacing local cars on a storage track from which they had been removed to reach three local cars which had been designated to be put into the Keddie local. The parties also agree that these switching operations continued throughout the night and early morning of the 30th, but they fail to agree, and respondent has failed to prove, at what period of time the interstate car was designated to become a part of the Keddie local, at what time it was made a part of that train, or what crew of workmen attached the car to the local. The parties stipulated as to the number of the car which carried the interstate commerce, the respondent presented a switch list with evidence to prove that such a list was the official designation of all cars to the particular train, that when the switch list was handed to the foreman that was the "designation" of the car which determined the interstate character of the employment. But the interstate car was not on this switch list, and, though the list was used at the trial by respondent's witnesses, it was not offered in evidence. Thus there was no evidence to show when the interstate car was designated for the Keddie local.

[6] The case made out by respondent in short is—that the switching crew of which he belonged made up a local train, that, at an undisclosed time after his injury this train left the yards carrying a car containing interstate commerce; that respondent does not know when or how the car was attached to the train or who put it there, that the switch list, which was an assignment of the duties of respondent's crew, made no mention of the interstate car. Since the presumptions and inferences are all with appellants on this issue, we must presume that the railway company "while in the use and operation of its railway within the state was engaged in intrastate commerce" Johnson v. Southern Pacific Co., supra [199 Cal. 126, 248 P. 502, 49 A.L.R. 1323], there being no competent evidence that appellants were engaged in interstate commerce at the time of the injury.

Thus, when the trial court, at respondent's request, instructed the jury that "At the time and place of the alleged injury to plaintiff, both the plaintiff and defendant were engaged in interstate commerce", it not only took from the jury the decision on a disputed question of fact, but it acted upon evidence which was so far short of competent proof that the prejudice to appellants is apparent. We cannot escape the conclusion that respondent's failure to meet the burden of proof of the essential element of interstate commerce necessary to give the court jurisdiction of a negligence action demands a reversal. Other questions raised do not require consideration at this time.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

McMAHON v. SCHINDLER et al.

Civ. 11053.

District Court of Appeal, First District, Division 1, California.

April 30, 1940.

Rehearing Denied May 29, 1940.

Hearing Denied June 27, 1940.

1. Trial ⇐330(5)

Where complaint alleged in one count that accident in which automobile occupant was injured was proximately caused by intoxication of driver and in another count that it was caused by his willful misconduct, and jury returned a general verdict, the District Court of Appeal was required to affirm judgment entered thereon if it found legal support in cause of action based on charges of intoxication, regardless of error in dealing with cause of action charging willful misconduct. Vehicle Code, § 403, St.1935, p. 154.

2. Automobiles ⇐224(8), 226(1)

One who accepts a ride in an automobile under circumstances which would lead a reasonable person to believe that the driver is intoxicated and who is injured as a result of the intoxicated driver's negligence in operating the automobile is barred by contributory negligence from recovering for the injuries so received. Vehicle Code, § 403, St. 1935, p. 154.

3. Automobiles ⇐245(87)

Whether one who accepts a ride in an automobile under circumstances which would lead a reasonable person to believe that the driver is intoxicated is contributorily negligent with respect to injuries resulting from driver's negligence in operating the automobile is ordinarily a question of fact for the triers of the facts, and it becomes a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference pointing unerringly to negligence of the one accepting the ride, contributing to the injury. Vehicle Code, § 403, St.1935, p. 154.

4. Appeal and error ⇐989
Automobiles ⇐245(24, 87)

Where the minds of reasonable men might differ, burden rests on jury to determine disputed questions of fact as to intoxication of automobile driver and contributory negligence of one accepting a ride, and province of appellate court is only to find whether there is sufficient evidence in the record to support the jury's finding. Vehicle Code, § 403, St.1935, p. 154.

5. Automobiles ⇐244(56)

In action against owner and driver of automobile for injuries sustained by occupant when automobile collided with telephone pole, evidence sustained finding that occupant was not contributorily negligent for allegedly accepting ride knowing driver to be intoxicated. Vehicle Code, § 403, St. 1935, p. 154.

6. Automobiles ⇐245(87)

In action for injuries sustained by automobile occupant when automobile collided with telephone pole, whether occupant was contributorily negligent in that she knew or should have known that driver was intoxicated was for the jury. Vehicle Code, § 403, St.1935, p. 154.

7. Automobiles ⇐224(1)

The fact that one who accepted ride in automobile took three intoxicating drinks while in the company of owner and driver did not in itself deprive occupant of the right to recover damages for injuries sustained when automobile collided with telephone pole. Vehicle Code, § 403, St.1935, p. 154.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Elena McMahon against Bernard Schindler and another for injuries sustained when an automobile in which plaintiff was riding crashed into a telephone pole. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Cooley, Crowley & Supple, of San Francisco (Leighton M. Bledsoe, of San Francisco, of counsel), for appellants.

J. Francis Shirley, of San Francisco, for respondent.

KNIGHT, Justice.

An automobile owned by Fred Cinquini and driven by Bernard Schindler, in which Elena McMahon, aged 22, Lena Ricci, aged 21, and Cinquini were riding, crashed head-on into a telephone pole, demolishing the car and injuring the four occupants. The injuries suffered by Elena McMahon were most severe, among them being a com-

pound, comminuted fracture of the tibia, the bone protruding through the flesh about an inch and a half, and a piece of flesh about three inches long being torn from the leg exposing the bone below the knee; severe back injuries, including three broken vertebrae; and an almost complete laceration of the tongue, it being severed through and through from left to right, about mid-portion, leaving only a small fragment holding the severed portion. On account of said injuries she brought this action for damages against the owner and the driver of the automobile, and was awarded a verdict for $3,500. From the judgment entered thereon the defendants appeal.

[1] The action was based on section 403 of the Vehicle Code, St.1935, p. 154, which permits a person receiving injuries while riding as a guest in an automobile to recover damages when it is established that such injuries "proximately resulted from the intoxication or wilful misconduct of the driver". The complaint contained three counts. In the first it was alleged that the accident was proximately caused by the intoxication of Schindler, and in the second he was charged with wilful misconduct; the third charged Cinquini with having invited respondent to ride as a guest in his automobile and having negligently permitted Schindler to drive the same while intoxicated. The jury returned a general verdict and, therefore, under the rule of the following cases, the judgment entered thereon must be affirmed if it finds legal support in the causes of action based on charges of intoxication (Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 206 P. 653; King v. Schumacher, 32 Cal.App.2d 172, 89 P.2d 466) regardless of whether any error was committed in dealing with the cause of action charging wilful misconduct. Hume v. Fresno Irr. Dist., 21 Cal. App.2d 348, 69 P.2d 483.

Appellants in their answer to the complaint denied that Schindler was intoxicated; and at the trial he testified he was not intoxicated; but on this appeal appellants concede that "the evidence fully supports the inference that the defendant Schindler was driving the car while intoxicated". They contend, however, that respondent was guilty of contributory negligence, as a matter of law, and therefore that she is barred from recovering damages.

The principal facts of the case may be summarized as follows: Respondent and Lena Ricci were employed as hostesses and entertainers in a night club in Colma, known as the Colma Cafe. Sometime after twelve o'clock on the night of the accident, appellants and two male companions visited the cafe. The closing time was two o'clock; and usually respondent, who lived seven or eight blocks away, was driven home by her employer. But on this occasion, at closing time, Cinquini asked respondent if she and Lena Ricci wanted to go with them. Respondent had known Cinquini for several months, and Schindler for about a week; and the young women accepted Cinquini's invitation. Cinquini operated a tavern in South San Francisco, and he first drove over there. One of the men left the party before reaching the tavern, and the others stayed at the tavern for about half an hour; and while there Cinquini served each with two "picon punches". Then at Schindler's suggestion, Cinquini, the two young women and Schindler started to drive to North Beach to get some steamed clams, Schindler doing the driving; but on the way they stopped for a half or three-quarters of an hour at a night club in Colma called Bocci Ball, where respondent had been formerly employed as hostess. At Cinquini's request, Schindler had driven the car from the tavern to Bocci Ball, and upon leaving there Schindler again took the wheel, respondent occupying the seat beside him. After proceeding some considerable distance at a moderate speed northward toward North Beach, Schindler increased the speed to about forty-five miles an hour. Respondent protested; and while passing through Daly City he slowed down to twenty or twenty-five miles an hour. Soon afterwards, however, he again increased the speed to fifty or fifty-five miles an hour and the car swerved; he also drove through stop signs without slowing down. Respondent again protested, and asked him not to drive so fast; but he laughed at her. She then observed that his eyes "were shining" and, realizing that he must be intoxicated, she told him to stop the car—that he was drunk; but he again laughed at her. She immediately turned around toward the back seat to ask Cinquini to do something about it, and, as she was doing so, the car crashed into the pole. At the trial the explanation offered by Schindler as to the cause of the accident was that it happened

while he was trying to wipe the windshield; but to a police officer at the scene of the accident he stated he had fallen asleep at the wheel; and the explanation made by him to the two young women was that he saw something white on the highway and that he swerved the car to avoid striking the object.

The testimony relating to the number of intoxicating drinks taken by Schindler is conflicting. He testified that throughout the night he had but five; one of beer before arriving at the Colma Cafe, one of beer at the Colma Cafe, two "picon punches" at the tavern, and at Bocci Ball one "coffee royal", consisting of a jigger of whiskey in a cup of hot coffee. Respondent testified that during his visit to the Colma Cafe he drank four or five hot "whiskey toddies"; and that while visiting Bocci Ball she saw him at the bar drinking a hot "toddy", but whether he drank more than one, and if so, how many more, she did not know. She further testified that the only intoxicating drink she had taken that night besides the two "picon punches" at the tavern was a "whiskey toddy" at the Bocci Ball.

[2-4] It is doubtless the law, as appellants contend, that where a plaintiff accepts a ride under circumstances which would lead a reasonable person to believe that the driver is intoxicated, and he is injured as a result of the intoxicated driver's negligence in operating the car, he is guilty of contributory negligence and may not recover damages on account of the injuries so received. But it has been definitely held that such a case presents no exception to the general rule that contributory negligence is ordinarily a question of fact to be determined by the triers of the facts; that it becomes a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference pointing unerringly to the negligence of the plaintiff contributing to the injury. Haight v. White, 16 Cal.App.2d 426, 60 P.2d 548; Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P. 2d 870; citing Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. In other words, as said in Lindemann v. San Joaquin Cotton Oil Co., supra, which is considered a leading case of this type, where the minds of reasonable men might differ, the burden rests upon the jury to determine the disputed questions of fact as to intoxication and contributory negligence, and the province of an appellate court is only to find whether or not there is sufficient evidence in the record to support the finding of the jury. And in the Lindemann case the court goes on to hold that evidence which tends to establish the intoxication of a driver to the degree which would render him liable for the injuries and damages suffered by his guest by reason of an accident is not conclusive of the question as to whether the guest had or should have had knowledge that the driver was so far affected by intoxicating liquor as to defeat his claim. If the rule were otherwise, says the court, then every person riding as a guest would be defeated by proof of the single fact that the driver was not in a fit condition to drive the automobile. Therefore, continues the court, the question upon which liability depends is whether the plaintiff knew or should have known that the driver was in a fit condition to drive his car on the occasion of the accident; and that question, says the court, is for the jury's determination, and, unless the plaintiff's conduct is so far contrary to the rules which govern the conduct of reasonable men in the ordinary affairs of life, or violates some rule of law, the jury's verdict and the trial court's judgment are not subject to annulment by an appellate court. Furthermore, and in this connection, the court there says [5 Cal.2d 480, 55 P.2d 881]: "Judgments formed upon what apparently appears to be the true relation of things often prove to have been erroneously formed. If, however, the circumstances were such as to justify a reasonable man in acting upon them, he will not be deprived of a remedy which the law provides if it afterward is proven that his judgment was fallaciously formed."

[5, 6] Here respondent testified that on leaving Bocci Ball, and before entering the car, she looked at Schindler and that to her "he looked perfectly all right"; that she had seen him at the Colma Cafe every night during that week, had seen him drink, and had never seen him become intoxicated. She further stated that there was no cause for complaint about the manner in which he drove the car from the tavern to Bocci Ball. Moreover, Schindler himself testified at the trial that when they left Bocci Ball he was in a fit condition to drive, that he "did not feel" that he was intoxicated. And apparently Lena Ricci saw no reason to suspect his condition until after they had traveled a considerable distance and

she heard respondent protesting the way the car was being driven. She then asked Cinquini if Schindler was all right and he assured her twice that he was. Appellants call attention to respondent's testimony wherein she stated that when they came out of Bocci Ball and saw Schindler take the driver's seat, she asked Cinquini if he were not going to drive, and that he replied that something told him he should. However, the testimony further shows that Cinquini at no time made any effort to do so; and, as stated, a little later he assured Lena Ricci that Schindler was all right; furthermore, at the trial he testified that he saw nothing in the manner in which Schindler drove the car to cause any alarm, and that at no time did he make any protest against Schindler's driving.

In view of the foregoing testimony, there is no legal ground upon which it may be held that the finding of the jury on the issue of contributory negligence, and the conclusion reached thereon by the trial court in passing upon the motion for a new trial are wholly wanting in evidentiary support. Tomlinson v. Kiramidjian, 133 Cal.App. 418, 24 P.2d 559; Haight v. White, supra.

Appellants argue that the facts of the Lindemann case are different from those of the present case; and, hence, that the law declared therein is not here applicable; and in support of their contention that respondent was guilty of contributory negligence as a matter of law they rely mainly on the cases of Schneider v. Brecht, 6 Cal. App.2d 379, 44 P.2d 662; House v. Schmelzer, 3 Cal.App.2d 601, 40 P.2d 577; Reposa v. Pearce, 11 Cal.App.2d 517, 54 P.2d 475; and Price v. Schroeder, 35 Cal.App. 2d 700, 96 P.2d 949. Regarding the Lindemann case it may be conceded that the nature of the evidence was quite different from that here presented; but the issue of fact submitted to the jury for determination, and the issue of law the reviewing court was called upon to decide, were exactly the same as those here involved; moreover, the verdict of the jury there, as here, was in favor of the plaintiff; therefore, the legal doctrines there declared have peculiar application to the present case.

With respect to the cases relied upon by appellants, it would appear that they are more of the type of the one we now have before us, it being claimed therein that the guest "was a participant in a drunken orgy in all the acts and events which led up to the intoxicated condition" of the driver of the automobile. Obviously, however, the decisions in those cases are not here controlling for the following reasons: In each of them, the jury or the judge before whom the case was tried found as a matter of fact that such claim was well-founded; in other words, the verdict was against the plaintiff, and the reviewing court, recognizing that the issue was one of pure fact for the determination of the jury or the trial judge, simply refused to disturb the finding. While here, as in the Lindemann case, the jury found that the claim made against the plaintiff was not well-founded; and the trial judge in denying the motion for a new trial approved the jury's finding; therefore, since there is evidence to support the finding, it is beyond the power of this court to interfere therewith on appeal.

On the other hand, numerous cases may be cited wherein it was held that the question of whether a guest knew or should have known that the driver was under the influence of liquor was one of fact for the jury, and not one of law for the courts. Particular attention may be called to Haight v. White, supra, and Tomlinson v. Kiramidjian, supra, in each of which a judgment in favor of the defendant notwithstanding the verdict, after the jury had returned a verdict in favor of plaintiff, was reversed on the ground that the question of the guest's contributory negligence was one of fact for the jury; also, Erickson v. Vogt, 27 Cal.App.2d 77, 80 P.2d 533, wherein a judgment in defendant's favor following a directed verdict was reversed, one of the grounds of reversal being that the jury should have been allowed to pass upon the question of whether the plaintiff was guilty of contributory negligence, where the evidence showed that she had been drinking with the defendant. Even in House v. Schmelzer, supra, cited in support of appellants' contention, it was held that "the question before the trial court [contributory negligence] was one of fact". [3 Cal.App.2d 601, 40 P.2d 578.]

Applying the above rules to the facts here presented, we conclude that the question of respondent's contributory negligence was one of fact for the jury's determination, and that its implied finding in her favor on that issue is sufficiently supported by the evidence, and cannot be disturbed on appeal.

[7] Nor does the fact that respondent took three intoxicating drinks while in the company of appellants in itself deprive her of the right to recover damages under the provisions of said section 403 of the Vehicle Code. To quote again from the Lindemann case, supra: "No prejudice by reason of the fact that either or both of the parties involved in the accident had partaken of intoxicants should cause a court, where a legal right is involved, to consider lightly the rights of said parties, even though their unhappy plight may have been brought about by conduct which may appear to be highly censurable."

The remaining points urged in support of the appeal all relate to the cause of action based on wilful misconduct; but since the judgment is sustainable on the issue of intoxication, it becomes unnecessary to inquire into the points directed against the issue of wilful misconduct.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.



38 Cal.App.2d 693

WILMANS v. WEISSMAN et al.

Civ. 11186.

District Court of Appeal, First District, Division 2, California.

May 2, 1940.

Hearing Denied July 1, 1940.

1. Limitation of actions ⇐112

The statute providing for moratorium on debts secured by deeds of trust, pursuant to order of court obtained by debtor, did not interrupt running of limitations, in absence of showing that court order had been made. Code Civ.Proc. § 337, subd. 1; St.1935, p. 56.

2. Limitation of actions ⇐6(1)

The statutes providing for moratorium on debts secured by deeds of trust were inapplicable as respects defense of limitations to action on note, where running of limitations was completed before effective date of such statutes. St.1935, pp. 1208, 1214; St.1937, pp. 57, 460.

3. Contracts ⇐73

Though forbearance is sufficient to constitute valid consideration for promise, it must be under an agreement to forbear, and mere forbearance alone is insufficient.

4. Estoppel ⇐52

A new consideration is necessary to support a contract to forbear enforcement of old contract.

5. Limitation of actions ⇐145(5)

When makers of note, at time of execution, promised to pay the note, such promise was exhausted as a consideration, and mere repetition of such promise by makers was not sufficient consideration for payee's promise to forbear enforcement, and hence payee could not recover amount due despite running of limitations. Code Civ.Proc. § 337. subd. 1.

6. Fraud ⇐42

Allegations of fraud in making of promise to pay overdue note when able were not sufficient basis for recovery of amount of such note, in absence of allegation that promise was made without intention of performing it, or with intent to deceive payee or to induce payee to enter into a contract of forbearance. Civ.Code, § 1572, subd. 4.

7. Limitation of actions ⇐13

Where plaintiff, upon defendant's solicitation, had forborne suing, defendants were not "estopped" by such forbearance from pleading the statute of limitations, since plaintiff was not thereby estopped to sue and estoppels must be mutual.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

8. Estoppel ⇐98(1)

An equitable "estoppel" must be mutual and reciprocal, meaning that it must bind both parties or neither.

9. Limitation of actions ⇐179(2)

Allegations of facts showing why plaintiff did not discover fraud at an earlier date were necessary to establish excuse for delay in bringing action for fraud, as respects running of limitations, and mere allegation that fraud was not discovered until specific date was insufficient. Civ.Code, § 1572, subd. 4; Code Civ.Proc. § 337, subd. 1.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Lillian Wilmans against Max Weissman and another, to recover on promissory note. From a judgment for defendant, plaintiff appeals.

Affirmed.

Jos. I. McMullen and Bruce McMullen, both of San Francisco, for appellant.

Joseph A. Brown and A. E. Cross, both of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiff brought this action to recover on a promissory note. To her third amended complaint the defendants interposed a demurrer. The demurrer was sustained without leave to amend and from the judgment entered thereon the plaintiff has appealed.

The payment of the note sued upon was formerly secured by a second deed of trust. But the first deed of trust was foreclosed and at the sale the property was sold for a sum less than the amount of the first obligation. It will not be necessary to again refer to the second deed of trust.

On April 20, 1930, the defendants executed their promissory note in favor of the plaintiff. The principal named in the note was $5,000. It was payable one year after date. This action was commenced on October 11, 1937. In their demurrer the defendants pleaded the statute of limitations. Code Civ.Proc., sub. 1, sec. 337. Under the foregoing facts the demurrer was properly sustained as the action was not commenced within four years after the promissory note fell due and payable unless the delay was accounted for by other allegations contained in plaintiff's pleading. The plaintiff claims that notwithstanding the foregoing facts the demurrer should not have been sustained for several different reasons. We will take up those reasons one at a time and state the facts on which they were based.

[1, 2] In the amended complaint the plaintiff alleged the enactment of certain moratorium acts, chapter 7, p. 56, Statutes 1935; chapter 348, p. 1208, Statutes 1935; chapter 5, p. 57, Statutes 1937, and chapter 167, p. 460, Statutes 1937. The moratorium acts enacted by our state legislature are numerous. One class of those acts provided a procedure by which a debtor might go into court and obtain an order providing that certain proceedings might not be had and taken against the debtor until a certain date not distant later than the date designated in the statute. The other class of said statutes, in definite terms, provided an extension of time. Chapter 7, Statutes of 1935, fell in the first class above mentioned. In her complaint the plaintiff did not claim that an order of court had been made. It is apparent therefore that said statute is of no help to her. Chapter 348 of the Statutes of 1935 took effect on June 21, 1935. It provided in section 19 that obligations which would expire during the period commencing with the effective date of that statute and ending on February 1, 1937, the time was extended so as not to expire until the 1st day of July, 1937. However said statute took effect June 21, 1935, and according to the facts of the present case the statute of limitations, Code of Civil Procedure, section 337, had expired on May 1, 1935. Under those circumstances said statute was inapplicable. 16 Cal.Jur. 399, and cases there cited. Both chapter 5 and chapter 167, Statutes of 1937, provided an extension of the time set forth in section 19 of chapter 348 of the Statutes of 1935. We have just shown that the latter statute was not applicable and it is therefore obvious that chapters 5 and 167 of the Statutes of 1937, purporting to amend chapter 348 of the Statutes of 1935, are not helpful to the plaintiff.

[3-5] In paragraph 4 and certain other paragraphs of her pleading, the plaintiff alleged that when the first default of the defendants occurred the defendant Max Weissman requested plaintiff to refrain from commencing proceedings against them, and in consideration of her forbearance promised to pay the accrued interest and principal when able. It is clear that forbearance is sufficient to constitute a valid consideration although it must be under an agreement to forbear, mere forbearance alone being insufficient. Estate of Thomson's Estate, 165 Cal. 290, 131 P. 1045. However, a careful reading of plaintiff's complaint does not disclose that the plaintiff agreed to forbear nor if so the terms of such agreement. When the defendants executed the note in suit they promised to pay it. That exhausted that promise as a consideration. To support a contract to forbear a new consideration was necessary. Smith v. Parlier Winery, Inc., 7 Cal.App. 2d 357, 46 P.2d 170; Jordan v. Scott, 38 Cal.App. 739, 743, 177 P. 504; Exchange Nat. Bank, Use of Nat. City Bank v. Alford, 187 Ga. 60, 200 S.E. 128, 120 A.L.R. 761. But the plaintiff does not allege a

new consideration to support her contract to forbear, she alleges, in effect, the defendants repeated their promise to pay. Those facts did not create a contract to forbear.

[6] In the paragraph last mentioned, and in other paragraphs, the plaintiff alleged the defendants promised to pay the accrued interest and principal when able. She also alleged that they did not pay. She does not allege that at any time they were able to pay. But she charged they acted fraudulently. It is statutory that the making of a promise without any intention of performing it, committed by a party to a contract with intent to deceive another party thereto, or to induce him to enter into the contract, is actual fraud. (Civ.Code, sec. 1572, sub. 4.) However, the plaintiff's complaint does not allege the promise of defendants was made without any intention of performing it, or that it was made with intent to deceive the plaintiff or to induce her to enter into a contract of forbearance. Therefore, the purported allegations of fraud were insufficient. Ayers v. Southern Pacific Railroad Co., 173 Cal. 74, 79, 159 P. 144, L.R.A. 1917F, 949.

[7, 8] In her next point the plaintiff alleges: "That defendants having solicited an extension of the statute of limitations from plaintiff, and plaintiff, relying on the good faith of defendants and in consideration of their promises, having refrained from bringing an action, defendants are estopped from taking advantage of such forbearance solicited by them to plead the statute of limitations." This point is but a different method of stating the contentions of the plaintiff which we have just discussed. We find no merit in the contention. The facts recited would not have precluded this plaintiff from commencing her proceedings at any time after the defendants defaulted in their payments. As she would not have been estopped, the defendants were not. An equitable estoppel must be mutual and reciprocal, that is, it must bind both parties or neither. 10 Cal.Jur. 627; 10 R.C.L. 839. The estoppel contended for could have no more force or effect in binding the parties than would a contract including the very subject matter urged by way of estoppel. Thompson v. Doaksum, 68 Cal. 593, 599, 10 P. 199.

[9] Apparently realizing that she was bound to excuse her delay in commencing this proceeding, she alleged that she did not discover the alleged fraud until August 9, 1937. She does not allege any facts whatever showing why she did not discover the fraud at an earlier date. Such allegations were necessary to constitute a defense. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809. For the foregoing reasons the trial court did not err in sustaining the defendants' demurrer.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



38 Cal.App.2d 637

McCOY v. McCOY.
Civ. 6335.

District Court of Appeal, Third District, California.

April 29, 1940.

Hearing Denied June 27, 1940.

1. Divorce ⇐303(3)

In proceeding between divorced parents for declaratory relief respecting a contract concerning custody of their minor children, where contract had been made part of the divorce decree, evidence relating solely to welfare of children did not justify finding that it would be for best educational interests of children that the father should have custody of one child, in rotation, for every third school term. Code Civ.Proc. § 1060.

2. Divorce ⇐303(3)

Where contract between divorced parents respecting custody of their minor children had been made part of the divorce decree, question of welfare of children could not be relitigated in subsequent proceeding between the parents for declaratory relief as to the contract. Code Civ.Proc. § 1060.

3. Divorce ⇐302

A provision, in contract made part of divorce decree between parents concerning custody of their minor children, providing that during school year the father should have privilege, upon request made to the mother, to have the children, or any of them, with him for "a reasonable period of time," providing it did not interfere with their schooling, could not be construed so as to

permit the father to have custody of one child, in rotation, for every third school term, especially in view of subsequent provision that the father should have right to have children with him during Christmas and Easter holidays and during week-ends and absence of evidence that quoted words were intended to include an entire school term.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding by John Rush McCoy against Aleen McCoy for declaratory relief in respect to a contract between the parties relating to the custody of their minor children. From a judgment for plaintiff, defendant appeals.

Reversed.

Anderson & Anderson, of Los Angeles, for appellant.

George M. Breslin and Henry G. Bodkin, both of Los Angeles, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought for declaratory relief in respect to a contract between the parties, relating to the custody of their minor children. The court upheld the contention of plaintiff, and findings and judgment were entered in his favor. Defendant appeals from said judgment.

On October 12, 1934, appellant and respondent, who were then married, entered into an agreement, which, among other provisions, covered the custody of their three children, consisting of a son, thirteen years of age, a daughter ten years old, and another son seven years old. Shortly thereafter, the parties were divorced, and the agreement was made a part of the decree. The portion of said contract with which we are here concerned, reads as follows:

"(a) Both father and mother are to have joint custody of the children;

"(b) The mother will maintain an adequate and proper home for the children until they reach their majority;

"(c) The father shall have the right and privilege of having the children during summer vacation, that is, between closing and opening of school;

"(d) *During the school year, the father shall have the privilege, upon request made to the mother, to have the children, or any of them, with him for a reasonable period of time, providing it does not interfere with their schooling.* (Italics ours.)

"(e) The father may have the children during any weekend, that is, Saturday and Sunday.

"(f) The father shall have the right to have the children, or any of them, with him, during Christmas and Easter holidays *'provided that the same shall meet with the approval and consent of the party of the second part.'*

"(g) With the exceptions hereinbefore expressly set forth, the wife shall have the children with her."

The complaint states the nature of the controversy as follows: "There is a complete dispute, difference and disagreement between the plaintiff and the defendant as to the meaning of the said clause of said agreement last hereinabove quoted, the plaintiff insisting that, under and pursuant thereto, he has a right to have the custody of at least one or more of such children during any given school term, and the defendant insisting that plaintiff has no right to the custody of any of said children during any school term for a period in excess of two or three weeks."

The court found:

"That under the provision in controversy of said contract of the parties hereto, as alleged in Paragraph VIII of the complaint in this action, and under the evidence in this case, and under certain concessions made by the plaintiff restricting the breadth of said provision of said contract, the following is found to be to the best educational interests of the three children of said parties, and to be within the purview of such disputed provision of said contract, and to be the right of the plaintiff with regard to school-term custody of said children under said provision of said contract, viz.:

"First: That the plaintiff shall have the care, custody and control of, and have living with him, one of said three children of the marriage of plaintiff and defendant, in rotation, for every third school term, as hereinafter defined, during such period as all three of such children are in the joint custody and control as provided in said contract of the parties hereto; that is to say, while all three of said children

are living with one or the other of said parties hereto."

There are other findings relating to the joint custody and control of the children, but the foregoing paragraph (First), is the one around which this dispute is centered.

The case of plaintiff came from four witnesses, including himself. The latter testified that he was interested in the education of his children; that they were normal, and in good health; that he had remarried; and wished to have the custody of the children in rotation, with the exception of his daughter. He gave no testimony relating to the intention of the parties at the time the contract was executed. No ambiguity or uncertainty was called to his attention. Witness Bacon was a psychologist from the University of Southern California. He testified that changing schools for the boys twice a year would not be detrimental. Witness Roubenheimer was also a psychologist from the same institution. His testimony was the same. Witness Hazel Schmidt was a school teacher. Her testimony was to the same effect. It is thus apparent that there was no evidence which related to a construction of the contract, or any of its terms. The hearing was similar to that which would be had upon an application to modify a decree of divorce in respect to the custody of minor children. This view is confirmed by the finding of the trial court, that it would be for the best *"educational interests"* of the children to rotate their schooling. The effect of the decision was to permit respondent to take one child at a time, out of the mother's home, for a semester, place him in a different school, and the following semester return such child to its mother, in turn, to go back to his old school, while a brother or sister was then taken away from his mother, and his association with his brother and sister, to undergo the same course of treatment. This was to be repeated during the children's minority, making a constant change in the home, the school, and the surroundings of each child every 18 months.

[1] It is contended by appellant that the trial court did not construe the contract, but in fact modified the same, and that the findings have no evidentiary support. We are in accord with that view. Section 1060 of the Code of Civil Procedure, which governs this action, provides: "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

In 8 California Jurisprudence Supplement, page 117, section 14, it is said: "Unless other relief is sought by the complaint, the judgment should merely declare the rights of the parties under the instrument under consideration."

[2] Here the judgment is not predicated upon a construction of the agreement, but is based and founded upon evidence relating solely to the question of the welfare of the minors. That question had already been adjudicated by the decree of divorce which embodied the contract, and it could not be relitigated under the guise of declaratory relief.

[3] We are further of the opinion that the trial court improperly construed the clause in dispute,—(sec. [d], supra.) If it was intended that plaintiff should have the custody of the minors one-half of each school year, it would not have provided that he might have them during any weekend, Christmas and Easter, as one or more of those days would come within the period which he now seeks their custody. There is nothing uncertain or ambiguous in the use of the expression "a reasonable period". That is a very common designation, and necessarily depends upon surrounding facts and circumstances. It cannot be stretched or distorted to mean an entire school term, particularly in the absence of any evidence which would tend to support that

construction. We find no such evidence in the record.

The evidence fails to support the findings, and the judgment must be reversed. It is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.



38 Cal.App.2d 659

LEMON v. LOS ANGELES TERMINAL RY. CO. et al.

Civ. 11288.

District Court of Appeal, First District, Division 1, California.

May 1, 1940.

1. Railroads ⇐69, 82(3)

A railroad corporation can acquire a fee-simple title to realty where there are no express conditions or limitations in the deed, and it does not hold its realty subject to an implied condition subsequent that realty should revert to grantor on abandonment of use for railroad purposes.

2. Courts ⇐92

Where two independent reasons are given for a decision, neither one should be considered mere dictum, but the ruling on both grounds is the judgment of the court, and each is of equal validity.

3. Railroads ⇐82(3)

An 1880 statute enacted to compel railroad corporations to operate their roads could not be read into deed to railroad so as to create a statutory condition subsequent resulting in a reversion to grantor on failure of railroad to operate its road for six months under conditions not permitted by the statute, since if a deed is sufficient, a railroad corporation acquires a fee-simple title to realty conveyed. St.1880, c. 57, p. 43.

4. Railroads ⇐82(6)

An 1880 statute enacted to compel railroad corporations to operate their roads was passed for a public rather than a private purpose, and under its provision that on failure to keep railroad in full operation for six months the right to operate should be forfeited and the land should revert to the original owners, an adjudication of forfeiture of right to operate in a proceeding to which the state is a party is a condition precedent to the right of a private person to maintain an action to establish a forfeiture. St.1880, c. 57, p. 43.

5. Railroads ⇐82(6)

Even if 1880 statute providing for forfeiture of right to operate and reverter of land to original owners on railroad's failure to operate for six months and section of Civil Code embodying those provisions, before amendment omitting reference to reverter, afforded a grantor a remedy for recovery of land abandoned for railroad purposes without a determination first in a proceeding to which the state was a party that railroad had breached its duty to operate, repeal and amendment, respectively, of those statutes, extinguished that remedy. St.1880, c. 57, p. 43; Civ.Code, § 468.

6. Railroads ⇐82(6)

An 1880 statute enacted to compel railroad corporations to operate their roads and providing for forfeiture of right to operate and reverter of land to grantors on failure to operate for six months was enacted in the exercise of the state's police power, and was a "penal" and not a "remedial" statute, and hence repeal of statute before the securing of a final judgment of forfeiture by a grantor extinguished grantor's cause of action. St.1880, c. 57, p. 43.

See Words and Phrases, Permanent Edition, for all other definitions of "Penal Statute," and "Remedial Statute".

7. Constitutional law ⇐92

The repeal in 1937 of an 1880 statute providing for the forfeiture of a railroad's right to operate and for the reverter of land to original grantors on failure of railroad to operate for six months could not affect vested rights. St.1880, c. 57, p. 43.

8. Constitutional law ⇐104

A person can have no vested right in an unenforced statutory penalty or forfeiture.

9. Statutes ⇐276(1, 2)

The repeal of a statute creating a penalty running either to an individual or to the state at any time before final judgment extinguishes the right to recover the penalty, and the same rule applies to remedial statutes unknown to the common law.

10. Statutes ⇐276(1)

The Legislature may withdraw a statutory right or remedy unknown to the common law, and a repeal of such a statute without a saving clause will terminate all pending actions based thereon.

11. Railroads ⇐82(6)

Where deed to railroad was in form sufficient to convey title in fee simple absolute, forfeiture of right to operate and reverter of land to grantor for failure of railroad to operate for six months under 1880 statute enacted for a public purpose to compel railroad corporations to operate their roads was not self-executing and would not take place until there was a judicial determination of the forfeiture. St.1880, c. 57, p. 43.

12. Railroads ⇐82(6)

Where 1880 statute providing for the forfeiture by a railroad of its right to operate and for reverter of lands to original owners on railroad's failure to operate for six months did not provide for a self-executing forfeiture, all intendments were against interpretation of statute as providing for a self-executing forfeiture, since forfeitures must be strictly interpreted, and only clear compelling language would permit such an interpretation. St.1880, c. 57, p. 43.

13. Forfeitures ⇐5

Even in the case of a self-executing forfeiture, the title of the party, whether it be an individual or the state, to whom the property is forfeited, is not completed upon the forfeiture, but the title can be perfected only by judicial determination.

14. Forfeitures ⇐5

A forfeiture resulting from a statute which imposes a penalty for violation of a statutory duty cannot be completely self-executing so as to divest the owner of his property without a judicial determination of the facts constituting the forfeiture.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Mara Bell Lemon, a married woman, against the Los Angeles Terminal Railway Company and others to establish plaintiff's claimed right to certain land. From a judgment dismissing with prejudice the first cause of action contained in her second amended complaint, plaintiff appeals.

Affirmed.

George Appell, Cyril Moss, and Milton M. Maharam, all of Los Angeles, for appellant.

E. E. Bennett, Malcolm Davis, and Edward C. Renwick, all of Los Angeles, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment dismissing with prejudice the first cause of action contained in her second amended complaint. This judgment was entered pursuant to an order of the trial court sustaining, without leave to amend, the general and special demurrers of the defendant Los Angeles & Salt Lake Railroad Company to the first cause of action contained in the complaint. This appeal presents similar legal problems to those involved in Wingard v. Los Angeles & Salt Lake Railroad Company, Cal.App., 102 P.2d 394. Each case involves a conveyance of land made many years ago to a railroad corporation. The contention of appellant in each case is that under general law, and under the provisions of a statute in effect when the conveyances were made, Stats. 1880, chap. 57, p. 43, subsequently embodied in sec. 468, Civ.Code, these lands reverted to the grantors when the railroad ceased to use them for railroad purposes. The actions involved on these two appeals are to establish plaintiffs' claimed right to these lands.

So far as pertinent here, the first cause of action in the second amended complaint in the instant case sets forth the following facts: On April 29, 1891, plaintiff Mara Bell Lemon conveyed a portion of a lot in Los Angeles county, owned by her in fee simple as her separate property, to the defendant Los Angeles Terminal Railway Company. That company had been organized in California in 1890 for the purpose of constructing and operating a railroad in Los Angeles and Ventura counties. This company, a defendant herein, did not join in the demurrer. It constructed its line of railroad across the property conveyed to it by plaintiff, and operated such railroad until March 5, 1901. On that date it transferred its various properties, including the parcel conveyed to it by plaintiff, to the demurring defendant and respondent, Los Angeles & Salt Lake Railroad Company, a Utah corporation, with an office in California. That company entered into an agreement with the Union Pacific Railroad Company whereby

the latter company was permitted to use, for railway purposes, the tracks and equipment of respondent across the property conveyed by appellant. It is alleged that a railroad was operated across the land up to May, 1934; that on May 28, 1934, the respondent filed an application with the interstate commerce commission requesting permission to abandon its railroad where it traverses the land here involved; that on June 30, 1934, the interstate commerce commission, by order, authorized respondent to abandon the railroad after July 30, 1934; that on December 6, 1935, the respondent petitioned the railroad commission of California for approval of the removal of its tracks where they cross the land here involved, which approval was granted on December 21, 1935.

The complaint does not allege that the deed from appellant to the Los Angeles Terminal Railway Company was limited in any way. The allegation is that plaintiff conveyed the described parcel to the grantee "for and as a part of its railway system". There is no allegation in the complaint, nor is it contended on this appeal, that the deed contained any such restriction—in fact, in the briefs it is conceded that the deed was without qualification as to use, and was in form sufficient to convey to the grantee title in fee simple absolute.

A second cause of action set forth in the complaint, as to which the demurrers were overruled, relates to a strip of land conveyed by appellant to the Los Angeles Terminal Railway Company by a deed expressly restricting use of the conveyed premises "for railroad purposes only", and providing for reversion to the grantor if such use should cease. Counts three and four of the complaint, as to which the demurrers were not sustained, are quiet title counts in the usual brief form, one count relating to the land involved on this appeal and the other to the land described in the second cause of action. The sufficiency of the allegations of these last three counts are not involved on this appeal.

[1] Appellant contends that without express statutory direction, under general law, and without regard to the provisions of the statute of 1880, supra, because of the non-use, the property has reverted to her. It is contended that in view of the fact that the corporation grantee in the deed was organized to operate a railroad, and under its articles of incorporation and the statutory provisions relating to railroad corporations was authorized to acquire lands for railroad purposes only, on abandonment of such use the lands reverted to her. Stated another way, it is appellant's contention that a railway corporation can never hold land in fee simple absolute, regardless of the provisions in the deed by which it takes title, but holds all of its properties subject to an implied condition subsequent. This is no longer an open question in this state. It is now settled that a railroad corporation can acquire a fee-simple title where there are no express conditions or limitations in the deed. City of Oakland v. Schenck, 197 Cal. 456, 466, 241 P. 545; Palmer v. Los Angeles etc. Ry. Co., 55 Cal.App. 519, 521, 203 P. 1012. The problem was considered and fully discussed in Midstate Oil Co. v. Ocean Shore R. R. Co., 93 Cal. App. 704, at page 707, 270 P. 216, at page 217, where it was stated:

"Title in fee simple to land may vest in a railroad company. Behlow v. Southern Pacific R. R. Co., 130 Cal. 16, 62 P. 295; Hannah v. Southern Pacific R. R. Co., 48 Cal.App. 517, 192 P. 304; Palmer v. Los Angeles etc. Ry. Co., 55 Cal.App. 519, 203 P. 1012. And in the case of City of Oakland v. Schenck, 197 Cal. 456, 241 P. 545, Mr. Justice Waste, speaking for the court, said: 'In Illinois, a railroad company can acquire land, whether by voluntary purchase or otherwise, for railroad purposes as defined in its charter. It does not hold land, as does the ordinary owner, with the right of using it for any purpose to which it may be adapted. * * * *In this state there is no such restriction on the right of a railroad company. It may acquire the fee in land by direct purchase,* although it may obtain only an easement for railroad purposes if it resort to proceeding in eminent domain.' [Italics ours.]

"The deed from Henry J. F. Butts et al. to the Ocean Shore Railroad Company must be measured by its own terms. There is nothing in the deed which in any way limited the company in the use that it might make of the land. The fact that the deed makes use of the words 'right of way' in one of its calls in the description does not limit the use to which the lands may be put. We must hold that the deed conveyed the fee. Such being the case, did the railroad company lose its fee to the lands by nonuser or abandonment?

The question is one of first impression in this state.

"In 33 Cyc. at page 221, the general rule concerning loss of lands or right by a railroad company by reason of forfeiture or abandonment is stated as follows: 'A railroad company's easement in its right of way or other land may be lost by abandonment or surrendered (citing McLemore v. Charleston etc. R. Co., 111 Tenn. 639, 69 S.W. 338); but where the land is conveyed to the railroad company in fee its title thereto is not lost by nonuser or abandonment (citing Watkins v. Iowa Cent. R. Co., 123 Iowa, 390, 98 N.W. 910; Enfield Mfg. Co. v. Ward, 190 Mass. 314, 76 N.E. 1053).' To the same effect are the following cases: [Citing many cases.]

"As opposed to this rule, respondent relies principally on the case of Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208, 114 Am.St.Rep. 509, 1 L.R.A.,N.S., 806, and note [6 Ann.Cas. 239]. In that case the court in holding a railroad company takes a mere easement, and not a title in fee, under a deed conveying to it land for purposes of right of way, and that the title reverts to the grantor upon the abandonment of the road, even though the deed contains covenants of warranty, confined its decision to cases where the contract of conveyance shows that it 'was sold and received for use as a right of way,' and did not pass upon the power generally of railroads to purchase land in fee. The decision as thus restricted is supported by the authorities. There is nothing in the deed, in the case at bar, however, showing that the land was 'sold and received for use as a right of way.'

"Respondent says that it bases its right to prevail in this action upon sections 465 and 468 of the Civil Code of California, relating to the powers of railroad companies. Respondent argues that under section 465 of the Civil Code a railroad company cannot acquire a fee in land acquired for a right of way, although the deed may be absolute in form, and upon abandonment of the land so conveyed for right of way purposes it reverts to the original owners or their successors in interest. We have already pointed out that a railroad company may acquire the fee to lands by direct purchase, and we cannot construe section 465 of the Civil Code, when read as a whole, so as to change the rule when the land is acquired for right of way purposes. Subdivision 7 of the section specifically provides that railroad companies have—'power * * * to purchase lands, timber, stone, gravel or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title 7, part 3, Code of Civil Procedure, for the condemnation of lands. * * *' And section 354 of the Civil Code provides that: 'Every corporation, as such, has power * * * to purchase, hold, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part.'"

[2] Appellant urges that the above cases, and particularly the Midstate case, should be overruled as unsound. We think, however, that the rule of law stated in those cases should not be overruled, but should be followed, not only because the principle has become a rule of property, but also because the rule is inherently sound. We do not agree with appellant that what was said in the quoted portion of the Midstate case, supra, was dicta, but believe that it constituted an alternative ground for the opinion. It is well settled that where two independent reasons are given for a decision neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the opinion than the other. The ruling on both grounds is the judgment of the court and each is of equal validity. Bank of Italy etc. Assn. v. Bentley, 217 Cal. 644, 20 P.2d 940; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; East Bay Mun. Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178; Union Pacific Co. v. Mason City Co., 199 U.S. 160, 26 S.Ct. 19, 50 L.Ed. 134.

In view of this conclusion, appellant's right to recover, if any exists, must rest on the provisions of the Statute of 1880, chapter 57, page 43, later embodied in substantially the same form in section 468 of the Civil Code. That statute, as passed in 1880, is entitled: "An Act to compel railroad corporations, or individuals owning railroads, to operate their roads." The body of the act reads as follows:

"Section 1. From and after the completion of any railroad, or the completion of such portion thereof capable of being operated, it shall be the duty of the corporation, or individual owning the same, to operate it; and upon the failure of said corporation or individual so owning

said road to keep the same, or any part thereof, in full operation for the period of six months, its or his right to operate the same in whole or in part, as the case may be, shall be forfeited; and the lands occupied for the purposes of its or his road, so far as the same shall not be operated, shall revert to the original owners, or their successors in interest. A railroad shall be deemed to be in full operation when one passenger train, or one mixed train, is run over it once each day in each direction and a sufficient number of freight trains to accommodate the traffic on said road.

"Sec. 2. This Act shall not be construed to apply to a case where the operation of the road is prevented by the act of God, nor to a case where the operation of said road, together with its branch or trunk lines, does not yield income sufficient to defray the expenses of maintaining and operating the same in connection with its said branch or trunk lines.

"Sec. 3. The Railroad Commissioners of the State of California shall have the power to examine and determine the question whether said road, together with its said branch and trunk lines, does or does not yield income sufficient to operate the same.

"Sec. 4. This Act shall take effect immediately."

In 1905, St.1905, p. 574, the provisions of this statute, so far as pertinent here, were made a part of section 468 of the Civil Code although the original statute of 1880 was not then expressly repealed. The code section remained unchanged until 1923, when a provision was added empowering the railroad commission to authorize discontinuance of a branch line for such period of time and upon such conditions as it might determine without forfeiting the right to operate the road. Stats.1923, chap. 246, p. 493. In 1937 the Statute of 1880, supra, was expressly repealed, without a saving clause, Stats. 1937, chap. 897, p. 2479, and section 468 of the Civil Code was amended, Stats. 1937, chap. 898, p. 2479. The section, as then amended, omitted all reference to the reverting of land to the grantors upon six months' failure to operate, and for that part of the section which had followed the language of the Statutes of 1880, supra, substituted the following: "The railroad commission of California shall also have full power and authority to authorize the discontinuance of operation in whole or in part of any line of railroad for such period of time and upon such conditions as the railroad commission may in its discretion determine, without forfeiture of the right to operate the same."

The complaint in the present action was filed on August 30, 1935.

It is appellant's main contention in this case as well as in the Wingard case, supra, Cal.App., 102 P.2d 394, that the provisions of the 1880 statute must be read into the deeds executed by the plaintiffs so as to create a statutory condition subsequent, resulting in a reversion to the grantors upon the failure of the defendant to operate the road for six months under conditions not permitted by the statute, or, if this theory not be sound, that the effect of the statute was to cause a forfeiture to the grantors at the end of the six-month period.

[3] The first contention cannot be sustained in view of the holding in the several cases above cited, and particularly in view of the decision in the Midstate case, supra, to the effect that a railroad corporation, if the deed is sufficient, acquires a fee-simple title. If appellant were correct, every deed to a railroad company would be subject to a statutory condition subsequent. The statute of 1880 was not intended as a limitation on the power of the grantor to grant, or on the power of the grantee to receive. It is a statute passed in the exercise of the police power to compel railroads to operate for the benefit of the public. Its provisions cannot be read into the deed any more than the numerous other police provisions with penalties attached regulating utilities can be read into each deed received by the utility.

[4] The second contention is equally untenable. Respondent points out many reasons why the forfeiture claimed was not self-executing, and why appellant cannot here recover. It is first urged that a private person may not maintain an action to establish a forfeiture and reversion of the property for breach of the public duty to operate before there has been a determination in a proceeding to which the state is a party that the railroad has forfeited its right to operate. Apparently, this contention has never been passed on in this state. In two cases in which on the particular facts there involved the decision was not rested on the 1880 statute or on section 468 of the Civil Code, the author of the

opinion voiced the question without passing on it. Conrey, P. J., in Hannah v. Southern Pac. R. R. Co., 48 Cal.App. 517, at page 523, 192 P. 304; Sloss, J., in Home R. E. Co. v. Los Angeles Pac. Co., 163 Cal. 710, at page 713, 126 P. 972. The contention seems to us to be sound. In view of the fact that as disclosed by its title, the statute of 1880 was passed not to benefit grantors or to reimburse them for any damage caused by the abandonment of the railroad, but "to compel railroad corporations * * * to operate their roads", the statute was obviously passed for a public rather than a private purpose. Moreover, by its terms the statute provides that the forfeiture and reversion shall take place only upon the forfeiture of the right to operate. Under such circumstances, as a protection to the public, there is a sound and compelling reason for holding that an adjudication of forfeiture of the right to operate in a proceeding to which the state is a party is a condition precedent to the right of a private person to maintain an action to establish a forfeiture of the railroad property. Under sections 2 and 3 of the statute of 1880, supra, the forfeiture does not take place if caused by act of God or if the railroad does not yield income sufficient to operate it, and the railroad commission is given power to determine this question. In the present case neither the railroad commission nor the interstate commerce commission, in the proceedings had before those bodies, determined that the respondent has forfeited its right to operate by reason of the breach of the statutory duty to operate.

[5-10] In addition, it is our opinion that the repeal in 1937 of the statute of 1880, supra, without a saving clause, and the amendment of section 468 of the Civil Code in the same year, constitute a complete bar to the cause of action here involved. Even if the statute of 1880, supra, and section 468 of the Civil Code prior to its amendment in 1937, did afford a grantor a remedy for the recovery of lands abandoned for railroad purposes without a determination first in a proceeding to which the state is a party, that the railroad has breached its duty to operate, the repeal and amendment respectively of those statutes extinguished such remedy. This conclusion follows from several basic premises. In the first place, whatever rights existed in appellant, such rights were not predicated on the contract between the parties, because the conveyance made by appellant to respondent, as already pointed out, was an unconditional conveyance of the fee-simple title. Midstate Oil Co. v. Ocean Shore R. R. Co., 93 Cal.App. 704, 270 P. 216. Furthermore, this right of action was a right unknown to the common law and is predicated solely upon the statutes involved. Whether the statute be construed as remedial or penal in character, it follows that the repeal of the statute before the securing of a final judgment extinguished the cause of action. Moss v. Smith, 171 Cal. 777, 155 P. 90. However, there can be no reasonable doubt but that the statute is penal in character. In view of the title of the statute of 1880, quoted supra, and in view of the provisions of the statute, it is apparent that the statute was passed by the state in the exercise of its police power over utilities to compel railroads to operate for the benefit of the public. The forfeiture provided is a penalty to induce performance of the duty to operate. The legislature could not have intended that the statute was primarily for the benefit of grantors. The obvious purpose and hope of the legislature was that no grantor would ever receive any benefit from the statute, and no grantor would receive such benefit unless the railroad failed in its duty to operate. To effectually enforce that duty the legislature saw fit to confer on grantors of railway property the power of enforcing a forfeiture if the railroad failed in its duty. But the right to enforce such forfeiture was conferred without regard to whether the grantor did or did not suffer any special damage by reason of the failure to operate. In fact, the grantor, under the statute of 1880, was entitled to enforce the forfeiture whether or not he retained any other land that would be damaged by the abandonment of the railroad, or whether or not he suffered any other damage of any kind by reason of such abandonment. For the purposes of the statute, the legislature could have provided that, upon breach of the duty to operate, the property was forfeited to the state, or could be forfeited at the suit of any citizen of the state. If this analysis of the statute be sound, and we think it is, then the statute is obviously a penal and not a remedial statute. County of Los Angeles v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329. It is true, of course, that the repeal of the statute in 1937 could not affect vested rights. But the rights of appellant were not vested. No person has a vested right in an unenforced statutory penalty or forfeiture. Moss v. Smith, supra; Anderson v. Byrnes, 122 Cal. 272, 54 P. 821. For

these reasons it has been held in a long line of cases that the repeal of a statute creating a penalty, running either to an individual or the state, at any time before final judgment, extinguishes the right to recover the penalty. The same rule applies to remedial statutes unknown to the common law. Napa State Hospital v. Flaherty, 134 Cal. 315, 66 P. 322; Anderson v. Byrnes, supra; First National Bank v. Henderson, 101 Cal. 307, 35 P. 899; People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, Ann.Cas. 1912B, 1148; Moss v. Smith, supra. The Supreme Court of this state, in a decision rendered since the filing of the briefs herein, has recently reviewed many of these cases in holding that a right or remedy unknown to the common law and dependent entirely on a statute is extinguished by the repeal of the statute. Southern Service Company, Ltd., v. County of Los Angeles, Cal.Sup., 97 P.2d 963. The rule is clearly stated at page 970 as follows: "The legislature may withdraw such a statutory right or remedy, and a repeal of such a statute without a saving clause will terminate all pending actions based thereon." The court, at page 970, quotes with approval from People v. Lindheimer, 317 Ill. 367, 21 N.E. 2d 318, 124 A.L.R. 1472, in part as follows: "'* * * there is no vested right in a public law which is not in the nature of a private grant, and, however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it. * * * The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered.'"

Other states have applied the above-mentioned rules to actions to recover statutory penalties imposed on utility corporations for violation of regulatory statutes. Thus in Denver & R. G. Ry. Co. v. Crawford, 11 Colo. 598, 19 P. 673, 674, it was held that repeal of a statute imposing double damages on a railroad guilty of killing stock and failing to file a description of the animals with the county clerk extinguished all causes of action not reduced to final judgment. The court held that a party could have "no such thing as a vested interest in an unenforced penalty". This case was cited and the above language quoted with approval in People v. Bank of San Luis Obispo, supra, and the case was cited with approval in Anderson v. Byrnes, supra. See, also, Miller v. Chicago & N. W. Ry. Co., 133 Wis. 183, 113 N.W. 384; Union Pacific Ry. Co. v. Proctor, 12 Colo. 194, 20 P. 615; Pensacola & A. R. Co. v. State, 45 Fla. 86, 33 So. 985, 110 Am.St.Rep. 67; Western Union Tel. Co. v. Smith, 96 Ga. 569, 23 S.E. 899; Mix v. Illinois Cent. R. Co., 116 Ill. 502, 6 N.E. 42.

[11] Appellant presents no satisfactory answer to the above reasoning. It is contended that under the authority of Arcata v. Arcata & M. R. R. Co., 92 Cal. 639, 28 P. 676, and Los Angeles Ry. Co. v. Los Angeles, 152 Cal. 242, 92 P. 490, 15 L.R.A., N.S., 1269, 125 Am.St.Rep. 54, a forfeiture took place automatically after the six months' nonuser, and hence was not affected by the 1937 repeal, the rights having become vested in the interim. Those two cases involved the interpretation and legal effect of certain *conditional* franchises granted to street railway companies. In the Los Angeles Railway Company case, for example, by the express terms of the ordinance granting the railway company a franchise, a time limit was fixed within which the work must be completed, and it was expressly provided that, if the work was not completed within the time specified, the franchise was forfeited as to the portion remaining uncompleted. This constituted an express limitation on the estate granted. Moreover, section 502 of the Civil Code provided that failure to complete the work within the time limits there fixed "*works* a forfeiture of the right of way". (Italics ours.) It was held that either under the express terms of the franchise or under the terms of the statute which there became part of the grant, there was a limitation on the estate of the railroad, and upon the happening of the condition, the estate was terminated. That is a far different situation than is here presented. Here the deed did not limit the estate of respondent, and the statute did not become part of such deed in the sense that it limited the estate of the grantee. In the present case, under the contract (the deed) between appellant and respondent, the latter secured an absolute, unconditional fee-simple title. In the case referred to, the contract between the parties expressly limited the right

granted. The statute there involved unequivocally provided what the ordinance granting the franchise must contain, and provided that noncompliance with the terms of such franchise "works a forfeiture". The statute of 1880 provides that under certain limited conditions the right to operate the road "shall be forfeited" and the lands "shall revert to the original owners". As was already pointed out in this opinion, we think when this statute is properly interpreted it was intended as a protection to the public, and that, as a condition precedent to the enforcement of the forfeiture by a private grantor, it was necessary to first have it determined in a proceeding in which the state was a party that the railway had forfeited its right to operate. Secondly, it seems apparent to us, that, in view of the nature of the title secured by respondent, and in view of the language, purposes and intent of the statute, the forfeiture was not self-executing and would not take place until there was a judicial determination of the forfeiture.

[12, 13] Appellant contends that it is the law that a common-law forfeiture does not take place until adjudication of the forfeiture, but that under a statutory forfeiture *it may be provided* that the forfeiture takes place on the commission of the offense. To this argument, as applied to the facts herein presented, there are three answers. In the first place, as already held, the forfeiture does not take place until it is determined in a proceeding in which the state is a party that the railroad has forfeited its right to operate. In the second place, the statute of 1880 does not provide for a self-executing forfeiture. In view of the rule of strict interpretation of forfeitures, all intendments are against such an interpretation. Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 P. 341. Only clear compelling language will permit such an interpretation. In the third place, even in the case of a so-called self-executing forfeiture, the title of the party, whether it be an individual or the state, to whom the property is forfeited, is not complete upon the forfeiture. The title can be perfected only by a judicial determination. This was clearly determined by the Supreme Court in People v. Broad, 216 Cal. 1, 12 P.2d 941. At page 3 of 216 Cal., page 942 of 12 P.2d, it is stated: "Even where, as here, the statute declares that a forfeiture takes place at the time of the commission of the offense, such forfeiture is not fully and completely operative and effective, and the title to the state [to which the property there involved was forfeited] is not perfected until there has been a judicial determination." The court also points out that, upon such judicial determination, the title of the person to whom the property is forfeited dates back to the commission of the offense. But here, before such judicial determination, the statute imposing the penalty was repealed.

[14] There is a fundamental distinction between forfeitures for breach of conditions contained in the grant or franchise creating the right, and forfeitures resulting from a statute which imposes a penalty for violation of a statutory duty. In the latter case the forfeiture cannot be completely self-executing so as to divest the owner of his property without a judicial determination of the facts constituting the forfeiture.

In view of these conclusions it is not necessary to pass on the several other points raised by respondent to sustain the judgment.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.



38 Cal.App.2d 737

WINGARD et al. v. LOS ANGELES & S. L. R. CO.

Civ. 11289.

District Court of Appeal, First District, Division 1, California.

May 1, 1940.

Railroads ⇐82(6)

A complaint alleging that plaintiffs had conveyed realty to railroad, that railroad constructed a depot house and yards used in the operation of railroad on realty, and that railroad subsequently abandoned operations by permission of the Interstate Commerce Commission and used former depot for purposes other than operating a railroad, and seeking to recover realty under 1880 statute providing for forfeiture of rights and reverter of realty on railroad's failure to operate for six months, was sub-

ject to general and special demurrers, where it was conceded that deed to railroad was sufficient in form to convey title in fee simple absolute. St.1880, c. 57, p. 43.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Angie Wingard, also known as Mary A. Wingard, individually, and Angie Wingard, as administratrix of the estate of Edward Lamar Wingard, also known as E. L. Wingard, deceased, against the Los Angeles & Salt Lake Railroad Company to establish plaintiffs' claimed right to lands which, under the general law and under the provisions of a statute in effect when conveyance was made to defendant, St.1880, c. 57, p. 43, subsequently embodied in Section 468, Civil Code, allegedly reverted to the grantors when defendant ceased to use them for railroad purposes. From a judgment dismissing with prejudice the cause of action set forth in their second amended complaint, plaintiffs appeal.

Affirmed.

George Appell, Cyril Moss, and Milton M. Maharam, all of Los Angeles, for appellants.

E. E. Bennett, Malcolm Davis, and Edward C. Renwick, all of Los Angeles, for respondent.

PETERS, Presiding Justice.

Plaintiffs appeal from a judgment dismissing with prejudice the cause of action set forth in their second amended complaint. This judgment was entered pursuant to an order of the trial court sustaining, without leave to amend, the general and special demurrers of the defendant Los Angeles & Salt Lake Railroad Company. This appeal presents precisely the same legal problems as are involved in the case of Lemon v. Los Angeles & Salt Lake Railroad Company, Cal.App., 102 P.2d 387, this day decided.

In this case the plaintiffs named only the Los Angeles & Salt Lake Railroad Company as defendant. So far as is pertinent here, the second amended complaint alleges that in 1901 plaintiff Angie Wingard and her husband (since deceased and whose estate is made a party plaintiff) owned certain described real property in Los Angeles county; that on December 26, 1901, plaintiff and her husband conveyed this described real property to defendant; that thereafter the defendant constructed a branch steam railway system from Signal Hill to Long Beach with its termini on the real property here involved; that defendant constructed on this property a railroad depot house and yards used in the operation of the railroad; that on August 3, 1932, defendant filed an application with the interstate commerce commission requesting permission to abandon the route and termini of portions of its line including that portion of its line and termini constructed on the real property here involved; that the interstate commerce commission granted such permission on October 24, 1932; that upon the order of abandonment becoming effective the defendant abandoned its termini and railroad on the real property here involved and ever since has continued to abandon said termini and railroad for railroad purposes and has used the former depot for purposes other than operating a railroad.

It is to be noted that in this case there is no allegation of permission sought or secured from the state railroad commission. The order of the interstate commerce commission referred to is not the same order as was involved in the Lemon case. These differences, however, in no way alter the legal principles involved.

It is to be noted that the second amended complaint does not allege that the deed from appellants to respondent was limited in any way. It is conceded by appellants that the deed was without qualification as to use, and was sufficient in form to convey to the named grantee title in fee simple absolute.

The demurrers were properly sustained for exactly the same reasons as are set forth in full in our decision in the Lemon case, supra. No useful purpose would be served by repeating what was there said. Upon the authority of, and for the reasons set forth in our decision in Lemon v. Los Angeles & Salt Lake Railroad Company, Cal.App., 102 P.2d 387, the judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

38 Cal.App.2d 688

LADY v. THOMAS et al.

Civ. 6340.

District Court of Appeal, Third District, California.

May 1, 1940.

Hearing Denied June 27, 1940.

1. Appeal and error ⇐110

An attempt to appeal from order denying motion for new trial is ineffectual, as statute does not authorize appeal from such order.

2. Bills and notes ⇐59

In suit to recover balance due on negotiable note and foreclose trust deed securing it, trial court properly held that undisclosed principal, whose signature did not appear on such instruments and to whom no reference was made therein, was not liable. Civ.Code, § 3099.

3. Bills and notes ⇐59

Under Uniform Negotiable Instruments Act, a suit may not be maintained on note against undisclosed principal, whose signature does not appear thereon, unless note is signed by use of his trade or other assumed name. Civ.Code, § 3099.

4. Bills and notes ⇐59

Under law merchant, to preserve integrity and permit free circulation of negotiable instruments, one whose name is not attached thereto may not ordinarily be held liable in suit based thereon, but in proper suit founded on quasi contract, independently of note, there may be remedy against disclosed or partially disclosed principal receiving benefits thereof.

5. Principal and agent ⇐131

A disclosed or partially disclosed principal is not covenantor or grantor in sealed contract or conveyance, unless he appears on instrument to be such.

6. Principal and agent ⇐131

Though principal is not liable as party to sealed instrument in which he does not appear as such, he may be subject to quasi contractual or other liability, as where he has received benefits of contract.

7. Principal and agent ⇐145(2)

The remedy against undisclosed principal, who is not liable on instrument not containing his name, is to disregard liability thereon and maintain separate suit to recover original consideration received by him.

8. Bills and notes ⇐59

In suit based on negotiable instrument, plaintiff may not recover judgment against principal whose name does not appear on such instrument. Civ.Code, § 3099.

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Suit by William Ellis Lady against James H. Thomas, his wife, Philip L. Wilson, and others to recover a balance due on a note and foreclose a trust deed securing it. From so much of a foreclosure judgment as denied plaintiff relief against defendant Wilson, plaintiff appeals.

Affirmed.

William Ellis Lady, in pro. per.

Overton, Lyman & Plumb, and Cecil A. Borden, all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from that portion of a judgment of foreclosure which denied him relief against an undisclosed principal in the execution of the promissory note which was secured by a trust deed. An effort is also made to appeal from an order denying plaintiff's motion for a new trial.

[1] The statute does not authorize an appeal from an order denying a motion for new trial. The attempt to appeal from that order was therefore ineffectual. Strauch v. Bieloh, 16 Cal.App.2d 278, 60 P.2d 582.

The complaint alleges, and the court found, that the defendants Mr. and Mrs. James H. Thomas, for a valuable consideration, executed a promissory note September 14, 1932, for the sum of $3,200, payable to Francis E. Dalin, one year from the date thereof at 7 per cent interest per annum payable quarterly; that the note was secured by a trust deed on certain described lots in Los Angeles, also executed by Mr. and Mrs. Thomas; that, as a part of the same transaction, the note and mortgage were immediately transferred to the plaintiff, William E. Lady; that Philip L. Wilson, a codefend-

ant, was, in fact, the undisclosed principal in the execution of the promissory note, but that his name did not appear in the note or mortgage, and no reference to such undisclosed principal was made in connection with the transaction. The court thereupon rendered judgment against Mr. and Mrs. Thomas for the aggregate sum of the principal and interest due on the promissory note, together with expenses incurred for taxes, costs, and counsel fees. The court directed foreclosure of the trust deed and sale of the property pursuant to the terms thereof to satisfy the judgment. The court, however, decreed that plaintiff take nothing against the defendant Wilson, on the theory that he is exempt from liability under section 3099 of the Civil Code, because his name does not appear on the note or mortgage, and no reference to him is made in those instruments. From the last-mentioned portion of the judgment this appeal was perfected.

[2,3] This is a suit to recover the unpaid portion of a negotiable instrument and to foreclose the trust deed executed to secure the note against not only the makers of the note but also against an undisclosed principal whose signature does not appear on the instruments, and to whom no reference is made therein. The trial court properly held that the undisclosed principal was not liable under such circumstances. Under the Uniform Negotiable Instruments Act adopted by California and other states of the Union, it is uniformly held that a suit may not be maintained on a promissory note against an undisclosed principal whose signature does not appear thereon, unless the note is signed by use of his trade or other assumed name. Sec. 3099, Civ.Code; Pratt v. Hopper, 12 Cal.App.2d 291, 55 P.2d 517; Crocker National Bank of San Francisco v. Say, 209 Cal. 436, 288 P. 69; 5 U.L.A. 134, sec. 18, subd. 7; 1 Restatement of the Law of Agency, 382, sec. 152; 1 Daniel on Negotiable Instruments (5th Ed.), 311, sec. 303; 2 Mechem on Agency (2d Ed.), 1319, sec. 1736; 3 C.J.Sec., p. 175, sec. 247; Brannan's Negotiable Instruments Law (4th Ed.), 156, sec. 18, Annotations.

The reason for the adoption of this rule releasing a principal from liability on negotiable instruments which do not bear his name is expressed in 2 Mechem on Agency, supra, as follows: "In addition to the limitation upon the principal's liability growing out of the nature of the instrument under seal, there is * * * a well recognized exception to the rule in the case of notes and bills of exchange, resting upon the law of merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or endorsed as his agent."

Section 3099 of the Civil Code provides in that regard: "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name."

The case of Craig v. Buckley, 218 Cal. 78, 21 P.2d 430, upon which the appellant relies, is not in conflict with the foregoing rule regarding the liability of an undisclosed principal in a suit on a negotiable instrument which does not bear his name. It is true that the facts of the Craig case were quite similar to those of the present case, but the liability of an undisclosed principal whose name does not appear on the promissory note upon which suit was brought was not mentioned or involved. Section 3099 of the Civil Code is not cited or discussed in that opinion. The only questions raised on appeal or discussed by the court in rendering its opinion were the contentions that, (1) the notice of sale of the property stated an erroneous and excessive amount for the satisfaction of which the property was to be sold; (2) the time of the sale of the property was unlawfully postponed contrary to the terms of the trust deed; (3) the sale of the property was unlawfully continued contrary to the terms of a restraining order, and (4) the judgment was erroneously rendered against both the principal and the agent, since the established rule requires a plaintiff to elect which one he prefers to hold for the obligation. In regard to the last-mentioned contention, the court merely held that the appellant's right to demand an election of liability as between the principal and the agent was waived by their failure to evoke that rule by demurrer or otherwise in the course of the trial. Clearly that case is not authority for the erroneous proposition that an un-

disclosed principal may be held liable in a suit on a promissory note which neither contains his signature nor makes reference to his name or liability in any manner.

Nor is the case of Bank of America, etc., Ass'n v. Cryer, 6 Cal.2d 485, 58 P. 2d 643, upon which the appellant also relies, in conflict with what we have previously said regarding the liability of the undisclosed principal in this case. The chief distinction between that case and the present one is that this suit is a direct effort to hold an undisclosed principal to a promissory note liable in an action on that instrument, contrary to section 3099 of the Civil Code, while the Cryer case was not a suit on a negotiable instrument, but it was merely an action on stockholder's liability under former section 322 of the Civil Code, which was repealed in 1930. In the Cryer case a judgment in favor of the defendant as a stockholder was affirmed for the reason that the stockholder's liability was limited to his proportionate share of the indebtedness of the corporation which existed during the time he was a stockholder, and because all of the indebtedness which was involved in that suit was incurred before Cryer became a stockholder therein.

[4-6] The learned Chief Justice, who wrote the opinion in the Cryer case, was very explicit in distinguishing between a suit for the liability of an undisclosed principal based on a negotiable instrument and an action, like the one which he was considering, for stockholder's liability, based on a quasi-contract from which the defendant received the benefits. That distinction is clearly drawn by all the authorities without conflict. Under the law merchant to preserve the integrity of negotiable instruments and permit them to circulate freely, it is uniformly held that one whose name is not attached to such instruments may not ordinarily be held liable in a suit based upon those documents. In a proper suit based, not on the note, but independently thereof, and founded on quasi-contract presented upon appropriate allegations and proof, there may be a remedy against a disclosed or partially disclosed principal who receives the benefits thereof. The rule is concisely stated in 1 Restatement of the Law of Agency, page 381, section 151, as follows:

"A disclosed or partially disclosed principal is not a covenantor or grantor in a sealed contract or conveyance unless he appears upon the instrument to be such.

* * * * * * * * *

"d. Although a principal is not liable as a party to a sealed instrument in which he does not appear as such, he may be subject to quasi-contractual or other liability, as where he has received the benefits of the contract."

[7] The remedy, as an exception to the general rule that one may not be held liable upon an instrument which does not contain his name, declared in the text found in 3 C.J.S., Agency, page 175, § 247, is to disregard the liability on the instrument and to maintain a separate suit to recover the original consideration received by him. That text reads: "Where the undisclosed principal has obtained the benefits of the transaction in which the note was given by the agent, which in equity he ought not to retain, the third person may reject the note and recover on the common counts or on the original consideration for the contract."

[8] Regardless of whether there should be a distinction between cases involving liability of an undisclosed principal in respect to negotiable instruments and those actions which grow out of non-negotiable instruments, it has been definitely determined that one may not recover judgment in a suit based on a negotiable instrument against a principal whose name does not appear thereon. This suit is founded on a negotiable instrument, and the trial court therefore properly held that the undisclosed principal on the note is not liable in this action.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

In re KALT'S ESTATE.*

KALT et al. v. YOUNGWORTH.

Civ. 12434–S.

District Court of Appeal, Second District, Division 1, California.

May 1, 1940.

Hearing Granted June 27, 1940.

1. Wills ⇐717

The right to renounce a devise under a will is a natural right, the exercise of which needs no statutory authorization, and, in absence of fraud, the exercise of such right is not open to question.

2. Wills ⇐867

The exercise of the right to renounce a devise under a will, even for avowed purpose of preventing application of such property to satisfaction of a particular debt, cannot be regarded as ipso facto fraudulent.

3. Wills ⇐867

On issue whether devisees' renunciation of interest acquired under testatrix' will was effective as against devisees' judgment creditor, a finding that renunciation was for express purpose of defeating collection of judgments did not compel conclusion that renunciation was fraudulent.

4. Wills ⇐717

The time within which the right to renounce a devise under a will must be exercised is immaterial unless it bears some relation to acts constituting fraud, and a renunciation is effective as of the effective date of will.

5. Wills ⇐867

Where testatrix' son, in his individual capacity, and the son's wife, approximately four years after will devising residue of testatrix' estate to son and his brother was filed for probate by the son, as executor, executed renunciations of their interest in residue of estate solely to prevent application of such interest to satisfaction of judgments against son, individually, and his wife, and there was no fraud, renunciations were effective as against judgment creditor, and the son and his wife were not "estopped" from relying upon renunciations by fact that son, who was nominated executor by will, had possession of property in controversy. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

6. Attachment ⇐64

The property of an estate is in "custodia legis" pending administration thereof, and any attachment filed for whatever purpose is subject to administration of the estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Custodia Legis".

YORK, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Proceeding in the matter of the estate of Ella W. Kalt, deceased, wherein Stanley R. Kalt, as executor, filed his second and final account, and a petition for final distribution of the remainder of the estate, and Leo V. Youngworth, as administrator with the will annexed of the estate of R. F. Goings, deceased, filed objections to the petition for final distribution. From an unsatisfactory order respecting distribution of the estate, Earl D. Kalt, Loretta Kalt and Stanley R. Kalt, in his individual capacity, legatees, appeal.

Order reversed with directions.

Wolfson & Swetow, of Los Angeles (Herbert Schwab, of Los Angeles, of counsel), for appellants.

Leo V. Youngworth, and J. Harold Decker, both of Los Angeles, for respondent.

DORAN, Justice.

The decedent, Ella W. Kalt, died on or about March 26, 1932, leaving a will which was admitted to probate in the superior court on May 9, 1932, upon the petition of Stanley R. Kalt, decedent's son, who was nominated therein as executor. Thereafter said Stanley R. Kalt qualified as executor. The petition for probate of the will was filed on April 12, 1932, and on May 18, 1932, letters testamentary were issued to him.

After making certain minor bequests of personal property to the decedent's grandchildren and to the respective wives of her two sons, the testatrix bequeathed and devised the residue of the estate to her two

* Subsequent opinion 108 P.2d 401.

sons, Stanley R. Kalt and Earl D. Kalt, share and share alike.

On July 12, 1932, Leo V. Youngworth, as administrator with the will annexed of the Estate of R. F. Goings, deceased, respondent herein, filed two actions on promissory notes in the municipal court, one being an action against Loretta Kalt and Stanley R. Kalt, in his individual capacity, in connection with which action judgment was recovered by plaintiff in the sum of $1,121.38, and the other case being an action against Stanley R. Kalt, in his individual capacity, in connection with which plaintiff recovered judgment in the sum of $1,239.91. At or near the time of commencement of these actions, writs of attachment were issued and levied as provided by law upon the attachable interests of Stanley R. Kalt and Loretta Kalt, in the estate of Ella W. Kalt, deceased. Abstracts of both judgments were recorded in the office of the county recorder of Los Angeles county, on August 1, 1934.

Approximately four years and four months after the filing of the will for probate, to-wit on August 26, 1936, Stanley R. Kalt, in his individual capacity, and Loretta Kalt, his wife, each separately executed and filed in the records of the probate proceedings a written instrument entitled renunciation, by the terms of which Stanley R. Kalt and Loretta Kalt rejected, renounced and disclaimed any and all right, title or interest which they, or either of them, had in and to the estate of Ella W. Kalt.

On June 17, 1937, Stanley R. Kalt, as executor, filed his second and final account, report and petition for distribution, which was set for hearing on December 6, 1937. The petition for distribution referred to the filing of the renunciations by Stanley R. Kalt and Loretta Kalt, and requested the court to distribute the rest, residue and remainder of the estate, after disposing of the minor bequests of personal property, to Earl D. Kalt who was the remaining residuary legatee; said petition further contained a waiver by Stanley R. Kalt, as executor, of the statutory commissions to which under the law he was entitled.

On November 29, 1937, Leo V. Youngworth, the administrator of the estate of R. F. Goings, deceased, filed written objections to the petition for final distribution, and this matter was also set for hearing on December 6, 1937. At the hearing, oral and documentary evidence was introduced and the matter was argued by counsel and submitted. Thereafter, on December 29, 1937, the court made its findings of fact and conclusions of law, and signed the order settling the final account and for distribution under the will, which order was entered on January 5, 1938.

The decree of distribution gave no effect whatsoever to the renunciations filed by Stanley R. Kalt and his wife, and provided that all personal property bequeathed to either or both of them under the terms of the will, be delivered to the officer making the levy under the writ of attachment, and further decreed that the property of the estate be distributed as in the will provided, to Earl D. Kalt and Stanley R. Kalt, share and share alike.

Thereafter, Earl D. Kalt, Loretta Kalt, and Stanley R. Kalt, in his individual capacity, and not as executor, filed a notice of appeal from the order of January 5, 1938, and particularly from that portion thereof decreeing distribution of the estate under the will.

The bill of exceptions herein sets out in substance the testimony of Stanley R. Kalt at the hearing on December 6, 1937, which reads in part as follows: "that he (Stanley R. Kalt) and his wife, Loretta Kalt, had separately executed and filed in the office of the clerk of the court on the 26th day of August, 1936, written renunciations of all of their right, title and interest in and to the estate and the last will and testament of Ella W. Kalt, deceased, because they realized that any share or interest which they might have in the estate, and which would be distributed to them, would be taken by the attaching creditor and as long as they were going to lose it, they preferred to have Earl D. Kalt receive the share or interest in the estate which they, or either of them, might otherwise have; that neither he nor his wife, Loretta Kalt, received any consideration whatsoever from Earl D. Kalt for the filing of the said renunciations and that neither he nor his wife had entered into any agreement whatever with Earl D. Kalt pertaining to the disposition of the rest, residue and remainder of the estate after the same was distributed to Earl D. Kalt."

The findings of the court are in part as follows:

"VIII. It is true that such purported renunciations and disclaimers were executed and filed herein by the said Stanley R. Kalt and Loretta Kalt for the express purpose

of defeating the collection of said judgments held by objector as aforesaid and that the making and filing of said purported renunciations and disclaimers by the said Stanley R. Kalt and Loretta Kalt, and the petition of the said Stanley R. Kalt, as executor of the said estate, for distribution of the said estate to Earl D. Kalt were for the express purpose of destroying said attachment and judgment liens, to the end that objector be hindered, delayed and defeated in the collection of said judgments, and for no other or further purpose.

"IX. It is true that said renunciations and disclaimers were executed and filed herein by the said Stanley R. Kalt and Loretta Kalt and said petition for distribution to the said Earl D. Kalt was filed herein without any consideration whatsoever from the said Earl D. Kalt to Stanley R. Kalt and Loretta Kalt or either of them, or to any other person.

"X. It is true that the said Stanley R. Kalt and Loretta Kalt are estopped to rely upon said purported renunciations and disclaimers and his said petition as such executor for the following reasons, to-wit: That said purported renunciations and disclaimers were executed by them and filed in these proceedings for the sole purpose of defeating the collection of said judgments by objector; that the said Stanley R. Kalt was named in the last will and testament of the decedent as the executor thereof and on the 12th day of April, 1932, filed in these proceedings a petition for the probate of said will and sought therein to be appointed as the executor of said estate; and denominated himself and the said Loretta Kalt as devisees and legatees under said last will and testament; * * * that during all of the time elapsing between the death of the decedent and the time of the filing herein of said purported renunciations and disclaimers by the said Stanley R. Kalt and Loretta Kalt the said Stanley R. Kalt and Loretta Kalt had in their possession and enjoyed the use and benefit of all of the personal property bequeathed to them or either of them under the provisions of said last will and testament; that during all of the time between the time of the death of the said decedent and the filing of said purported renunciations and disclaimers by the said Stanley R. Kalt and Loretta Kalt, they nor neither of them made any statement or performed any act or acts to or in the presence of objector indicating directly or indirectly that they or either of them did not intend to take the property devised and bequeathed to them in said last will and testament; that the said Stanley R. Kalt and Loretta Kalt did not file said purported renunciations and disclaimers until approximately four (4) years and four (4) months after the filing of said last will and testament for probate by the said Stanley R. Kalt."

Thus, briefly, it will be seen that the court found and accordingly concluded that appellants renounced the devise under the will for the purpose of defeating the collection of the judgment and are "estopped to rely upon said purported renunciations".

Appellant states the question involved as follows: "Is an heir, devisee or legatee under a will estopped from filing a renunciation and refusing to accept the benefits conferred upon him by such will even where it is done for the purpose of defeating the claim of an attaching creditor, and where such heir, devisee or legatee is not guilty of fraud or collusion with the remaining residuary legatee?"

Although other jurisdictions have had occasion to give the subject consideration the question is one of first impression in California, for which reason the quotations, from the authorities which follow, are somewhat comprehensive.

Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20, 22, 27 A.L.R. 465, was an action in equity to subject the income from a trust estate to the payment of a judgment. The will devised an undivided one-third of the estate in trust for the use and benefit of the defendant and his minor daughter, one-half of the income therefrom to be paid to each of them during their lifetime. The judgment had been obtained many years prior to the death of the testatrix, and on April 10, 1915, the day after the death of the testatrix, an execution was issued and levied upon the interest of Lewis D. Osborne in her estate. The will was admitted to probate in May, 1915, and on May 19, 1915, this action was commenced seeking to subject the interest of Lewis D. Osborne in the estate to the payment of the judgment. Service of the papers was made upon Osborne on May 24, 1915, and on September 14, 1915, the defendant Osborne appeared by counsel and was given

fifteen days to plead. Later this time was extended to October 6, 1915. On October 29, 1915, he filed an answer disclaiming any interest in the property sought to be subjected to the payment of plaintiff's judgment and alleged that prior thereto, on the 16th day of October, 1915, he had filed in probate a written instrument and renounced the bequest made by the will of his sister in his favor. The minor daughter, by her guardian, intervened in the action setting up the renunciation and alleging that she was entitled to the entire interest in the estate. To this petition in intervention the plaintiff filed an answer setting up three defenses, (1) alleging acceptance of the bequest by Osborne, (2) that the written renunciation was filed after the execution was levied and became a lien upon his interest in the estate, and (3) that it was therefore void. Quoting in part from the opinion, the supreme court of Iowa held that, "* * * The rule that a legatee may reject or renounce a bequest made for his benefit, even without casting a burden upon him, is quite as universally recognized as that of presumed acceptance. * * * Creditors have no right, nor courts jurisdiction, to compel acceptance, or to prevent the beneficiary from renouncing or rejecting a gift. * * * Surely, Osborne did not estop himself by failing to renounce the bequest prior to the funeral of testatrix, or the admission of the will to probate. The record does not disclose what, if any, expense appellee incurred after the petition was filed, nor should her claim that she was misled and induced to incur expense in reliance upon that well-known trait of human nature from which the law raises a presumption that one, when offered, will accept a valuable gift, be accorded serious consideration. Her attitude was hostile to the defendant from the start and affords some justification for the presumption that she was proceeding promptly for the purpose of making renunciation by Osborne impossible, rather than that she was being misled and induced to incur expense in reliance upon his conduct. The evidence does not show that Osborne made declarations that he intended to accept the bequest, but, on the contrary, it tends to show that he told the attorney for the trustee, shortly after his sister's death, that he did not intend to accept the provisions of the will. The record contains no evidence tending to show that appellee relied upon any declarations or conduct of Osborne, or that she incurred any expense because of his failure to more promptly, publicly declare his intention to renounce the gift. The record is wholly barren of proof tending to show acceptance. Whether the facts pleaded, if proven, were sufficient to constitute an estoppel, we have no occasion to decide. Manifestly, the record does not disclose facts from which an estoppel may be inferred. * * * The answer alleged that Osborne by his declarations and conduct accepted the provisions of the will. The evidence wholly fails to show any declarations by him inconsistent with his act renouncing the gift. He was not bound at his peril, to inform appellee of his intention. It was entirely optional with him whether he would accept the provision made for him by his sister for his benefit and permit it to be applied upon appellee's judgment. She could do nothing to control his discretion in the matter. Levying an execution upon the property devised could not avail the appellee unless her debtor finally accepted the bequest. Surely he was not bound, on account thereof, to accept." Schoonover v. Osborne, supra.

It should also be noted that the court in the Schoonover case, supra, held as follows: "All of the courts hold that the renunciation, when filed, relates back to the time when, under the law, the will became effective."

In Lehr v. Switzer, 213 Iowa 658, 239 N.W. 564, 566, the same court again declares, December 16, 1931: "That the renunciation relates back to the time when under the law the will became effective is well established," and, "That a beneficiary under a will has the right to file an unconditional and final renunciation of all benefits granted him under the will and that his creditors cannot complain of such renunciation is well established by our decisions," observing, also, that "It is true that there is a presumption that a beneficiary accepts the terms of a will that are beneficial to him, but this presumption is overcome by a complete renunciation." See, also, In re Murphy's Estate, 217 Iowa 1291, 252 N.W. 523.

In Bradford v. Leake, 124 Tenn. 312, 137 S.W. 96, 100, Ann.Cas.1912D, 1140, the supreme court of Tennessee held, "A beneficial devise is always presumed to be accepted, and, nothing else appearing, the gift

will begin immediately upon the going into effect of the will; that is, at the moment of the testator's death. However, even such a devise may be renounced, and in that event the renunciation will relate to the moment of the gift, and prevent its ever taking effect. * * * Where the gift is not prima facie beneficial, but saddled with onerous exactions, there is no presumption of acceptance. When there is an express renunciation in such a case, it will relate to the death of the testator, as in the former instance, and will furnish conclusive evidence that the gift was void from the beginning," citing Bradford v. Calhoun, 120 Tenn. 53, 109 S.W. 502, 504, 19 L.R.A., N.S., 595, in which last cited case appears the following: "The renunciation is not a voluntary conveyance, void as against existing creditors, because, when he has properly renounced, the renunciation relates back to the date of the gift, and, as he has never accepted the gift, he has had nothing that could be made the subject of a voluntary conveyance."

In Albany Hospital v. Hanson et al., 214 N.Y. 435, 108 N.E. 812, 813, Ann.Cas.1916D 1195, the court declares as follows: "Other English cases and the weight of authority, I think, in this country, is to the effect that such a devise is really an offer to the proposed beneficiary, and, while the presumption is that he will accept it when he has an opportunity, there is no presumption of immediate acceptance; if acceptance does occur, the title will relate back to the time of the devise, at least in the absence of intervening rights; if refusal results, the devise will never take effect, and title never vest." Authorities there cited reach the same conclusion in substance and effect.

The subject received consideration in Brown v. Routzahn, decided by the Circuit Court of Appeals of the Sixth Circuit on March 17, 1933, 63 F.2d 914, 916: "First, under the Ohio law the only effect of the formal election of the decedent to take under the will was to bar his right of courtesy; it was still open to him to accept or reject the gift. * * * Next, there is no law in Ohio limiting the time in which a donee may reject or accept a testamentary gift. * * * In the light of the above statements, the situation presented is, so far as we are informed, without precedent. The decedent was in possession of the estate from 1912 until it was transferred to the trustees in 1920. It was not, however, in his possession as donee, but as a coexecutor. Nevertheless, at any time within that period he could have taken the one-third or made a renunciation that would have estopped him from claiming it. He did neither. It may be conceded, too, we think, that had he died at any time between 1912 and the date of the distribution, this property would have passed under a general devise in his will, or, leaving no will, would have passed under the laws of descent and distribution as a part of his estate. * * * The presumption arising from the beneficial character of the gift would have required that result. * * * Superficially this would seem to fix a transferable interest in the donee as of the date of the distribution. On the other hand, however, the law of Ohio does not require a donee to accept or reject a gift within any specified time, and a rejection made at any time before distribution is valid. We thus have a situation where, had the decedent died within the period of administration, the property would have passed as a part of his estate, but, living, he had the right, at any time before distribution, to reject the gift. In the one case the presumption of acceptance would carry through; in the other, it would be rebutted by renunciation. The question is therefore narrowed to the inquiry as to whether the doing of an act which the donee had the right to do, the rejecting of the gift, was a transfer within the meaning of the statute taxing transfers in contemplation of death. * * *

"The decedent never owned or had control of the property as donee. All he had was a right to accept. Coupled with this right was an equal right to reject. Either could be exercised so long as the estate was in administration. He did reject. * * * What it [the government] did was to collect a tax, not upon the transfer of an interest in property, but upon the exercise of a right to refuse a gift of property. This we think it had no right to do."

The same conclusion was reached by the supreme court of the state of Illinois in People v. Flanagin, 331 Ill. 203, 162 N.E. 848, 849, 60 A.L.R. 305. The court declared, "The law is clear that a legatee or devisee is under no obligation to accept a testamentary gift. 'It seems clear that the law does not compel a man to accept an estate, either beneficial or in trust, against his will, while it may reasonably presume, in the absence of evidence, that an estate has been accepted, especially where it is beneficial in its character. But, when it turns out that the

estate has not been accepted, it remains in the original owner, precisely as if the conveyance had not been executed. It has failed to be effectual to convey the estate, and is, by the disagreement of the party, rendered null.' Burritt v. Silliman, 13 N.Y. 93, 64 Am.Dec. 532.

" 'An estate vests, under a devise, on the death of the testator before entry. But a devisee is not bound to accept of a devise to him nolens volens, and he may renounce the gift, by which act the estate will descend to the heir or pass in some other direction under the will. The disclaimer and renunciation must be by some unequivocal act, and it is left undecided whether a verbal disclaimer will be sufficient. A disclaimer by deed is sufficient, and some judges have held that it may be by a verbal renunciation. Perhaps the case will be governed by circumstances.' 4 Kent, Comm. 533.

" 'An heir at law is the only person who by the common law becomes the owner of land without his own agency or assent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect.' 3 Washburn on Real Prop., (6th ed.) 402 [sec. 1829].

"At page 700 [6th ed., sec. 2478] it is said: 'It is hardly necessary to add that no one can make another the owner of an estate against his consent by devising it to him, so that if the devisee [named] disclaims the devise it becomes inoperative and goes to the heir.'

"This doctrine has been announced in a great many decisions, among which are Albany Hospital v. Albany Guardian Soc., 214 N.Y. 435, 108 N.E. 812, Ann.Cas.1916D, 1195, Bradford v. Calhoun, 120 Tenn. 53, 109 S.W. 502, 19 L.R.A. (N.S.) 595, Defreese v. Lake, 109 Mich. [415] 421, 67 N. W. 505, 32 L.R.A. 744, 63 Am.St.Rep. 584, Welch v. Sackett, 12 Wis. 243, Re Stone's Estate, 132 Iowa 136, 109 N.W. 455, 10 Ann.Cas.1033, King v. Gridley, 46 Conn. 555, and Watson v. Watson, 128 Mass. 152. In these cases the rule is announced that the renunciation relates back to the moment when the gift was made, so that the estate does not vest, but remains in the original owner, precisely the same as if the will or deed had never been executed, or passes under the instrument, according to its terms, to another (Burritt v. Silliman, supra; Defreese v. Lake, supra; Bradford v. Calhoun, supra), and that a renunciation is not a voluntary conveyance and is not subject to attack by creditors (Bradford v. Calhoun, supra). * * *

"The authorities all agree that the devisee cannot be vested with an estate against his will, and he has a right to refuse it, and, when not accepted, it remains in the original owner as if no conveyance had been executed. The instrument cannot be regarded as a voluntary conveyance, since it was optional with the devisees to accept or renounce, and, if it was held that their renunciation was merely a conveyance of the interest devised to them, this would constitute their act in renouncing and refusing to accept as an acceptance of the devise which vested the estate in them. The evidence is that they received nothing for the execution of the instrument, and there is no proof they did so. Their motive in executing the document was to minimize the inheritance tax, and this was not an unlawful motive for refusing to accept the devise. So long as they did not fraudulently receive a benefit for their action, their motives were immaterial."

[1] Sound reason supports the conclusion reached in the foregoing authorities, and to argue otherwise is futile for in the final analysis the right to decline a gift or to renounce a devise under a will is a natural right, the exercise of which needs no statutory authorization.

[2, 3] In giving consideration to the issues involved in the within appeal, it should be emphasized that the element of fraud is entirely absent. No reference to fraud appears in the findings nor, indeed, is there any evidence of facts which would justify such an inference. It should be emphasized also that the effect of the renunciation was merely to prevent the application of certain property, capable of isolation, to the satisfaction of a particular debt. Whether, in the circumstances here presented, the renunciation would postpone or even forever prevent the collection of the debt, or render its collection more difficult or less likely, is beside the issue. Moreover, the right to decline a gift or to renounce a devise under a will, being a natural right, does no violence to morals, and, in the absence of fraud, the exercise thereof is not open to question. Nor can the exercise of such a right, even for the avowed purpose of preventing the application of certain property to the satisfaction of a particular debt, be regarded as ipso facto fraudulent, for such action is lawful

per se and as such neither raises the presumption nor necessarily warrants the inference of fraud. Referring to the finding that the renunciation was "for the express purpose of defeating the collection of said judgments", respondent's argument that "This was the ultimate fact in issue from which the conclusion that it was fraudulent naturally followed," therefore cannot be sustained.

[4, 5] With regard to the reasons relied upon to support an estoppel, as recited in the findings above mentioned, it should be pointed out that Stanley R. Kalt was nominated as executor in the will and was also one of the devisees, hence the fact that he "sought" to be appointed as executor and "denominated" himself as a devisee, as recited in the findings, is of no significance. Moreover, the time within which the right to renounce must be exercised is immaterial unless it bears some relation to acts constituting fraud. In addition, no element of estoppel can be derived from the fact that appellants had possession of the property in question. The record reveals that such possession was maintained by appellant Stanley R. Kalt as executor, and necessarily followed by operation of law from the appointment of appellant as such. There is nothing in the law which required appellants Stanley R. Kalt and Loretta Kalt to indicate, announce or otherwise reveal an intention ultimately not to accept under the will. In other words, the elements of estoppel were not present and hence the application of the doctrine was unwarranted. Subd. 3, sec. 1962, Code Civ.Proc.

[6] It should be noted that a renunciation is in no sense either a conveyance or an assignment. Moreover, as indicated in the decisions above referred to and which are in accord with the weight of authority, the renunciation is effective as of the effective date of the will. This being so, the court is without power to include in the decree of distribution the property embraced by the renunciation. And, finally, it should be borne in mind that the property of an estate is in custodia legis pending the administration thereof, and any attachment filed, for whatever purpose, is subject to the administration of the estate.

For the foregoing reasons the order decreeing distribution of the estate under the will, is reversed with directions to distribute the estate in accordance with the views herein expressed.

I concur: WHITE, J.

YORK, Presiding Justice.

I dissent. While the weight of authority in Iowa and a number of other states generally appears to sustain the view of my associates, as enunciated in the majority opinion herein, such decisions have no authoritative force in this state. The statement of law announced in the majority opinion will be used as a basis for building up in California a new line of cases creating a dangerous precedent. The facts and circumstances shown in the instant case should cause appellant Stanley Kalt's renunciation to be declared void as against public policy, because if such procedure is sustained, it will open wide a new door to fraud in connection with the adjudicated claims of creditors.

Under the factual situation presented by the record herein (which is different in many particulars from that presented by any of the cases from outside jurisdictions cited in the main opinion), it would seem unconscionable to permit appellant Stanley Kalt to defeat his creditor by renouncing for that purpose alone his right to participate in the estate of his mother, especially in view of the fact that as executor he procured probate of the will, proceeded to administer the estate and failed to give notice of his renunciation until more than four years had elapsed after the rights of his creditor had intervened by the issuance of writs of attachment against his interest in said estate, and until two years after his creditor's claims had been adjudicated and abstracts of judgments recorded. In other words, conceding that a donee under a will has the right to renounce a devise or a legacy given to him thereunder, such right must be exercised within a reasonable time after opportunity is afforded the donee to do so (Strom v. Wood, 100 Kan. 556, 164 P. 1100; Bacon v. Barber, 110 Vt. 280, 6 A.2d 9, 123 A.L.R. 253, 259); what is a reasonable time being a question of fact for the trial court's determination. The trial court did not find directly upon this issue, but the phraseology of the findings of fact indicates that such issue was considered and was resolved against the renouncing appellant.

In the case of Lehr v. Switzer, 213 Iowa 658, 239 N.W. 564, 566, cited in the majority opinion as authority for the views therein expressed, the testator died in De-

cember, 1926, and a renunciation by a son of the testator of "all interest in the estate of my said father under said will and in the estate of my said father however arising", was filed in April, 1930. Meanwhile a creditor had attached the apparent interest of said beneficiary in the estate and had acquired a sheriff's deed of certain property after sale upon execution. The court held that nothing in the record estopped the beneficiary from renouncing the gift under the will. In reaching this conclusion, while the court recognized that a long time had elapsed before said beneficiary filed his renunciation, it stated that the record did not show that he knew of the levy or sale at the time he renounced the gift. Also, that the beneficiary was a nonresident and there was no claim that he had asserted any right whatever under the will.

In the instant case, the actions in which the attachments issued were upon promissory notes executed by the renouncing appellant and his wife. Said renouncing appellant was appointed executor upon his own petition for probate of the will, and he continues to act in such capacity, although he has filed a waiver of his right to statutory fees. His entire course of conduct with respect to the administration of the estate, together with his failure to announce his renunciation for a period of four years after the attachments issued, compels the conclusion that he thereby waived his right to renounce the undoubtedly beneficial gift.

Under the circumstances, the trial court was justified in concluding that the judgment creditor stood in the shoes of appellant Stanley Kalt and his wife, to the extent that when he levied upon said appellant's apparent interest in the estate, he then had a lien upon it, and that said appellant could not defeat such lien by renouncing the right which had theretofore accrued to the said judgment creditor.

Except for a bequest of certain personal property, the share of testatrix' estate which appellant Stanley Kalt has purportedly renounced is derived from the residuary clause of the will. In this connection, it should be noted that in the case of Lehr v. Switzer, supra, the same situation obtained, i. e., the renouncing beneficiary was a son of testator and was one of the residuary legatees under the will, and had renounced all interest in the estate of his father "however arising". It was there stated at page 566 of 239 N.W.: "The share given to Wesley was in the residuary clause of the will. The general rule is that, where the residuary gift is to several beneficiaries, as in this case, and as to one of such residuary beneficiaries the gift lapses, the share of such beneficiary goes to the testator's heirs or next of kin as intestate property, and does not increase the shares of the other beneficiaries under the residuary clause. Levings v. Wood, 339 Ill. 11, 170 N.E. 767; In re Hall's Estate, 183 Cal. 61, 190 P. 364; Crocker v. Crocker, 230 Mass. 478, 120 N.E. 110, 5 A.L.R. 1617; In re Billings' Estate, 268 Pa. 67, 110 A. 767; Stetson v. Eastman, 84 Me. 366, 24 A. 868; Kent v. Kent, 106 Va. 199, 55 S.E. 564; Lyman v. Coolidge, 176 Mass. 7, 56 N.E. 831; Canfield v. Canfield, 62 N.J.Eq. 578, 50 A. 471; Booth v. Baptist Church, 126 N.Y. 215, 28 N.E. 238.

"This being the rule, under the facts of this case, Wesley, being an heir of testator, would be entitled to one-sixteenth of the property in Audubon county." See, also, Estate of Arms, 186 Cal. 554, 566, 199 P. 1053.

"The rule that a general residuary clause will include and be applicable to lapsed legacies does not apply in respect to a residuary clause where the legacy which has failed or lapsed was intended to be a disposition of part of the residue. In such case, on failure of the intended legacy of part of the residuum, the part as to which the disposition has failed will go as in the case of intestacy, and the residuum passing under the residuary clause will not be augmented by a residue of a residue." 74 A.L.R. 547, citing In re Kelleher's Estate, 205 Cal. 757, 760, 272 P. 1060.

From this it would appear that in spite of the so-called renunciation of all his rights in the estate of his mother as heir, devisee or legatee, the renouncing appellant Stanley Kalt is entitled to receive one-fourth instead of one-half of the residuary estate, as provided in the will of testatrix. Otherwise, if said appellant's contention is upheld, he will succeed in doing indirectly that which would avail him nothing if done directly, to-wit: an assignment of his interest in the estate to his brother. Because, if such assignment were made, the judgment creditor herein would be able to subject the interest so assigned to execution under his judgments.

The order appealed from should be affirmed, and in any event, at least one-fourth of the residuary estate should be distributed to said appellant Stanley Kalt, subject to the judgments herein referred to.



38 Cal.App.2d 650

PLACERES DE ORO CO. v. CARPENDER.

Civ. 6239.

District Court of Appeal, Third District, California.

April 30, 1940.

Rehearing Denied May 29, 1940.

1. Fraud ⇐23

Fact that agent for mine owner failed to disclose to prospective purchasers hidden works in the mine of which he had knowledge, would not render mine owner liable for damages for fraud where purchasers had been thoroughly informed by mine owner of conditions in the mine and the information was equally accessible to them.

2. Fraud ⇐58(4)

In action to recover damages for alleged fraud in sale of placer mine, evidence sustained finding that mine owner fully and fairly informed purchasers of all previous operations and works in the mine and that purchasers were informed of possible concealed works which should have placed them on notice and required them to make further investigation and inquiry regarding location of hidden operations.

3. Appeal and error ⇐1011(1)

In action tried before court, without jury, reviewing court could not interfere with judgment, which was based on conflicting evidence.

4. Fraud ⇐58(1)

The absence of gold in a purchased gold mine in paying quantity is not necessarily proof of vendor's fraud.

5. Trial ⇐395(1)

Findings determining the truth or falsity of every material allegation of each section of the complaint to which findings refer are not objectionable where allegations of the pleadings to which findings refer are reasonably certain and clear in their meaning.

6. Trial ⇐404(1)

Findings should be construed to uphold rather than to defeat a judgment.

7. Appeal and error ⇐1071(1)

In action to recover damages for alleged fraud in sale of gold mine, wherein trial court determined every essential allegation of complaint regarding charge of fraud and all incidental elements thereof to be untrue, plaintiff could not complain of trial court's failure to adopt more specific findings on allegations of fraud and such failure did not constitute reversible error since if further findings were adopted on any of the issues they would be adverse to plaintiff.

8. Appeal and error ⇐1071(1)

A mistake in findings referring to consecutively numbered sections of complaint, consisting of reference to wrong paragraph number of the complaint, was harmless where reference to context of finding as compared with language of the complaint established paragraph of complaint to which finding referred.

9. Trial ⇐395(2)

Findings in which trial court designated allegations found to be true and determined that all of the other allegations of the complaint were untrue, were not ambiguous.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Placeres de Oro Company against Bert Carpender to recover damages for fraud. From an adverse judgment, plaintiff appeals.

Affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, and C. W. Pearson, of Placerville, for appellant.

Butler, Van Dyke & Harris, of Sacramento, and Lyon & Roberts, of Placerville, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against it in a suit for damages for alleged fraud exercised by the defendant in the sale of a placer gold mine near Placerville in El Dorado county.

The defendant had owned the Carpender Placer Mine since 1904. He obtained it from his father, who had previously operated it to some extent. It consisted of a claim upon which there was a shaft three or four hundred feet in depth, at the bottom of which a tunnel extended easterly 2200 feet to the property line. The tunnel also ran westerly from the shaft a distance of several hundred feet. The mine contained other lateral channels, gangways, crosscuts and drifts, from which, in addition to some breasted areas, the soil and gravel were conveyed to the surface and washed out in sluice boxes to extract its gold content. The mine followed the course of an ancient subterranean river channel called the "Blue Lead". The pay dirt was located several hundred feet beneath the surface of the earth. Above this ancient river bed there was overlaid substrata of gold-bearing gravel and soil which, by the action of water and volcanic upheavals in past ages, were deposited in and mingled with the soil of the Blue Lead channel. That entire region had been extensively mined from early days. The extent to which Bert Carpender's father developed that mine does not appear. For a period of thirty-five years the defendant either personally operated the mine or he worked in and about it while it was leased to half a dozen other men.

The defendant dug an incline shaft to a depth of 400 feet and ran a cross-tunnel for exploration purposes, several hundred feet in length, hoisting the gravel therefrom and extracting the gold by washing it out in sluice boxes. He obtained only a comparatively small quantity of gold from his personal operations. In 1907 he leased the property to a miner by the name of Pearce, who worked it for about a year, extending the main tunnel and running three short crosscut channels from which he obtained a quantity of gold. In 1909 it was leased to Dodge Burtt, who made a survey and prepared maps of the mine. He took numerous samples from the tunnels and tested them for their gold content. He did not extend the gangways nor conduct any real mining operations. In 1911 the property was leased to G. H. Hayes, who operated it actively for fifteen months. He sank another shaft to a depth of over a hundred feet and extended a tunnel 75 feet easterly therefrom, and another one westerly a similar distance. He also ran an irregular tunnel along the course of the Blue Lead vein a distance of over 900 feet, striking a gray-pay-gravel bench from which he extracted $40,000 in gold. The defendant worked in the mine with Mr. Hayes throughout the entire term for which it was leased, with the exception of two and a half months. In 1912 the mine was leased to a man by the name of Taylor. He operated it for about a year, exploring and extending somewhat the tunnels which had been previously opened by Hayes. The defendant also worked with him every day that the lessee conducted the mine. For several years the mine was not operated, during which periods of time it remained filled with water. In 1934 Mr. Carpender leased the mine to a stock company, which explored the tunnels, testing the soil and working therein for about six months. The defendant also worked in the mine with that stock company. He was familiar with all of the gangways, crosscuts and breasting of areas which were developed. In 1929 the mine was leased to the Burke Company, which opened a drift and cross-cut from the incline shaft, breasting out certain small areas. Mr. Carpender worked in and about the mine for that company throughout its term of lease and knew all about the development under its management.

All of the foregoing information was related to the purchasers by the defendant.

The defendant was born in the vicinity of the mine in question, and, during his entire lifetime he lived at the mine or in Placerville, near by, where he was known and highly regarded by the entire community. Many miners in that vicinity also worked in the Carpender mine and were perfectly familiar with its operations, including all of the tunnels, drifts and cross-channels. Fred Stancil had worked in the mine for Mr. Carpender as superintendent and otherwise, for several years. He knew all about the history of the Blue Lead and the development and operations of that mine.

In the spring of 1936, Malcolm W. Moss, W. D. O'Brien and J. K. Gold interviewed the defendant on several occasions about purchasing the mining property. Mr. O'Brien was a skilled and experienced mining engineer. Mr. Carpender testified that he fully and fairly explained to them in detail the history

and development of the mine, referring to a map thereof in his possession, which he informed them did not depict all of the crosscuts and tunnels which had been developed. He told them of the various leases of the mine heretofore referred to and of the works which each one completed. He spoke of the driftings and breastings of certain areas. He told of the cessation of operations and of the floodings of the mine during several periods. He said to the proposed purchasers he would send Fred Stancil, a reliable mining employee of the defendant, through the mine with them for exploration purposes, and that he would permit them to make a thorough examination and take samples of soil for testing and assaying to determine its gold content. He told them they would find "most of these drifts open". Clearly that remark inferred they would find some of the tunnels filled with fallen earth and gravel. He told them "Fred could explain all about them". Mr. Carpender was sixty years of age. He was in the habit of running the hoist. He told the purchasers that since he was the only one who could operate the hoist, he would let Stancil go down into the mine with them for the reason that he knew "just as much about it". At least two of them, Messrs. Moss and O'Brien, visited the mine several times. Stancil accompanied them in a thorough examination of the entire underground works. No objections were offered to the character or extent of the information with which they were furnished. No criticism of the conditions observed in the mine was made. No further inquiry regarding blocked gangways or fallen dumps of gravel was made of Mr. Carpender. Apparently they were perfectly satisfied with the conditions and with the prospect of a successful operation of the mine.

May 14, 1936, the defendant gave the three men above mentioned an option to purchase the mine, together with a considerable quantity of machinery and equipment for the sum of $35,000, to be exercised on or before June 1, 1936. In the meantime they continued to examine and inquire regarding the mine, with the apparent result of entire satisfaction. The condition of the mine and the details of the transaction were discussed with the defendant several times. On June 1st, they exercised the option and purchased the mine and machinery, paying Mr. Carpender therefor the sum of $35,000. The three purchasers conducted active operations of the enterprise as a mining partnership (secs. 2511–2513, Civ. Code), until February 20, 1937, at which date they organized a Nevada corporation to which they then transferred title to the property.

The mining operations were actively continued without substantial success until March 1, 1937. The plaintiff expended some $30,000, developing the mine. During that period of time they did not charge the defendant with fraud, concealment or misrepresentation with respect to the character or condition of the mine. They finally became discouraged and then asserted for the first time that they had discovered "old works", of which they had not been informed, indicating that they had been deceived into purchasing a mine which had been completely "worked out" and which was valueless. They abandoned the enterprise without informing the defendant of their intention in that regard until after the mine had filled with water, thus preventing him from locating and inspecting the alleged works of which they complained. They organized the plaintiff corporation, Placeres de Oro Company, to which they transferred title to the property and assigned their chose in action February 20, 1937. They then brought this suit for damages for alleged fraud, filing the complaint on July 29, 1937.

The gist of the allegations of fraud is found in paragraph VI of the complaint. The pleading charges that the defendant represented to the purchasers of the mine that the Blue Channel was virgin soil which had never been mined for precious metals, except to wash out the gravel which had been necessarily removed from the visible tunnels and gangways, together with the gravel which had been obtained from small visible areas in a process of breasting the walls of the tunnels.

The cause was tried by the judge sitting without a jury. The court adopted findings to the effect that the purchasers of the mine examined it thoroughly before buying it; that they were granted the unrestricted privilege of exploring the mine and of procuring therefrom samples of earth or gravel for the purpose of assaying and testing them for their mineral value; that they were furnished a map of the underground workings of the mine

with the explanation that it was incomplete; that the defendant truthfully answered all questions propounded to him respecting the value and condition of the mine; that he made no false statements in that regard, and that he was not guilty of fraud in the sale of the mine. Judgment was thereupon rendered in favor of the defendant to the effect that plaintiff take nothing by its action.

We are of the opinion that, in spite of a serious conflict of evidence, there is ample testimony to adequately support the essential findings of the court and the judgment which was rendered. The trial judge is an experienced and careful jurist in mining litigation. The defendant was called by the plaintiff under the provisions of section 2055 of the Code of Civil Procedure and thoroughly examined. The record of his testimony consumes over 200 pages in the transcript. Four other miners testified in behalf of the defendant, corroborating him in many material respects. Mr. Stancil was not called as a witness. His absence was not accounted for. Mr. Carpender denied that he misrepresented the value or condition of the mine in any respect. On the contrary, he explained in great detail the shafts, the crosscuts, the tunnels, the drifts, and the breasting of areas which were developed and performed under each successive tenant, and by himself. He informed them that the mine had been flooded at intervals. Any experienced mining engineer should take notice that such flooded conditions as existed in this mine would be likely to loosen gravel and cause the caving of tunnels and drifts. The defendant said he thought he informed them that they "would find most of the drifts open". This warning inferred that they might find some of the tunnels filled with earth and gravel. This statement, together with the condition found to exist in the mine, should have indicated to a skilled mining engineer that accumulated gravel and debris in some of the tunnels and drifts might conceal evidence of former development. Carpender affirmatively denied that he told the purchasers none of the tunnels had been closed by fallen dirt or gravel, or that all of the former work of the mine was visible. The appellant does not claim that he made such statements to the purchasers. While there is evidence on the part of the appellant that the mine had been "worked out" and "gutted", the chief contention is that a portion of one tunnel, at a point some distance from its entrance, was blocked by dirt and gravel concealing a continuation thereof which was not called to their attention before the mine was purchased. It is claimed that extensive breasting operations were conducted in other areas.

It seems inconsistent that the defendant should have assured the purchasers that the entire mine was "virgin soil", with certain minor exceptions, in view of the fact that all the parties and everybody in the vicinity knew that extensive mining operations had been previously conducted therein for thirty-five years past. The defendant testified that he told them in detail all about the previous operations with reference to a map, which he informed them was not complete with respect to the depicting of certain tunnels and drifts thereon. It seems improbable that Mr. O'Brien could have been deceived into purchasing the mine with numerous visible tunnels and evidence of former extensive operations such as he found there.

[1-3] The appellant insists that the defendant is bound by the failure of Fred Stancil, acting as his agent in examining the mine, to inform the purchasers of the hidden works concealed by accumulations of gravel and debris. That omission was testified to by several of plaintiff's witnesses. It is contended that evidence was uncontradicted and that the finding of an absence of fraud is therefore not supported by the record. We are of the opinion that conclusion is not warranted. It is true that Mr. Stancil was not called as a witness. But, assuming that he failed to disclose hidden works in the mine of which he had knowledge, that fact would not render the defendant liable for damages for fraud, since the purchasers had been thoroughly informed of conditions in the mine and the information was equally accessible to them. 12 Cal.Jur. 759, sec. 35. There is adequate proof to support the finding that Carpender fully and fairly informed the purchasers of all the previous operations and works in the mine. Their attention was called to the fact that certain tunnels and drifts might have caved. In support of the judgment, there is, at least, substantial evidence that the purchasers were informed of possible con-

cealed works, which should have placed them on notice and required of them further investigation and inquiry regarding the location and nature of the hidden operations. If it appeared there was a conflict between the statements of Fred Stancil and the defendant regarding the location of caved tunnels, further information on that subject should have been sought before the option to purchase the mine was exercised. The statement of Mr. Carpender that the mine had been flooded on several occasions and the presence of evidence of former extensive mining operations, including numerous caved walls and fallen dumps of earth, should have warned the purchasers that the obstructed tunnels might conceal excavations beyond the piles of dirt and gravel. The evidence of fraud and concealment was contradicted by the testimony of the defendant. The evidence on that issue was therefore conflicting. Under such circumstances we may not interfere with the judgment. Mr. Carpender was not asked to visit the mine after the alleged discovery of undisclosed works until the mine had been abandoned and was filled with water, so that he was prevented from observing the condition of which the purchasers complained.

[4] The trial court was warranted in assuming that the mine was finally abandoned because it did not "pan out" as successfully as the purchasers hoped that it would. Gold mining is an uncertain venture. There is much truth in the proverbial saying that "gold is where it is found". The absence of gold in a purchased mine in paying quantity is not necessarily proof of fraud on the part of the vendor. Since the evidence in the present case is conflicting we are of the opinion this court is not warranted in interfering with the judgment.

It is contended the findings do not support the judgment, and that they are irreconcilably conflicting. We are of the opinion the findings are not defective or uncertain. On the contrary, we believe they may be reasonably reconciled in support of the judgment.

[5, 6] The challenged findings refer to consecutively numbered sections of the complaint. Each finding specifically determines the truth or falsity of every material allegation of each section of the complaint to which it refers. Some of the findings determine that a designated section of the complaint is either true or false in its entirety. Others find that particular sections of the complaint are untrue, with certain exceptions which are clearly referred to or quoted. There is no reasonable doubt regarding the court's determination of all material issues covered by the findings. That method of adopting findings has been approved, where the allegations of the pleadings to which they refer are reasonably certain and clear in their meaning. Schomer v. R. L. Craig Co., 137 Cal.App. 620, 629, 31 P.2d 396. Findings should be construed to uphold rather than to defeat a judgment. Ensele v. Jolley, 188 Cal. 297, 303, 204 P. 1085; 24 Cal.Jur. 989, sec. 215.

[7] We have carefully analyzed each of the challenged findings in the light of the asserted defects which are elaborately pointed out in the appellant's briefs. We are satisfied the findings are not uncertain or defective in any of the particulars assigned. The court determined every essential allegation of the complaint regarding the charge of fraud, and all of the incidental elements thereof, to be untrue. If a specific finding upon any allegation incident to the charge of fraud has been omitted, the appellant may not complain, for the adoption of further findings upon any of the issues of this case would be bound to be adverse to the appellant. Under such circumstances the failure to adopt more complete findings is not reversible error. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; 24 Cal.Jur. 499, sec. 188.

[8, 9] The complaint is couched in sixteen consecutively numbered sections. The first four sections name the three individuals who constituted the original mining partnership, their association and purpose to purchase the property owned by the defendant, the name of the mine and its approximate location, the subsequent organization of the plaintiff corporation to which title to the property and chose in action were assigned for the purpose of suit. The last three sections of the complaint describe the mining property in detail, and allege its character and asserted value, together with the various sums of money expended by the purchasers in operating the mine, declaring that no part of the purchase price of the property or money expended in operating it had been repaid to plaintiff,

and then declare the assignment of the cause of action and transfer of the property was made to plaintiff. All of the allegations of these seven sections of the complaint were found to be true. Certainly the appellant may not complain of those favorable determinations. Finding No. IV inadvertently refers to paragraph No. VIII of the complaint. Reference to the context of the last-mentioned finding as compared with the language of the complaint indicates beyond a doubt that it refers to paragraph VII of the complaint. That mistake is harmless. Findings Nos. VII and IX determine that all of the allegations of sections X and XII of the complaint are untrue. Each of the remaining findings quotes portions of specifically designated paragraphs of the complaint, which are asserted to be true. There is no uncertainty as to any such allegations found to be true. In each of these last-mentioned findings, after specifically designating the allegations found to be true, the court definitely determines that all of the other allegations of those sections of the complaint are untrue. The findings were drawn with meticulous care.

We are satisfied the court was very specific in the adoption of its findings; that all material issues have been determined by the court; that the findings are neither ambiguous nor uncertain, and that they fully support the judgment.

For the foregoing reasons the judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



38 Cal.App.2d 726

WILSON v. McCORMICK S. S. CO.
Civ. 12143.

District Court of Appeal, Second District, Division 1, California.

May 6, 1940.

Hearing Denied July 3, 1940.

1. Pleading ⇐291(2)

In action against steamship company for injuries to seaman, plaintiff's failure to file affidavit, denying genuineness and due execution of release set up in answer as separate defense, did not estop him from introducing evidence that such release was not fairly made with, nor fully comprehended by, him because of his mental incompetency at time of signing it. Code Civ.Proc. § 448; Jones Act, 46 U.S.C.A. § 688.

2. Release ⇐15

A release of injured seaman's claims against steamship company for damages does not bar inquiry into his rights, but such release, formally signed by him, sealed and witnessed, is prima facie good and cannot be set aside, unless obtained by duress, mistake, or fraud.

3. Contracts ⇐99(3)

Before courts will set aside solemn binding written contracts, proof of their invalidity must be clear and convincing.

4. Release ⇐57(2)

In injured seaman's action against steamship company for damages, evidence *held* insufficient to show that plaintiff's written release of all claims for damages in consideration of payment of $1,250 was not fairly made with, nor fully comprehended by, him or was unconscionable. Jones Act, 46 U.S.C.A. § 688.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by James E. Wilson against the McCormick Steamship Company, to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals.

Reversed and remanded, with directions.

Lasher B. Gallagher, of Los Angeles, for appellant.

Herbert R. Lande, of San Pedro, for respondent.

WHITE, Justice.

This is an appeal from a judgment for plaintiff entered upon the verdict of a jury in an action for damages for personal injuries alleged to have been sustained by plaintiff in the course of his employment as a seaman, resulting from a fall through an open hatch into the hold of the ship owned by his employer, the defendant company. The action was brought pursuant to the provisions of the Jones Act, 46 U.S.C. § 688, 46 U.S.C.A. § 688, which extends to

a seaman the right to recover in an action at law for injuries sustained in the course of his employment and resulting in whole or in part from the negligence of any officers, agents or employees of the employer or by reason of any defect or insufficiency in its equipment. See Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., 45 U. S.C.A. § 51 et seq.; Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709.

In general, the facts are that at the time of his injury, on December 18, 1937, plaintiff was working on the steamship Point San Pablo, owned by the defendant, and which was docked at Los Angeles harbor. About 7 o'clock on that evening the chief mate directed plaintiff to "go forward and get lanterns and hang them upon the bow and on the stern". In obedience to this order, plaintiff went forward, with the aid of a flashlight, because the deck was in total darkness. He walked over the deck load to the forecastle head, then down the ladder on the port side to the passageway between what was designated as No. 1 hatch and the forecastle. Plaintiff tried the switch for the lights in the fore and aft passageway, but the lights did not burn. He then went to the lamp locker in the forecastle and tried the lights there, without success. He then took two or three lanterns out of the locker, lighted them, put his flashlight in his back pocket, picked up the lanterns and proceeded down the fore and aft passageway, intending to go to the peak of the forecastle head, where he had been ordered to place a lantern. Four iron bars, known as "sealing bars", rounded on one side and flat on the other, and which are used in fastening down the hatch covers when the ship puts to sea, had been removed from the hatch and laid in the passageway. On the night plaintiff was hurt the No. 1 hatch into which he fell was open and there were no guard ropes placed around the same, although on previous occasions the former chief mate had rigged a guard line around this hatch when it was open while the ship was in port. What occurred at the time and immediately preceding the accident may be epitomized in the following quotation from plaintiff's testimony: "As I walked out of the fore and aft passageway, in turning to my right, I stepped up on top of these sealing bars, and slipped and fell into the lower hold of No. 1 hatch. * * * They" (the sealing bars) "were about twelve inches above the deck. * * * My feet slipped and I lost my balance and I fell backwards into No. 1 hold. * * * The sealing bars moved underneath my feet. * * *" As a result of the accident plaintiff sustained injuries which were diagnosed as "Fracture of skull, probably depressed. Second, fracture, 8th, 9th and 10th ribs. Third, Fracture lumbar vertebra."

In its answer defendant denied negligence on its part as well as the existence of any unsafe or dangerous condition; and as separate defenses alleged, first, that plaintiff's injuries were proximately caused by his own negligence, and second, that in consideration of payment of the sum of $1,250, plaintiff had executed a release of all claims. A copy of such release was annexed to the answer. Trial was had before a jury, which returned a verdict in favor of plaintiff for the sum of $1,500 in addition to the $1,250 received by plaintiff pursuant to the terms of the release. Following the denial of its motion for judgment notwithstanding the verdict and for a new trial defendant steamship company prosecutes this appeal from the judgment entered upon the verdict.

[1] As its first ground of appeal appellant asserts that under the provisions of section 448 of the Code of Civil Procedure the "genuineness and due execution" of the release were admitted by plaintiff when he failed to file "an affidavit denying the same", and that he was therefore precluded from seeking to avoid the legal effect of the instrument by evidence that he was mentally incompetent at the time he signed it. The authorities do not support appellant's contention in this regard. Gajanich v. Gregory, 116 Cal.App. 622, 3 P.2d 389; Moore v. Copp, 119 Cal. 429, 432, 51 P. 630; McKenzie v. Los Angeles Life Ins. Co., 97 Cal.App. 659, 275 P. 1003; Baird v. Pacific Elec. Ry. Co., 39 Cal.App. 512, 179 P. 449; Martin v. Postal Union Life Ins. Co., 16 Cal.App.2d 570, 61 P.2d 333. As was said in Gajanich v. Gregory, supra [116 Cal.App. 622, 3 P.2d 392]: "The above section provides that, when the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk within ten days after receiving a copy of the answer an affidavit denying the same, and serve a copy thereof on the defendant. It has been held that, by

the use of the term 'genuineness' is meant that the document pleaded is the identical instrument which it purports to be, and that it appears in the exact form in which it passed between the parties; and that the admission of its due execution means only that it was regularly signed and delivered in the form in which it appears. * * * Nor do these admissions preclude a party from challenging the effect of the instrument on the grounds of fraud or mistake; and under section 462 of the Code of Civil Procedure such defenses need not be pleaded by way of replication. * * *" Therefore plaintiff was not estopped from introducing evidence to the effect that although he signed the release, nevertheless the same was not fairly made with him nor fully comprehended by him, and that the instrument was therefore void.

If it be found that the release given by plaintiff to the defendant steamship company is valid, then such finding is determinative of all other issues raised. Respondent attacks the validity of the release in question on the ground that the same was not fairly made with nor fully comprehended by him. With reference to the circumstances surrounding the execution of the release, plaintiff testified that following the accident on December 18, 1937, he remained at the Seaside Hospital in Long Beach until January 21, 1938, when he was transferred to the San Francisco Marine Hospital; that the physicians at the Long Beach hospital told him that he had just a few fractured ribs and there was nothing to worry about; that when he came to the San Francisco hospital he was in severe pain, his head felt heavy and dizzy, he could not distinguish things clearly and he had a severe pounding pain in his head; he could not concentrate on reading because of severe pains in his head. He did not leave his bed until about two weeks before his discharge from the hospital. The day of his discharge, February 21, 1938, was four days after he was first able to walk away from his bed unsupported. The longest time he was on his feet was the day before his discharge, when he was up about two hours. During the time he was "learning to walk" he was in severe pain. He was in a forward stooped position, had severe headaches, pains, pounding in his head and everything hazy in front of his eyes. He was unable to read consistently and could not read whole paragraphs of print. He was told at the Marine Hospital that his injuries were getting better, but was not told the extent of his injuries.

On February 21, 1938, plaintiff left the Marine Hospital and took a street car to the law office where he signed the release. He testified: "* * * I was very weak yet, and I was suffering from pain in my back and also in my head, and I could only walk very slow, and I had to stop several times and * * * rest. * * * My legs were very weak and it seemed like they would not hold my weight. * * * The traffic made me dizzy and everything went hazy in front of my eyes." He had a "terrific pain" in his back from sitting on a hard wooden bench in the office of the lawyer where he signed the release. He talked to Mr. Fricke (a representative of defendant company) about fifteen minutes, then went out and had some breakfast, and returned and had a conversation. "Mr. Fricke asked me what I wanted, and I told him I wanted sufficient money to go home and live on until I was able to return to work. * * * I told him I wanted $1500. And he said, you are kind of high. But, he said, I will take the subject up with Mr. Black, and you come back at two-thirty in the afternoon." Plaintiff testified that during this conversation he "was suffering from severe pain in my back and shoulders". "It increased all the time." At two-thirty plaintiff had another conversation with Mr. Fricke. "Mr. Fricke then told me that Mr. Black would give me a thousand dollars, and that I would be able to live on that sum as I would be able to go home to San Pedro then. I said, 'Well, I guess I will have to take it, because I am broke and have to have money for my wife and myself.'" Plaintiff further testified that he did not read the release before he signed it; that at the time he signed it he was suffering from severe pain in the back and shoulders and a severe pounding and headache in his head; that he "could not think very clearly"; that the extent of his injuries was not discussed with Mr. Fricke. Plaintiff further testified that upon his return to San Pedro he received treatments at the United States Public Health Service for about three months and wore a brace for his back; about March 29 he fainted and was returned to the Seaside Hospital for two nights and a day; that in May he went to a Dr. Brown, who took X-rays and fitted him with another brace which extended the entire length of his back and

held him in a rigid upright position; that going about without the brace made him weak and gave him pains in the back.

It further appears in the evidence that on June 23, 1938, approximately a month after he filed the complaint herein, plaintiff obtained from the United States Department of Commerce a certificate rating him as an able-bodied seaman. During his cross-examination plaintiff admitted that in his application for such certificate he represented to the authorities that he was in good physical condition and able to perform the duties of an able-bodied seaman. It was also shown that in June he worked on a ship, and that in July he was employed upon another vessel, making a trip from Los Angeles to the Hawaiian Islands and from there to San Francisco.

Expert testimony was presented by a physician skilled in the treatment of nervous and mental diseases who pronounced the plaintiff as suffering from what is termed an "anxiety neurosis", described by the doctor as "a state of mind which has been caused by a definite psychic or organic lesion of the brain, in contra-distinction to an anxiety state, which anyone may have, if the appropriate situation presents itself. In other words, an anxiety neurosis is more or less of a chronic situation, while an anxiety state is not. The symptoms are the same, but they are intensified and prolonged in the anxiety neurosis." Answering a hypothetical question embodying plaintiff's condition and the circumstances surrounding the execution of the release, the physician testified as follows:

"* * * The Court: That is not the question. The question is: Did he understand what he was doing?

"A. Not to the fullest extent. It is well known that a person who is suffering from dizziness and headaches and general fatigue does not have full charge of all his mental faculties, and is unable to arrive at an answer which would be in keeping with his normal mental state when he was not ill. Also a conclusion reached while under such symptoms would depend a great deal upon the patient's knowledge of the situation, which would undoubtedly be somewhat influenced by the symptoms that he had at that time."

Defendant introduced evidence to the effect that plaintiff was normal at the time he executed the release in question. It appears without contradiction that the activities looking toward a settlement of plaintiffs claim against defendant company were initiated by the former. On February 12 and 17 he wrote letters to defendant's attorney in that regard, the first of which reads as follows: "Mr. J. H. Black. Dear Sir: Writing to you and would like to have an advance on my account and need a $150, as I want to send home to my wife a $100 and the rest to get an outfit of clothes so I can get out of hospital and come to your office. I have been in past a favor to your good office on two cases, one from the S/S Charles L. Wheeler and S/S Ernest H. Meyers. I have no intention of bringing lawsuit on my accident. I know we will be able to come to terms. Hopeing I can have the amount stated this week"; and the second one reading: "I am writing again to find out why I haven't heard from you in person or an answer to my last letter. I am leaving the hospital Monday, I can get some dress clothes to go with. That is why I ask for $150 advanced to my account pending settlement with your office. Mr. Black, I have wanted to settle my case with you and I do wish this could be taken care of. I will be an out-patient for treatments at San Pedro, where I shall go when I leave here. I shall expect to hear from you tomorrow." Four days later the release was signed. The last-mentioned document is captioned with large-size type reading: "Do not sign this unless you fully understand its contents—this is a full release of all claims and demands"; and following the signature of plaintiff upon the release the following appears: "Do you understand that signing this paper settles and ends every claim for damages, as well as for compensation, maintenance, cure and wages?" In the blank space following the word "Answer" plaintiff wrote, "Yes."

Respondent contends that the evidence herein narrated shows that he suffered from a brain concussion at the time of his injury December 18, 1937, was hospitalized until the day upon which he signed the release, during all of which time he was afflicted with severe headaches, was unable to concentrate on any one subject for any length of time, and when standing upon his feet was subject to dizzy spells. This, respondent asserts, constitutes evidence of sufficient substantiality to support the implied finding of the jury that the release was not fairly made and was invalid.

In attacking the validity of the release respondent reminds us of his position as

a mariner and therefore, so to speak, a ward of the court of admiralty, "whose rights are tenderly guarded and whose acts, when waiving or yielding his rights, are carefully scrutinized". He invokes the rule stated in Riegel v. Higgins, D.C., 241 F. 718, 722, and elaborated in the Henry S. Grove, D.C., 22 F.2d 444, 446, as follows: " 'Releases by seamen are never conclusive, except when made knowingly and intentionally, and with a full understanding of the situation.' This being true, the doubt should be resolved in favor of the libelant. A court should be slow to hold that a release becomes operative as to a matter of liability of which the releasing party may have been in ignorance, and which, in fairly interpreting the document, was not in contemplation of the parties when it was made. Tug Ross Coddington [D.C., 40 F.2d 280], 1924 A.M.C. 615."

[2, 3] We have discussed this matter at some length because of our concern or responsibility for seamen in cases of this nature. We are not unmindful that a release of this kind is not a bar preventing inquiry into the seaman's rights. As was said by the Third Circuit Court of Appeals in the case of The Adonis, 38 F.2d 743, 744, "it can always be looked into. [Citing cases.] But a release of this kind, formally signed, sealed, and witnessed, is however, prima facie good, and cannot be set aside unless it was obtained by duress, mistake, or, in this case, by fraud, * * *." Before courts will set aside solemn binding written contracts, proof of their invalidity must be clear and convincing. Were the rule otherwise, a written instrument would afford but slight protection to the parties.

[4] In the instant case there can be no doubt but that plaintiff conceived the idea of settling his claim or demand against the defendant, for in his first letter he wrote, "I have no intention of bringing lawsuit on my accident, I know we will be able to come to terms"; and again in his letter of February 17 he clearly indicates his intentions and desires by the use of the following language: "I have wanted to settle my case with you and I wish this could be taken care of." Coming now to a consideration of the facts and circumstances just preceding and at the time of the execution of the release, we find that respondent was discharged from the hospital that morning, whereupon he immediately sought defendant's agent, Mr. Black. Departing from the hospital at 8:30 o'clock a. m., he walked four blocks to the car line, waited for seven or eight minutes on the street corner until the right car came along, got on it, and stood up on the moving street car for some twenty minutes. He then alighted in downtown San Francisco and walked directly to the proper address of defendant's counsel on Sansome street, got into an elevator and went directly to the office of Mr. Black, arriving about 9:30 o'clock. He thereupon talked with Mr. Fricke, an associate of Mr. Black, for about fifteen minutes, and then left by himself, went down upon the street to a restaurant, obtained his breakfast, and again went back to Mr. Black's office, arriving at about 11:30 a. m., at which time he had a further talk with Mr. Fricke. Upon this last-named occasion he told Mr. Fricke he wanted $1,500 to settle his claim, and Mr. Fricke said that in his opinion the amount was high, but he would take the subject up with Mr. Black, and suggested respondent return at 2:30 in the afternoon. Respondent then went down on Market street, obtained something to eat, and returned at about 2:30 to Mr. Black's office. Upon this occasion Mr. Fricke told respondent that the company would give him $1,000, whereupon respondent stated, in effect, that he guessed he would have to take it, as he was broke and had to have money for himself and his wife. He then accepted the proffered release, signed his name thereto, and indicated by writing the word "yes" that he understood that the paper he signed was a full and complete settlement and adjustment of his claims against appellant. Following the execution of the release he went with a representative of appellant to the bank where the check was cashed, and the sum of $1,000 was delivered to respondent. Following his return to Los Angeles, it is true, he testified he continued to suffer from his injuries, but nevertheless it also appears that respondent was never licensed as an able-bodied seaman at any time prior to the accident, but between the time he received the $1,000 from appellant and June 23 he passed an official examination as to "eyesight, hearing and physical condition", and represented that he was in good physical condition and able to perform the duties of an able-bodied seaman receiving a certificate authorizing him so to do.

Plaintiff's behavior and condition prior to and at the time the release was executed point unerringly to the conclusion that his

physical and mental state was such that he formed in his own mind a determination to compromise his claim; that he fixed an amount for which he would settle; that he made the approach to appellant's representatives; that he negotiated with them, in which negotiations he asked for $1,500 and finally compromised for $1,000 plus $250 he had theretofore received; that he signed the release and accepted the money which passed in the transaction. There is neither evidence nor contention here that plaintiff could not read, but there is evidence in the record that he looked at the paper. He signed it; and the evidence falls far short of the amount required to overcome the presumption that he knew and understood its contents. Had respondent read the document in question he could not have been misled into believing it was anything short of a full and complete release. The record is totally bereft of any evidence that the appellant steamship company or its representatives did anything either to urge respondent to enter into negotiations for a settlement or to induce him to sign the release, or that appellant made any representations at any time to respondent that the document tendered for his signature was anything but a full and complete release and satisfaction of any and all claims asserted by him against appellant steamship company by reason of injuries received by respondent.

Therefore, considering the release here in question from the standpoint of the fairness of the conditions under which it was secured and of the settlement which it constituted, we find nothing unconscionable therein. The consideration which passed to the injured seaman under the terms of the settlement was not negligible or inadequate, considering the injuries sustained by him, when we remember that within a few months after the execution of the release plaintiff represented himself as an able-bodied seaman, satisfactorily passed a physical and mental examination for such rating, and was by the federal maritime authorities classified as such able-bodied seaman, thereafter entering upon employment in such capacity.

With reference to the position of both the seaman and his employer in the making of a settlement of this kind, the United States Circuit Court of Appeals of the Second Circuit, in the case of Bonici v. Standard Oil Co. of New Jersey, 103 F.2d 437, 438, said: "Hence, while 'one who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman' (Harmon v. United States, 5 Cir., 59 F.2d 372, at page 373), nevertheless a release fairly entered into and fairly safeguarding the rights of the seaman should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty. Even if a seaman is the court's ward, the court cannot be always at hand to watch over him, for it can only move ponderously in a formal lawsuit. Fair settlements are in the interest of the men, as well as of the employers."

Because the release constitutes a full and complete defense to the action, a discussion or review of other points raised becomes unnecessary.

The judgment is reversed and the cause remanded, with directions to the court below to enter judgment for defendant notwithstanding the verdict.

We concur: YORK, P. J.; DORAN, J.



38 Cal.App.2d 748

HOME OWNERS' LOAN CORPORATION v. HANSEN et al.

Civ. 6388.

District Court of Appeal, Third District, California.

May 6, 1940.

1. Taxation ⇐509

California does not follow the rule that tax liens are by their own force superior to private contract or mortgage liens.

2. Taxation ⇐501, 510

A paramount lien for unpaid taxes depends solely upon legislative enactment and a specific expression of legislative intent is necessary for tax liens to take precedence

over pre-existing mortgage or other contract liens.

3. Taxation ⇐509

The Legislature has the power to make lien of taxes paramount to mortgages or other contract liens and the superiority of tax lien need not be declared in express terms, it being sufficient if the priority may be inferred from the provisions of an act.

4. Licenses ⇐31

Provision of Retail Sales Tax Act of 1933, that in any case in which any tax is not paid when due the board "may" file for record in the recorder's office of any county a notice of lien and that from the time of filing any such notice the amount of tax specified in such notice shall have force and effect of lien of a judgment, the use of the word "may" is, in effect, mandatory if a lien is to be created. St.1933, p. 2607, § 26.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

5. Licenses ⇐31

Provision of Retail Sales Tax Act of 1933 that in any case in which any tax is not paid when due the board "may" file for record in the recorder's office of any county a notice of lien and that from the time of filing any such notice the amount of tax specified in such notice shall have force and effect of lien of judgment, the language used indicates that a lien of judgment is not effective as against retailer unless there has been a filing of notice of lien by the board. St.1933, p. 2607, § 26.

6. Licenses ⇐32(2)

In section of Retail Sales Tax Act of 1933, providing procedure for collection of delinquent sales taxes, the fourth paragraph providing for sale by board of property belonging to retailer should be construed in connection with first paragraph providing for the manner and means of obtaining a lien. St.1933, p. 2607, § 26.

7. Licenses ⇐32(2)

Under Retail Sales Tax Act of 1933, although notice of lien may be filed at any time within two years of delinquency of payment, the board is precluded from seizing or selling any property of the retailer until such notice has been filed in the county where the property is situated. St.1933, p. 2607, § 26.

8. Licenses ⇐31

The Retail Sales Tax Act of 1933 does not make retail sales tax liens paramount to existing contract or mortgage liens. St. 1933, p. 2599.

9. Licenses ⇐31

The lien established by the procuring of a judgment for delinquent sales taxes under the Retail Sales Tax Act of 1933 does not automatically have preference over other prior contract or mortgage liens. St.1933, p. 2599.

10. Licenses ⇐31

Where state did not file notice of lien for delinquent sales taxes under Retail Sales Tax Act of 1933, the state's judgment for delinquent sales taxes was subject to lien of mortgage recorded prior to rendition of the judgment. St.1933, p. 2607, § 26.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action for the foreclosure of a mortgage on real property by the Home Owners' Loan Corporation against Axel Hansen, the State of California, and others. From a foreclosure decree which failed to recognize any lien or interest in behalf of the State of California, the State appeals.

Affirmed.

Earl Warren, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for appellant.

J. V. McDermott and Ewell D. Moore, both of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This appeal raises the question as to the right of priority of lien in the State of California for unpaid sales taxes due and owing.

Respondent corporation filed an action in Los Angeles county for the foreclosure of a mortgage on real property situated therein. The State of California was made a party defendant because of the fact that the state had a judgment for $74.32 against Axel Hansen, the owner and mortgagor of the property, subject to the foreclosure suit. The judgment of foreclosure decreed that the real property therein described be sold and the proceeds of the sale applied to payment of the commissioner's fee, costs of suit and principal and interest in satisfaction of the mortgage debt. The foreclosure decree failed to recognize any lien or interest in behalf of the State of California in respect to the real property involved therein.

The note and mortgage to respondent corporation was executed on August 2, 1934, and the mortgage was recorded on October 5, 1934. A license or permit to engage in the sale of tangible personal property at retail was issued to the defendant, Axel Hansen, the mortgagor, by the board of equalization of the state of California for the period from July 1, 1934, to September 15, 1935. During this period there accrued and became due to the State of California a retail sales tax in the sum of $13.58. This sum, together with interest and a penalty which was imposed, amounts to $16.28. Other retail sales taxes due from Axel Hansen to the state accrued on retail sales made by him after September 15, 1935, and as to these latter taxes the state makes no claim of priority to respondent's lien of the mortgage. The Retail Sales Tax Act of 1933 (Stats.1933, p. 2599; Deering's Supp.1933, p. 2359, Act 8493) was amended in 1935 and the amendment became effective on September 15, 1935. Section 26½ was added to the act by the legislature in 1935, St.1935, p. 1225. This section provides that the state does not have a preference over any recorded lien which attached prior to the date when the tax became a lien.

Appellant claims priority of lien as to said sum of $16.28, which accrued on sales made prior to September 15, 1935. It is contended that the state has a superior or prior lien against the property of the retailer, on the theory that any tax lien in California is ex proprio vigore superior to a private prior contract or mortgage lien. The 1935 amendments to the Retail Sales Tax Act of 1933 preclude the possibility of the application of the doctrine ex proprio vigore to property subject to a lien for taxes accruing on retail sales made after September 15, 1935. The act of 1933 is silent on the right of priority of lien. It is the silence of the statute in this regard which leads to the claim that the doctrine of ex proprio vigore applies as to tax liens. Consequently, appellant is claiming priority of lien against the property of the retailer for taxes accruing on retail sales of tangible personal property made only before the effective date of the 1935 amendment. We are concerned alone with the Retail Sales Tax Act of 1933, and this act becomes important in determining the question of priority of lien in the absence of a finding that California follows the rule that any tax lien is ex proprio vigore superior to a prior private contract or mortgage lien.

Considerable confusion has existed through various jurisdictions in determining the dignity to be granted to tax obligations. As early as 1800 the supreme court of South Carolina, in the case of Butler v. Baily, 2 Bay 244, 249, held that a tax imposed upon persons was a lien on all the property of the person assessed, and superior to an earlier judgment lien, even though there was no statute purporting to create such lien, or any lien. Other jurisdictions adopted this rule of the Butler case, and held that taxes are ex proprio vigore a lien on all the property of the taxpayer. The importance of proper maintenance of the government and the necessity of expediting its functions were among the reasons given for the superiority granted to tax liens.

The case of Dougherty v. Henarie, 47 Cal. 9, decided in 1873, was perhaps the first authority in this state which might be deemed to state the rule of law that tax liens are ex proprio vigore superior to all other liens. The question was raised as to the superiority of a title acquired under a tax deed issued upon a sale for state and county taxes. The court held that the tax deed conveyed the title, discharged of the plaintiff's lien. At page 14 of 47 Cal., the court stated as follows: "The general rule is that a sale and conveyance in due form, for taxes, extinguishes all prior liens, whether for taxes or otherwise. The necessity of collecting revenue for the support of the Government imperatively requires that the lien for taxes shall take precedence over all other liens; and that a tax sale, followed by a proper conveyance, shall transfer the title discharged of prior tax liens."

The court was aided, however, in reaching its conclusion as to title under the tax deed by the presence of a section of the revenue law which provided that the tax deed conveyed to the grantee the absolute title to the lands described in the deed. In determining the effect of this section of the revenue law, the court said at page 15 of 47 Cal.:

"More explicit and comprehensive language could not well have been employed to define the nature of the title which passes by the tax deed. * * * This language is so explicit as to require no interpretation and to leave no room for construction."

In California Loan Company v. Weis, 118 Cal. 489, 50 P. 697, the question arose as to whether the lien of personal property

taxes was superior to the lien of a pre-existing mortgage which had attached to the land. The court held that the title of the purchaser under a sale of the land for delinquent personal property taxes was paramount to the lien of the mortgage. The decision in this instance was, however, based solely on the construction of the Political Code and it cannot be said that this case stands for the proposition that tax liens are ex proprio vigore superior to prior mortgage liens. The court said at page 493 of 118 Cal., at page 699 of 50 P.: "It still remains to be considered, before leaving this branch of the case, whether the legislature of this state has, in the exercise of an unquestioned power, made the lien of its taxes paramount. As this matter, the power being conceded, *depends for its determination entirely upon statutory enactment,* adjudications in sister states will be of little value, unless based upon identical laws." (Italics ours.)

In every case in which the question of the superiority of the tax lien has been in issue it will be noted that a construction of a statute has been involved. It is also true that the decisions, with the exception of the holding in the case of O'Dea v. Mitchell, 144 Cal. 374, 375, 381, 77 P. 1020, has, in the final analysis, depended upon the language used in the statutes applicable. It appears in a number of the decisions that language used with reference to the superiority of tax liens is nothing more nor less than a recognition of power in the legislature to make such tax liens paramount by the use of appropriate language to that effect. This conclusion is supported by an examination of those cases which disclose a discussion of the statutes immediately following the use of terms which might be deemed to indicate that California follows the rule that tax liens are ex proprio vigore superior to private liens. With the possible exception of the holding in the O'Dea case, supra, we conclude that the authorities cited by appellant do not uphold the proposition that tax liens are ex proprio vigore superior to private liens.

[1] In concluding that California does not follow the rule announced by some decisions that tax liens are by their own force superior to private contract or mortgage liens, we quote from the opinion in Guinn v. McReynolds, 177 Cal. 230, 170 P. 421, and Bolton v. Terra Bella Irr. District, 106 Cal.App. 313, 289 P. 678, 679. In the Guinn case, decided in 1918, the court said at page 232 of 177 Cal., at page 422 of 170 P.: "In dealing with tax or assessment liens, as with others, our decisions have recognized that the question of priority *is one of legislative intent.* Where, accordingly, the tax or assessment lien is preferred to an earlier contract lien, the basis of priority is found in the statute."

The Bolton case, decided in 1930, presented the question as to whether a tax deed taken under a sale for delinquent county taxes, passes title free from any lien for delinquent irrigation district taxes or assessments levied on the same land. The court stated that an assessment is not in all respects the same as a tax, but that it had many of the same qualities, and that as used in the Political Code, the word "taxes" includes assessments of irrigation districts, as well as general taxes. The court held that the purchaser of the land at the general tax sale did not take title free from the lien of the irrigation district assessments which had theretofore been levied against the land. In reaching this conclusion the court declared that priority of lien for unpaid taxes depended upon statutory enactment, and was a question of legislative intent. At page 319 of 106 Cal.App., at page 681 of 289 P., the court quoted from the decision in the Guinn case, as follows: "A lien for unpaid taxes or assessments is generally held to be superior to all contract liens, whether prior or subsequent in time. But the authorities declare, virtually without dissent, that even a tax lien is not entitled to rank ahead of a pre-existing mortgage, or other contract lien, unless the legislative enactment creating the tax lien has given it priority."

[2] The decisions in both the Guinn and Bolton cases dispel any doubt as to whether California follows the rule of law that tax liens are ex proprio vigore superior to a pre-existing mortgage or other contract liens. These cases definitely hold that a paramount lien for unpaid taxes depends solely upon legislative enactment. We are of the opinion that these last-mentioned cases correctly state the law and that a specific expression of the legislative intent is necessary for tax liens to take precedence over pre-existing mortgage or other contract liens. In San Mateo County Bank v. Dupret, 124 Cal.App. 395, 12 P. 2d 669, decided in 1932, the court made the statement that tax liens were paramount

to the rights created by mortgages and deeds of trust. However, in support of this proposition the court cited 18 California Jurisprudence 132, sections 435, 436. Section 435 merely states the rule of law as decided by the Guinn case, to the effect that it is within the power of the legislature to make the lien of taxes paramount to a mortgage or other contractual lien. The preceding language of the Dupret case, upon which the appellant in this action relies, was unnecessary to the determination of the issues therein, and it is not in accordance with the weight of authority.

[3] Legislative intent being a prerequisite to the creation of priority of tax liens, it is our opinion the lien of appellant for unpaid sales taxes takes precedence over the lien of respondent's mortgage only if such priority is found to exist in the Retail Sales Tax Act of 1933. It is not denied that the legislature has power to make the lien of taxes paramount to mortgages or other contract liens. The superiority of the tax lien need not be declared in express terms. It is sufficient if the priority of such lien may be inferred from the provisions of the act.

The Retail Sales Tax Act of 1933 does not by express terms provide that the state shall have a prior or paramount lien for retail sales taxes due and owing as against the property of the retailer, and in our opinion the act of 1933 fails to disclose a legislative intent to create a priority in favor of such a tax lien. There is no language present in the act of 1933 which may be deemed to indicate an intention to create a preference in favor of the state. Section 26 of the act provides the procedure for the collection of delinquent sales taxes, but it is notably silent regarding the effect of the state's lien with relation to those of third parties who may have prior private liens on the property of the retailer. Section 26, paragraph 5, pursuant to the sale of the retailer's property by the board, fails to indicate that an absolute title is passed to the purchaser, but simply provides that: "* * * such bill of sale or deed shall vest the interest or title of the retailer in the purchaser." This language implies that vested interests of third parties may intervene.

[4] The act of 1933 not only fails to disclose a legislative intent to create a prior lien in favor of the state, but prescribes the procedure under section 26 which must necessarily be followed in order to create a lien in any event. It is true that the first paragraph of section 26 provides that the board may file a notice of lien as against the retailer. It is asserted that the use of the word "may" precludes the necessity of filing such notice in order to obtain a lien. However, the use of the language following the provision for the filing of such notice would appear to indicate the necessity of such action on the part of the board. The use of the word "may" is, in effect, mandatory, if the lien is to be created. This language provides as follows: "From the time of filing any such notice the amount of the tax specified in such notice shall have the force and effect of the lien of a judgment against the retailer named in said notice of lien for the amount specified in such notice."

[5] The language used clearly indicates that the lien of a judgment is not effective as against the retailer unless there has been a filing of notice of lien by the board.

[6] Section 26, paragraph 4, provides for the sale by the board of property belonging to the retailer. This paragraph permits sale of the retailer's property in satisfaction of the delinquent taxes any time within two years of the delinquency. There is no particular restriction as to what property of the retailer may be seized by the board. Both personal and real property are subject to seizure. It is provided that only the property so seized shall be subject to the lien of the tax. The first paragraph of section 26 provides for the manner and means of obtaining the lien. The notice of lien may be filed in any county and thereby becomes as effective as a lien of a judgment in the particular county in which it is filed. The language used in the fourth paragraph of section 26 should be construed in connection with the first paragraph of that section.

[7] A reasonable construction of section 26 leads to the conclusion that the legislature intended that the state should have a lien upon the property of a retailer only after filing notice of lien as provided for in paragraph 1 of that section. Consequently, although the notice of lien may be filed any time within two years of the delinquency of payment, the board is precluded from seizing or selling any property of the retailer until such notice has been filed in the county where the property is situated.

[8-10] We conclude that California does not follow the rule of law that tax liens are by their own force superior to private contract or mortgage liens and that the Retail Sales Tax Act of 1933 fails to disclose a legislative intent to make retail sales tax liens paramount to existing contract or mortgage liens. It appears that the appellant failed to secure its lien against the property of the respondent in the manner provided by the act since there was no notice of lien filed under paragraph 1 of section 26 of the act of 1933. The lien established by the procuring of a judgment for the delinquent sales taxes does not automatically give it preference over other prior contract or mortgage liens. The appellant's judgment for delinquent sales taxes is therefore subject to respondent's mortgage lien.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



38 Cal.App.2d 674

MECCHI et al. v. LYON VAN & STORAGE CO.

Civ. 11065.

District Court of Appeal, First District, Division 1, California.

May 1, 1940.

Hearing Denied June 27, 1940.

See 104 P.2d 26.

1. Appeal and error ⇐1151(2)

The appellate court cannot decrease amount of damages awarded by jury for personal injuries, though larger than reviewing court might think justified, unless it appears that verdict was result of passion or prejudice or is so grossly excessive that ends of justice warrant reduction.

2. Damages ⇐132(1)

A jury's verdict, awarding $10,000 damages to five-year-old boy for concussion of brain, broken leg, which was subsequently bored into and wired, facial cuts and bruises, resulting pain at times, and ugly facial scar not entirely correctible by plastic surgery, *held* not so grossly excessive as to warrant reduction of amount thereof by appellate court.

3. Automobiles ⇐12

The word "highway", used in statute prohibiting parking of vehicle at curb or edge of through state highway, unless both right wheels are within 18 inches of such curb or edge, is not synonymous with word "roadway", used in city ordinance prohibiting parking of vehicle in roadway other than with such wheels within foot of and parallel with established curb line, as "roadway" covers territory for vehicular traffic only, while "highway" also covers territory for pedestrian travel. Vehicle Code, §§ 81, 83, 84, 588; St.1935, pp. 98, 99, 193.

See Words and Phrases, Permanent Edition, for all other definitions of "Highway" and "Roadway".

4. Automobiles ⇐9

A city and county ordinance, prohibiting parking of vehicle in roadway other than with two right-hand wheels within foot of and parallel with established curb line, except on streets marked for angle parking, *held* not invalid as in conflict with statute prohibiting parking of vehicle at curb or edge of through state highway, unless both right wheels are within 18 inches of such curb or edge, except when loading or unloading merchandise, as city had power to enforce regulations as to parking of vehicles except on through state highways. Vehicle Code, § 588, St.1935, p. 193.

5. Municipal corporations ⇐591

To enforce ordinance, legislative body, such as city and county board of supervisors, may delegate to board or commission right to determine state of facts on which ordinance shall operate.

6. Negligence ⇐136(14, 25)

Whether violation of statute or ordinance proximately contributed to accident and was excusable or justifiable are fact questions.

7. Appeal and error ⇐1064(1)

Failure of instruction, that violation of ordinance is negligence as matter of law, to inform jury that it may find such violation justifiable or excusable, is not reversible error when only inference which may be drawn from evidence is that violation was not justifiable or excusable.

8. Automobiles ⇐173(4)

Deliberate unlawful parking of motor vehicle for personal convenience, as by parking van at right angle to curb to unload merchandise because there was no room to stop and park it parallel to curb, as required

by city ordinance, is not excusable or justifiable.

9. Negligence ⇐136(29)

Ordinary care on part of minor is fact question.

10. Negligence ⇐85(1)

The standard of care required of minor is measured by exigency of occasion.

11. Negligence ⇐82

Neglect or refusal to obey law, even on part of child, may be proximate cause of injury to person guilty thereof, except where injured minor is intellectually so immature that no negligence, statutory or otherwise, may be imputed to him.

12. Automobiles ⇐245(74)

Whether five-year-old boy, struck by automobile being driven between automobiles, parked parallel with street curb, and van backed up to opposite curb, possessed sufficient intelligence to be held accountable for his actions and violated city ordinance, requiring pedestrian crossing roadway elsewhere than at crosswalk to yield right of way to vehicles on roadway, were fact questions for jury on conflicting evidence.

13. Negligence ⇐136(25)

The sequence of facts to each other, relation of negligent precipitous acts or omissions to primary continuing negligent acts, and whether causation was independent or concurrent, are fact questions.

14. Automobiles ⇐244(36)

In action for injuries to boy struck by automobile, being driven by individual defendant between automobiles parked parallel with street curb and corporate defendant's van, backed up to opposite curb, evidence *held* sufficient to sustain jury's implied finding that individual defendant's negligence was concurrent with corporate defendant's negligence in illegally parking van and not sole proximate cause of accident, so as to render corporate defendant liable for damages.

15. Trial ⇐296(7)

Omission of essential elements from formula instructions was not harmful to defendant, appealing from judgment on jury's verdict for plaintiffs, where omitted matters appeared in other instructions.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Angelo Mecchi, Jr., a minor, by his guardian ad litem, V. Mecchi, and V. Mecchi individually, against the Lyon Van & Storage Company and another, to recover damages for personal injuries to the minor and costs of hospitalization, medical care, etc. Judgment for plaintiffs, and named defendant appeals.

Affirmed.

Charles V. Barfield and Hadsell, Sweet, Ingalls & Lamb, all of San Francisco, for appellant.

Joseph F. Leonard and Jesse H. Miller, both of San Francisco, for respondents.

WARD, Justice.

An appeal by defendant Lyon Van & Storage Co., a corporation, from a judgment in the sum of $10,000 in favor of Angelo Mecchi, a minor, rendered in an action brought by V. Mecchi, his guardian ad litem, for personal injuries suffered by the minor, and from a judgment in favor of the father V. Mecchi in the sum of $790.94, to cover the costs of hospitalization, medical care, etc. Each of the judgments was against the defendants Lyon Van & Storage Co., a corporation and Louis S. De Benedetti. The latter did not appeal.

On the date of the accident, the minor, between five and six years of age, had been playing in front of or near the residence of his parents on the north side of Filbert street, between Mason and Taylor streets, in the city and county of San Francisco. Filbert street, at the place of the accident, measures 38 feet 9 inches from curb to curb. In this block, two automobiles were parked a few feet apart on the north side of the street, parallel with the curb. A moving van, belonging to appellant, measuring 28½ feet with the tail gate down, was delivering household furniture to a residence on the south side of Filbert street. It was backed up to this residence, its tail gate protruding over the curb and its front extending into the street. The evidence relative to the position of the van is in conflict, but an inference could reasonably be drawn from the record that its front projected over into the north half of the street, not immediately opposite either of the two parked cars, but rather in the direction of the space between them. The minor was hit by an automobile driven by defendant De Benedetti, who had turned into Filbert street and was proceeding in a westerly

direction, while De Benedetti was attempting to drive through the space left open by the van and the two parked cars for traffic. The boy was picked up about six feet west of the front end of the van.

[1, 2] The first contention of appellant is that the judgment is excessive. Injuries were sustained consisting of concussion of the brain, a broken left leg (femur), (which was subsequently bored into and wired), and cuts and bruises about the boy's face. The apposition and alignment of the broken leg are good, but at times the child complains of pain, and he has an "ugly" scar on his face, the appearance of which may be improved but not entirely corrected by plastic surgery. Even if the amount awarded is larger than a reviewing court might think justified, we are not in a position to decrease it unless it appears that the verdict was the result of passion or prejudice or that it is so grossly excessive that the ends of justice warrant a reduction, which the facts do not indicate. Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601; Formosa v. Yellow Cab Co., 31 Cal.App.2d 77, 87 P.2d 716; Gladstone v. Fortier, 22 Cal.App.2d 1, 70 P.2d 255.

Section 41 of the Traffic Ordinance of the city and county of San Francisco, in effect at the time of the accident, reads: "The operator of a vehicle shall not stand or park such vehicle in a roadway other than parallel with the curb and with the two right hand wheels of the vehicle within one (1) foot of the regularly established curb line, except that upon those streets which have been marked for angle parking, as provided in this section, vehicles shall be parked at the angle to the curb indicated by such marks. The police department is hereby authorized to determine upon what streets angle parking shall be permitted and to indicate such places by the placing of white lines upon the surface of the roadway to indicate the proper angle for parking, provided that such lines shall not be placed upon, nor shall angle parking be permitted upon any street where such parking would diminish the width of the roadway available for travel to less than twenty (20) feet, nor upon any street where there is less than thirty (30) feet between the curb and the nearest rail of any street car track, nor upon any arterial street."

The above ordinance was admitted in evidence, over defendants' objection that it was "incompetent, irrelevant and immaterial, having no relation to the facts involved in this case", but upon a stipulation that no white lines had been placed on Filbert street between Mason and Taylor streets for the purpose of permitting angle parking, and that the police department had never designated such block for angle parking.

The accident occurred on the 10th day of June, 1937. Section 588 of the California Vehicle Code was amended in 1937, but did not become effective until August 27th of that year. Stats.1937, chap. 323, p. 702. This section at the time of the accident provided: "Except when loading or unloading merchandise, no person shall park or leave standing any vehicle at the curb or edge of a through State highway unless both right wheels of the vehicle are within eighteen inches of the curb or edge of such highway." Stats.1935, chap. 714, p. 1929 (see p. 193). Section 458 of the Vehicle Code, applicable to the 1935 provision of section 588 reads: "The provisions of this division are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein." Section 459 provided in part: "The provisions of this division shall not prevent local authorities within the reasonable exercise of the police power from adopting rules and regulations by ordinance or resolution on the following matters: * * * (g) Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersection."

[3, 4] The ordinance prohibits the standing or parking in a "roadway" other than with the two right hand wheels of the vehicle within a certain distance of and parallel to the established curb line, except on streets marked for angle parking. Section 588 applies to a "through State highway", vehicles engaged in loading or unloading merchandise alone being exempt from its provisions. Appellant's van was parked at an angle and was unloading merchandise. It is appellant's contention that the ordinance, undertaking as it does to deal with vehicles parked or standing at an angle to the curb, and

whether or not engaged in loading or unloading, was in conflict with section 588 and therefore invalid in that the legislature had assumed complete jurisdiction over vehicles under such conditions.

In 1935 a "highway" was defined as a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel. Vehicle Code, sec. 81, Stats.1935, chap. 27, p. 98. As the statutes provided in 1935, and still provide, a "roadway" is that portion of a highway improved, designed or ordinarily used for vehicular travel. (Vehicle Code, sec. 83.) Under the statutes in effect at the time of the accident, a "through highway" or a "through State highway" was not defined. Upon such premise, appellant contends that "roadway" is included in "through State highway". The word "highway" is not synonymous with "roadway". "Roadway" covers a territory for vehicular traffic only. "Highway" covers not only that portion used for vehicular traffic, but also that for pedestrian travel. Vehicle Code, sec. 84. A highway may have an unbroken course, or it may have intersecting byways through which other traffic may, with reasonably equal rights, enter or depart. When "stop" signs are erected at the intersecting entrances, it becomes a through highway. A highway or a through highway may be state, county, municipal or even designated as a United States highway. The State Department of Public Works may erect "stop" signs at the entrance to any state highway (Vehicle Code, sec. 471), and local authorities, except by permission from the State Department of Public Works, are prohibited from erecting signaling devices, etc., in such manner as to require the traffic on any state highway to stop before entering or crossing any intersecting highway (Vehicle Code, sec. 466), except that such local authority may designate any highway within its jurisdiction as a "through highway", erect "stop" signs, etc., and require all vehicles to stop before entering or crossing the same. Counties and municipalities are prohibited from enforcing any ordinance on a subject covered by the provisions of division IX of the Vehicle Code; section 588, contained in that division, refers to loading and unloading merchandise on a through state highway.

If the purpose of section 588 was to permit generally throughout the state angle parking when loading or unloading merchandise, it would have been a very easy matter to have used the word "highway" instead of "through State highway". The fact that prior to 1935, and subsequent thereto, the statute defined certain words and phrases is not controlling in this case. We are bound by the provisions of the statute at the time of the accident. The city and county of San Francisco was entitled and empowered to enforce regulations relative to the parking and standing of vehicles except on a through state highway.

Appellants contend that the ordinance is unconstitutional in that it applies to all highways in the city and county of San Francisco; that through state highways are under the supervising provisions of the statute. There is no evidence in the record to show that any state highway runs through or terminates in the city and county of San Francisco. Assuming one did, however, during the period in which we are interested, and that the vehicle code provisions were applicable thereto, this would not invalidate a provision in an ordinance applicable only to a city and county "roadway" if the roadway was not in fact a state highway. Section 588 does not provide a method or manner of parking vehicles on the streets or roadways of a county, city and county, or town. No conflict appears in fact or in law and the claim of unconstitutionality of the ordinance can not be successfully maintained. There is no evidence in the record indicating that Filbert street, between Mason and Taylor streets, is a "State highway" or a "through highway", state or otherwise. We conclude, therefore, that so far as the facts in this case are concerned, the ordinance in that respect is not in conflict with the provisions of the Vehicle Code. It is true that traffic regulation has gradually become a state affair, particularly as relates to speed (Ex Parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172), but when the state confines its exercise of authority to specified highways, there is scope left to the municipal authority, and the exercise of authority within that scope creates no conflict or inconsistency with the legislative scheme.

[5] Further objection is made to the constitutionality of the ordinance, in that

it vests entire control in the local police department. In a like manner, authority is rested in state departments to control state highways. To enforce an ordinance, a legislative body,—in this case the board of supervisors,—may delegate to the board or commission the right to determine a state of facts upon which an ordinance shall operate. Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577; In re McLain, 190 Cal. 376, 212 P. 620; Flynn v. Bledsoe Co., 92 Cal.App. 145, 267 P. 887; Borum v. Graham, 4 Cal.App.2d 331, 40 P.2d 866; Gould v. Western Dairy Products, Inc., 12 Cal.App.2d 188, 55 P.2d 274. A denial of such right would be " 'to stop the wheels of government' ". Union Bridge Co. v. United States, 204 U.S. 364, 387, 27 S.Ct. 367, 374, 51 L.Ed. 523.

[6, 7] The court instructed the jury: "If you find from the evidence in this case that the driver of the Lyon Van & Storage Company van stood the same on Filbert street, between Mason and Taylor streets, in violation of the provisions of the city ordinance, and that said standing of said van was a or the proximate cause of the accident in question and the injuries sustained, then I instruct you that if you so find, it is your duty to find the defendant Lyon Van & Storage Company guilty of negligence."

Appellant contends that an instruction, that the violation of an ordinance is negligence as a matter of law, is erroneous if it fails to inform the jury that it may find such violation justifiable or excusable. Mora v. Favilla, 186 Cal. 199, 199 P. 17. There is some merit in appellant's contention if the violation was in fact excusable or justifiable, that is, if the violation was beyond the control of the operator of the vehicle, as for instance if there was a cessation in the function of the mechanism of the vehicle, or failure to have a driver's license upon the person of the driver, because misplaced, or if the vehicle was operated on the wrong side of the road to avoid an obstruction. Rath v. Bankston, 101 Cal.App. 274, 281 P. 1081; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Gallichotte v. California Mutual Building & Loan Assn., 4 Cal.App.2d 503, 41 P.2d 349. "Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact * * *." (Scalf v. Eicher, 11 Cal.App.2d 44, 53 P. 2d 368, 373), but the failure to include the language in question or similar language in an instruction when the only inference that may be drawn from the evidence shows that the violation was not justifiable or excusable, is not ground for reversal.

The court also instructed the jury as follows:

"Now, speaking of the statute, and these provisions of the ordinance, and also the provisions of the State Motor Vehicle Code, under the law the violation of a statute or ordinance, except provisions relative to speed limits—the violation of a statute or ordinance constitutes negligence as a matter of law. Unless, however, such violation is a proximate cause of injury to another, it becomes immaterial. There must appear to be a causal connection between the violation of law and the injury before the defendant can be held liable.

"I instruct you that any violation of any municipal ordinance that has no proximate causal connection with the accident becomes immaterial. Therefore, even though you find from the evidence that the employee of the defendant Lyon Van & Storage Company may have violated a municipal ordinance in the manner in which he placed the van, in order to unload the same, if you further find that any such violation on his part did not proximately contribute to the accident, but that said accident was solely and proximately due to the negligence of the defendant De Benedetti, if any, or solely and proximately due to the concurrent negligence of the defendant De Benedetti and the plaintiff, Angelo Mecchi, Junior, if any, then, if you so find, I instruct you that you can not render a verdict against the defendant Lyon Van & Storage Company.

"Of course, on the other hand, if you find by the same reasoning that any violation of a municipal ordinance was the proximate cause of the accident, and you further find that said violation on the part of the defendant did proximately contribute to the accident, or did proximately contribute to it, even though the defendant De Benedetti was connected with the question of the injury, or even though he was concurrently negligent, and you find the plaintiff was not guilty of contributory negligence which proximately contributed to his injury, then you must find your verdict against the Lyon Van & Storage Company or against both defendants."

[8] Appellant contends that there was not room to stop and park the van parallel to the curb. Deliberate unlawful parking for personal convenience is not excusable or justifiable. Mason v. Crawford, 17 Cal. App.2d 529, 62 P.2d 420.

[9-11] At the request of appellant the court instructed in substance that no pedestrian shall cross a roadway other than by a route at right angles to the curb, and when crossing at any place other than a crosswalk shall yield the right of way to all vehicles upon the roadway. Ordinance 7691 (N.S.) of the city and county of San Francisco, sec. 10 (Municipal Code 1939, chap. IX, part II, sec. 20, p. 536). Appellant contends that there was an undeniable violation of the plain terms of the ordinance and that the violation may not be excused on account of the minor's age. Assuming that the minor was of sufficient age of discretion, another fact was in dispute, namely, did the minor actually violate the ordinance. Ordinary care on the part of a minor is a question of fact, but the standard is not the same as for an adult. The standard of care is measured by the exigency of the occasion. If any injury occurs as the result of the neglect or refusal to obey the law, the act of disobedience may, even on the part of a child, be a proximate cause of the accident, except where the minor is intellectually so immature that no negligence, statutory or otherwise, may be imputed to him.

[12] The court gave the following instruction:

"In other words, minors, as well as adults, are required to exercise ordinary care; but it is well settled that the ordinary care which a child is required to exercise must be determined by a different rule than is applied in the case of adults. The care which a child is required to exercise is only that degree of care which children of his maturity and capacity under similar circumstances ordinarily exercise; and this degree of care, except in a case where it can be inferred under the evidence that the child not only knew, but realized and apprehended the danger of his conduct, is to be determined—the degree of care is to be determined from the circumstances of the particular case in which his conduct is involved, and under the evidence as presented to the jury; and, of course, there is no precise age at which the law as a matter of law will hold a child accountable or unaccountable for all his actions. The question as to the capacity of a particular child at a particular time to exercise care to avoid a particular danger is one of fact falling within the province of the jury to determine.

"So, therefore, you can not find in this action that the minor plaintiff Angelo Mecchi was guilty of contributory negligence unless you find from the evidence that he did something which a child of his age and intelligence acting under the same or similar circumstances would not have done, or that he failed to do something that a child of his age and intelligence would have done under the same or similar circumstances."

Under this instruction the jury was permitted to determine whether the minor possessed sufficient intelligence to be held accountable for his actions; whether in fact he violated the terms of the ordinance. Even, eliminating the age of the child, the evidence upon this point was conflicting. The driver of the automobile at one time made a statement that there was a "flash * * * of an object running across from the curb". At another time he stated that he did not know whether the boy was running, walking or standing still. One witness testified that the boy was standing still in the street, between the two parked cars.

This case is quite similar to McKay v. Hedger, 139 Cal.App. 266, 34 P.2d 221. In that case an ice truck was parked, in violation of a statute (Cal. Vehicle Act, sec. 138, St. 1931, p. 2129), away from the curb, so that it obstructed the use of part of the street and interfered with traffic. A minor, of the age of five years and seven months, with several other children approached the rear of the truck for the purpose of obtaining small pieces of ice. An automobilist, driving by the truck, struck the minor who had run from behind the truck into the path of the oncoming automobile. The court said, pages 271, 272 of 139 Cal.App., page 224 of 34 P.2d: "On the question of contributory negligence, it must be borne in mind that Myron was an infant of tender years. Respondent suggests that under the record before us we could conclude, as a matter of law, that the child was not guilty of contributory negligence because of his age. Without deciding this question, we can dispose of this contention of appellants with the following quotation from Woodman v. Hemet Union High School District [136 Cal.App. 544] 29 P.(2d) 257, 259: 'The answer to this contention is

found in the tender years of the boy. In Barrett v. Harman, 115 Cal.App. 283, 1 P. (2d) 458, 459, a boy of the age of eleven years was injured. The court there said: "The defense of contributory negligence may be invoked in an action by or on behalf of a child where the latter was of an age sufficient to exercise discretion for the avoidance of injury; but a child is not held to the same degree of care as an adult, and is only required to exercise that degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion. There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age, and the question as to the capacity of a child at a particular time to exercise care to avoid a particular danger is one of fact for the jury. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712." ' "

[13, 14] If the employees of appellant violated a valid parking ordinance, and, conceding the correctness of the jury's implied finding that the minor was not guilty of contributory negligence, we are still faced with the question, was the evidence sufficient to show that the accident and consequent injury would not have happened but for appellant's negligent parking. In other words, were the acts of De Benedetti alone the proximate cause, or did they conjoin with the violation of the ordinance by appellant to produce this accident. The sequence of facts, one to another, and the relation of negligent precipitous acts or omissions to primary continuing negligent acts, and the determination of whether the causation was independent or concurrent are questions of fact. Whelan v. Bigelow, 33 Cal.App.2d 717, 92 P.2d 952. There is some evidence to indicate that De Benedetti in guiding his vehicle between the parked cars and the illegally parked van was forced to drive so that the presence of the minor was not readily and easily ascertainable. By the finding impliedly determining that the negligence of De Benedetti was concurrent with the negligence of the appellant, we may not interfere. In McKay v. Hedger, supra, 139 Cal.App. at pages 274, 275, 34 P.2d at page 225, the court said: "Omitting from consideration negligence arising from the violation of some law or ordinance, negligence is either positive or passive in its nature. It is the doing of some act which a reasonably prudent person would not do, or the failure to do some act, or to take some precaution, which a reasonably prudent person would do under the circumstances. It must result in some injury to person or property which must be so situated or related to the negligent actor in point of time and place that he must owe the duty of not committing the injury, and under such circumstances that the one guilty of negligence, if he had used ordinary prudence and foresight, should have foreseen that the injury was a result to be anticipated. Measured by these rules, we have concluded that the question of whether or not the parking of the ice truck in Lewis avenue at a considerable distance from the curb was negligence under the facts here disclosed was a question of fact to be determined by the jury. * * * Any adult should realize the nature of children at play and should so regulate his conduct that his carelessness does not result in unnecessary injury to them. * * The primary causation may be so continuous that a concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result."

Appellant requested an instruction that no insurance company was a party to or interested in the action. An instruction covering the same subject in a modified form, taken from the language in Brown v. Yocum, 113 Cal.App. 621, 298 P. 845, was given. In that case the appellate court did not attempt to formulate an instruction, but only to state a principle. However, without analyzing the language thereof, and assuming that appellant's offered instruction would have been more favorable to appellant, no prejudicial error resulted from the giving of the instruction in modified form.

[15] Appellant further objects that certain formula instructions did not contain certain essential elements. If not contained in each formula instruction, the same matter appears in the next instruction or in other instructions, so that it is apparent that no harm to appellant's cause resulted.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

BAY CITIES TRANSIT CO. v. CITY OF LOS ANGELES et al.*

Civ. 12608.

District Court of Appeal, Second District, Division 2, California.

May 10, 1940.

Hearing Granted July 9, 1940.

1. Automobiles ⇐62

Under statute authorizing the railroad commission to grant certificates of public convenience and necessity to passenger stage corporations notwithstanding provisions of any city ordinance or permit and providing that a regulation of the commission shall prevail over any conflicting ordinance or permit, the legislature intended to vest in the commission exclusive jurisdiction over the regulation of passenger stage corporations not operating wholly within the corporate limits of a single city. Gen.Laws 1937, Act 6386, § 50¼; Const. art. 12, § 23.

2. Municipal corporations ⇐56

The term "vested" as used in proviso that constitutional provision relating to the power of the railroad commission over public utilities shall not affect powers of control over public utilities relating to the making and enforcement of regulations "vested" in any city which the city shall vote to retain is limited to those powers possessed by a chartered city relating solely to the regulation and control of municipal affairs. Const. art. 12, § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested".

3. Automobiles ⇐62

The right to designate the route to be taken by passenger buses in Los Angeles is not a "municipal affair" within constitutional provision relating to the power of the railroad commission over public utilities and leaving unaffected the powers of a chartered city, relating to the regulation of municipal affairs, since the right of control over street traffic is an exercise of a part of the sovereign power of the state. Const. art. 12, § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

4. Municipal corporations ⇐703(1)

The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof subject to legislative control.

5. Automobiles ⇐62

Though the regulation of traffic on a public street is of special interest to the people of the municipality, it does not follow that such regulation is a "municipal affair", and if there is a doubt on question whether such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state.

6. Automobiles ⇐9

Whenever the state sees fit to adopt a general scheme for the regulation and control of motor vehicles on the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned.

7. Automobiles ⇐62

The statutory provisions giving the railroad commission exclusive jurisdiction over the regulation of passenger stage corporations not operating wholly within the corporate limits of a single city constitute a general scheme for the regulation and control of motor vehicles on the public highways of the state and supersede the authority of Los Angeles under an ordinance to designate the route to be followed by such a corporation operating buses between fixed termini or over a regular route not exclusively within the corporate limits of Los Angeles. Gen.Laws 1937, Act 6386, §§ 2¼, 50¼; Const. art. 12, § 23.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the Bay Cities Transit Company against the City of Los Angeles, the Board of Public Utilities and Transportation, a department of the City of Los Angeles, and others to prevent the Board of Public Utilities and Transportation from interfering with the operation of plaintiff's bus lines on the speedway in the Venice district of the city. From a judgment of dismissal, plaintiff appeals.

Judgment reversed with directions.

Hector P. Baida, of Santa Monica, for appellant.

Ray L. Chesebro, City Atty., and F. Von Schrader, Asst. City Atty., both of Los Angeles, for respondents.

* Subsequent opinion 108 P.2d 435.

PER CURIAM.

Plaintiff commenced this action to prevent the board of public utilities and transportation of the city of Los Angeles from interfering with the operation of plaintiff's bus line on the speedway in the Venice district of said city. Plaintiff contends that ordinance No. 58198, under the terms of which the city claims the right to divert the plaintiff's buses from the speedway, is ineffective for this purpose, since the subject matter of the ordinance is under the control of the railroad commission of the state of California. A general demurrer to the petition was sustained and, plaintiff declining to amend, a judgment of dismissal was entered from which this appeal is prosecuted.

Plaintiff operates a passenger bus line along a route lying partially within the city of Los Angeles and partially within the city of Santa Monica. In the year 1935 upon plaintiff's application for a certificate of public convenience and necessity, the railroad commission of the state of California made an order designating the route to be followed by plaintiff in operating such bus line and restricting operations to that route only. In compliance with the requirements of ordinance No. 58198 of the city of Los Angeles, plaintiff applied for and obtained a permit from the board of public utilities and transportation of such city to operate its bus line over those portions of the route designated by the railroad commission which were situated within the corporate limits of the city of Los Angeles. The only portion of such operation with which we are here concerned is the portion lying within the Venice district of the city of Los Angeles. Commencing in May, 1938, a series of hearings were held by the board of public utilities and transportation for the purpose of determining the convenience and necessity of the operation of plaintiff's buses over that portion of the designated route lying within the Venice district. As a result of these hearings the board found that the operation of buses over the portion of the designated route in question was extremely hazardous, and concluded that the portion of the operation lying within the Venice district should be rerouted in the interests of safety. Accordingly the board made its order that plaintiff's permit "be canceled, effective at 12:01 A. M., March 5, 1939, and the Company be notified that this Board will, upon receipt of proper application, grant a new permit for the operation of said bus line over the Speedway from the Los Angeles-Santa Monica City Boundary to Navy Street", one-half of the traffic to be over the old route and the other half over a newly designated route.

Ordinance No. 58198 of the city of Los Angeles grants to the board of public utilities and transportation the power to issue permits for the operation of motor buses upon the public streets of the city, whether the operation is wholly or partly within the city limits, if it be found that public convenience and necessity so require. The ordinance further authorizes the board to revoke any license or permit granted by it. Section 50¼ of the Public Utilities Act (Act 6386, Deering's Gen. Laws, 1937) provides that no passenger stage corporation shall operate its stages over any public highway without first obtaining from the railroad commission a certificate of public convenience and necessity. By section 2¼ of the Public Utilities Act a "passenger stage corporation" is defined as one which operates passenger stages over any public highway in this state between fixed termini or over a regular route which is not exclusively within the limits of a single incorporated city. The conflict between the legislative enactment and the ordinance, in so far as the latter purports to regulate operations only partly within the city limits, is at once apparent. We are called upon to determine whether the state or the city has the paramount authority and power to designate the route to be followed by a passenger stage corporation which operates motor buses between fixed termini or over a regular route not exclusively within the corporate limits of such city.

[1] Section 50¼ of the Public Utilities Act provides: "* * * The railroad commission, in the exercise of the jurisdiction conferred upon it by the constitution of this state and by this act, shall have power and authority to grant certificates of public convenience and necessity and make decisions and orders and to prescribe rules and regulations affecting passenger stage corporations, notwithstanding the provisions of any ordinance or permit of any incorporated city * * * and in case of conflict between any such order, rule or regulation, and any such ordinance or permit, the certificate, decision, order, rule or regulation of the railroad commission shall in each instance prevail." It is

manifest that in enacting section 50¼ it was the intention of the legislature to vest in the railroad commission exclusive jurisdiction in the matter of the regulation of passenger stage corporations not operating wholly within the corporate limits of a single city. The power of the legislature to grant to the railroad commission such exclusive jurisdiction appears to be settled by that portion of section 23, article XII of the state Constitution, which provides: "* * * The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. From and after the passage by the legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission * * *."

On behalf of defendants it is contended, however, that by virtue of other provisions of this same section of the Constitution, added by the amendments of 1911 and 1914, the asserted vested right of the city to enact and enforce the ordinance in question in the manner in which it is sought to be enforced is reserved to the city to the exclusion of any legislative control. These provisions of the amendments to section 23 are: "* * * provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired * * * and provided, further, that this section shall not affect the right of any city and county or incorporated city or town, to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law. * * *" Since the charter of the city of Los Angeles was amended in 1913, St.1913, p. 1629, so as to grant to the city the power to supervise, control and regulate all public utilities in the city, defendants contend that the city had a vested right to pass the ordinance in question and to enforce it in the manner in which it is sought to be enforced in this case, upon the theory that it was merely the making and enforcing of a local, police, sanitary or other regulation. It does not appear that the power which the charter amendment purports to vest in the city has ever been surrendered by vote of the city.

[2-7] It is settled that the term "vested" as used in section 23, article XII of the Constitution, is limited to those powers possessed by a chartered city relating solely to the regulation and control of municipal affairs. City of San Mateo v. Railroad Commission, 9 Cal.2d 1, 68 P.2d 713. That the right to designate the route to be taken by plaintiff's buses is not a municipal affair is evident from the language used in Ex parte Daniels, 183 Cal. 636, 639, 192 P. 442, 444, 21 A.L.R. 1172: "The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof, subject to legislative control. People v. County of Marin, 103 Cal. 223, 232, 37 P. 203, 26 L.R.A. 659: Elliott on Roads and Streets [3d Ed.] §§ 25, 505, 543, 544, 1112, 1115; Dillon on Mun.Corps. (5th Ed.) vol. 3, § 1122. The right of control over street traffic is an exercise of a part of the sovereign power of the state. Elliott on Roads and Streets, sections cited supra. While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state. The rule is that—'Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.'" The question whether or not the regulation of the use of city streets for commercial purposes is a matter for legislative or municipal control has

been decided by the Supreme Court in Morel v. Railroad Commission, 11 Cal.2d 488, at page 500, 81 P.2d 144, 150, where it is held that: "* * * whenever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned." That the provisions of the Public Utilities Act here under consideration constitute a general scheme for the regulation and control of motor vehicles upon the public highways of the state cannot be doubted.

The conclusion at which we have arrived is in harmony with the decision of the appellate department of the superior court of Los Angeles county in People v. Willert, Cal.Super., 93 P.2d 872, wherein it was held that the criminal provisions of the ordinance in question were inoperative. In the Willert case an employee of the Bay Cities Transit Company was prosecuted for driving one of the company's buses in the Venice district in the absence of a permit for such operation. The order of the trial court dismissing the action was affirmed by said appellate department in a well-reasoned opinion in which the ordinance was held to be ineffectual as being in conflict with the superior authority vested in the railroad commission.

Defendants contend that the right is reserved to the city to create franchises for public utilities and that under such right the city can control the operation of plaintiff's buses. It is unnecessary to pass upon this contention since there is no merit in defendants' claim that plaintiff's canceled permit was in fact a franchise. When the canceled permit is considered in the light of the charter provisions and ordinances relating to the granting of franchises, it is apparent that the permit was not a franchise granted "upon the terms and conditions and in the manner prescribed by law" as required by the Constitution. In this respect it is sufficient to note that many of the terms and conditions required by the charter and ordinances relating to the granting of franchises to be included in all franchises are omitted from the permit which was granted to plaintiff.

The judgment is reversed with directions to the superior court to overrule the demurrer.

39 Cal.App.2d 57

WHITE v. WHITE.

Civ. 12269.

District Court of Appeal, Second District, Division 2, California.

May 10, 1940.

1. Evidence ⇐183(14)

In action on note, testimony that witness had read correspondence between plaintiff and defendant showing that note was to run for a long period, and that such correspondence had been destroyed when plaintiff's corporate employer was placed in receivership, was sufficient basis for admission of testimony concerning contents of such correspondence.

2. Appeal and error ⇐992
Evidence ⇐187

Sufficiency of the preliminary proof of loss of a document before testimony about its contents is received is addressed to trial judge's sound discretion, whose determination on substantial evidence will not be disturbed unless proof of loss or destruction was manifestly insufficient.

3. Bills and notes ⇐60

The payee of a note had prima facie authority to fill in a blank left in note for due date, so as to make the note payable in 10 years, where there was evidence indicating intent that the note should run at least 10 years. Civ.Code, § 3095.

4. Bills and notes ⇐60

When an instrument containing a blank is delivered, the person in possession thereof has prima facie authority to complete the instrument by filling in the blank, but such instrument may be enforced against a person who became a party thereto before its completion only when the blanks have been filled in strictly in accordance with authority given and within a reasonable time. Civ.Code, § 3095.

5. Bills and notes ⇐60

Where note was delivered with due date left blank, and with intent that note should extend at least 10 years, filling in the blanks 14 years later but before commencement of action on the note, so as to make the note run for 10 years, was within a "reasonable time" and note could be enforced. Civ.Code, § 3095.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".

6. Appeal and error ⇐1010(1)
Bills and notes ⇐60

Determination of what is a reasonable time for filling in blank in negotiable instrument depends upon facts of each case, and trial court's determination that blank has been completed within a reasonable time will not be disturbed on appeal if there is substantial evidence to sustain such finding. Civ.Code, § 3095.

7. Limitation of actions ⇐48(1)

Where note was executed in 1924, with due date left blank, and in 1938 the blank was filled in so as to make the note due August 14, 1934, action commenced February 25, 1938, was not barred by 4-year statute of limitations. Code Civ.Proc. § 337, subd. 1.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Mark B. White against Orrin A. White, to recover on promissory note. From a judgment for plaintiff, defendant appeals.

Affirmed.

Arthur J. Mullen, Raymond Tremaine, and Franklin L. Knox, Jr., all of Los Angeles, for appellant.

T. W. Ward, and Brooks Gifford, both of Pasadena, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover the amount due upon a promissory note, defendant appeals.

These are the essential facts:

August 14, 1924, defendant signed and delivered to plaintiff a promissory note in the sum of $2,000. At the time of delivery plaintiff was named as payee in the note, but the space for the insertion of the due date was left blank. In March of 1938, plaintiff filled in the blank with the words "10 years", thus making the maturity date of the note ten years after date.

Defendant relies for reversal of the judgment on these propositions:

First: The trial Court committed prejudicial error in permitting a witness to give testimony as to the contents of a lost document, for the reason that a sufficient foundation had not been laid for the admissibility of the testimony.

Second: Plaintiff was without authority to insert into the note the words "ten years".

Third: Even if plaintiff had authority to fill in the blank left in the note, it was not filled in within a reasonable time after the delivery of the note.

Fourth: The Statute of Limitations (sub. 1, sec. 337, Code Civ.Proc.) has barred any right of action that plaintiff might have had predicated upon the note.

[1, 2] The first proposition is untenable. John L. Mason was called as a witness on behalf of plaintiff and testified that in 1924 he was employed as bookkeeper and cashier for Hanover Woolen Manufacturing Company, of which plaintiff was general manager, and that in the course of his duties he read the correspondence between plaintiff and defendant relative to the note which is the subject of dispute here. He testified that he read a letter written by defendant to plaintiff and placed it in the personal file of plaintiff where it remained until destroyed, when the Hanover Woolen Manufacturing Company was placed in receivership. He further testified that he had endeavored to locate the letter but without success. He was then permitted over objection to testify that the letter in substance which defendant had sent to plaintiff requested a loan of $2,000 which would have to run for a long term. He further testified after identifying the note which is the basis of the suit that a letter in defendant's handwriting accompanied the note, stating that he would be unable to commence paying on the note until such time as he had repaid a building and loan obligation and that this would require at least ten years. The admission of this testimony was proper. The rule is established in California that the sufficiency of the preliminary proof of the loss of a document before testimony as to its contents is received is addressed to the sound discretion of the trial judge (Kenniff v. Caulfield, 140 Cal. 34, 41, 73 P. 803), and that the determination of the trial judge that substantial evidence has been introduced to show the loss or destruction of the original document will not be disturbed by an appellate court, in the absence of a showing that the proof of loss or destruction was manifestly insufficient (Kenniff v. Caulfield, supra, 140 Cal. at page 42, 73 P. 803; Brown v. Gow, 128 Cal.App. 671, 673, 18 P.2d 377).

The record in the instant case fails to show an abuse of discretion on the part of the trial judge. On the contrary the testimony of the witness Mason was substantial evidence of the destruction of the document as to the contents of which he testified.

[3, 4] The second proposition is likewise untenable. The law is established in California that when an instrument is delivered which contains a blank, the person in possession thereof has prima facie authority to complete it by filling in the blank. Such an instrument, however, when completed may be enforced against any person who became a party thereto prior to its completion only when the blank has been filled in strictly in accordance with any authority given and within a reasonable time. Sec. 3095, Civ.Code. See, also, 1 Cal.Jur.(1921), sec. 18, p. 1084, and 1 Cal.Jur.Ten Year Supp.(1936) p. 259, sec. 18.

Applying the foregoing rule to the facts of the instant case, it appears that plaintiff had the prima facie authority to fill in the blank left in the promissory note by defendant and further that such completion of the instrument was done strictly in accordance with the authority given by defendant, because from the testimony of witness Mason the inference is reasonably drawn that in the letter which defendant sent to plaintiff accompanying the note he stated that he would be unable to commence paying on the note until such time as he had repaid a building and loan obligation, which would require at least ten years.

[5, 6] The third proposition is likewise without merit. A blank in a negotiable instrument must be completed within a reasonable time. Section 3095, Civ.Code. The determination of the question what is a reasonable time depends upon the facts of each particular case (Keyes v. Fenstermaker, 24 Cal. 329, 332), and the trial court's determination that the blank has been completed within a reasonable time will not be disturbed on appeal if there is substantial evidence to sustain such finding. 8 Cor.Jur.(1916) p. 188, sec. 319; Cassetta v. Baima, 106 Cal.App. 196, 200, 288 P. 830. In the present case there was substantial evidence to sustain the trial court's finding that the blank had been filled in within a reasonable time, since the evidence shows that the blank was filled in before the present action was commenced, February 25, 1938. It has been held that insertions may be made during the trial of a cause and be within a reasonable time. Cassetta v. Baima, supra, 106 Cal.App. at page 200, 288 P. 830.

[7] Defendant's final proposition is without merit. The note was executed August 14, 1924, due ten years thereafter, to-wit, August 14, 1934. The four year statute of limitations (subd. 1, sec. 337, Code Civ.Proc.) was applicable, thus making August 14, 1938, the date upon which the statute of limitations would have run. However, the present action was commenced February 25, 1938, which thus was within ample time.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: MOORE, P. J.; WOOD, J.



39 Cal.App.2d 88

ISAACS et al. v. JONES et al. (ROSS, Intervener).

Civ. 6339.

District Court of Appeal, Third District, California.

May 11, 1940.

1. Appeal and error ⇐910

Where intervener's appeal was upon judgment roll, and original complaint was not part of judgment roll, District Court of Appeal was bound to accept trial court's interpretation that original action was for specific performance of a contract and declaratory relief.

2. Parties ⇐40(3)

In action by original landowner's creditor under a deed of trust against owner's grantee and others to construe a contract, intervener, whose claim was that of a purchaser at execution sale, on a judgment against original owner, to collect rents of property from grantee during time that property was held by grantee as a tenant in possession, had no "interest" in the litigation and was not entitled to intervene, especially where intervener was claiming only

a right to collect rentals separably against each defendant. Code Civ.Proc. § 387.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Proceeding by Charles Isaacs and another, against H. M. Jones, and others, wherein Edgar Ross intervened seeking to recover the value of the occupancy of property from H. M. Jones during the time the property was held by him as a tenant in possession. From an unsatisfactory judgment, intervener appeals.

Affirmed.

J. Edgar Ross, in propria persona.

George R. Maury, of Los Angeles, for respondents.

PER CURIAM.

David R. Saunders and wife were, prior to the times herein mentioned, the owners of certain parcels of real property in the county of Los Angeles. This property was subject to a deed of trust to secure the repayment of a promissory note held by Charles Isaacs. Saunders also became indebted to J. Edgar Ross, who brought an action against him to enforce payment, and at the same time caused an attachment to be issued and levied upon the property. In time Ross obtained judgment for some $1,720, and upon an execution sale he became the purchaser of the property, and in due time received a deed thereto. In the meantime Saunders had sold his interest in the real property to H. M. Jones, respondent herein. Isaacs, not having been paid, directed the trustee to proceed to sell under the power in the trust. A receiver was appointed who ousted Jones who had been in possession. Jones had continued to occupy the property for a period of one month and eight days after Ross had received his deed therefor, and the receiver occupied the property and collected the rentals from that time until January 2, 1932, a period of six months, when Isaacs finally received his deed and the receiver discharged, after paying into court the net proceeds of his receivership to await the outcome of the litigation.

Ross, claiming to be entitled to recover some $300 from Jones for the month he used and occupied the premises, and also to recover from the receiver while in possession, intervened in the original foreclosure action of Isaacs v. Jones et al. However, in that action as to the moneys collected by the receiver (Isaacs v. Jones, 12 Cal.App.2d 98, 54 P.2d 1123), the court found that such moneys in his hands belonged to Isaacs and not to Ross. The sole issue now in this phase of the action is whether Ross, the intervener, can recover the value of the occupancy from Jones during the time the property was held by him as a tenant in possession.

The trial court here held that the original action was an action for specific performance of a contract and for declaratory relief (under the doctrine of Mines v. Superior Court, 216 Cal. 776, 16 P.2d 732), and the claim of intervener Ross being a claim at law and for an amount less than the jurisdictional requirement of the superior court, was not proper, and ordered judgment for defendant Jones and against Ross, the intervener.

[1] The original complaint is not a part of the judgment roll before us, and this being an appeal upon the judgment roll, we must accept the interpretation of the trial court that the original action was for specific performance and declaratory relief.

Section 387 of the Code of Civil Procedure states under what conditions a person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene. We do not believe that Ross had such an interest. The main action was to construe a contract, while the claim of Ross was that of a purchaser at an execution sale to collect the rents of property from the tenant in possession. He had no interest in the matter in litigation; he did not claim possession but only the right to collect certain rentals, not against both defendants alike, but separably against each.

In Horn v. Volcano Water Co., 13 Cal. 62, 73 Am.Dec. 569, the action was to foreclose a mortgage. The interveners were contract creditors of the mortgagor. They sought to intervene, alleging that the mortgage was executed in fraud by collusion of the mortgagee and mortgagor to defeat the right of interveners as creditors. The court held the intervention was improper.

In Lindsay-Strathmore Irrigation District v. Wutchumna Water Co., 111 Cal. App. 707, 296 P. 942, 943, lower riparian owners sought to intervene, alleging an attempt to deprive them of their riparian rights. The court there said: "The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. * * To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation."

[2] We fail to see wherein the appealing intervener had an interest in the matter in litigation. He had no right of possession of the property as against Jones when the action was commenced, but merely a statutory right, based upon an implied contract to collect rentals from the tenant in possession; provided no superior rights intervened. Furthermore, the complaint in intervention sets up two separate severable claims, one against the receivership estate, the other against Jones, who was not the main party in interest in the original action, but merely a proper party defendant.

The judgment is affirmed.



38 Cal.App.2d 737

In re LAIR'S ESTATE.

LAIR v. SHNELL et al.

Civ. 12611.

District Court of Appeal, Second District, Division 2, California.
May 6, 1940.

1. Wills ⇐684(7)

A beneficiary of a testamentary trust for maintenance was entitled to income during the administration of the estate.

2. Executors and administrators ⇐315(1)

It was unnecessary to set forth in order for distribution of property which testatrix directed should be held in trust for maintenance of her husband, that any part of the estate distributed to the trustee was in fact encumbered by a trust deed executed to secure payment of a sum borrowed to pay expenses of administration.

3. Executors and administrators ⇐398

Probate court acted properly in authorizing execution of a trust deed on real property which testatrix had directed should be held in trust for maintenance of her husband, in order to obtain funds to pay expenses of administration, since expenses of administration are chargeable against the principal of the estate and may not be deducted from the income.

4. Wills ⇐684(5)

Where it was necessary to borrow money secured by a deed of trust on real property of the estate which testatrix had left in trust for maintenance of her husband, to pay costs of administration, interest on money borrowed was properly paid by beneficiary of trust but trial court erred in compelling him to pay the principal before receiving further income.

5. Trusts ⇐326

In proceedings on first account of a husband, as trustee of testamentary trust, of his deceased wife, established for his maintenance, wherein beneficiaries who were to take trust estate at death of husband sought to charge husband for a sum borrowed to pay administration expenses and secured by trust deed on realty of estate, findings that it was previously ordered that encumbrance be paid from income from the whole of the estate was merely a "conclusion" of trial court, and as such, was erroneous.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

6. Executors and administrators ⇐398

An order authorizing execution of a trust deed on assets of an estate left by deceased in trust for maintenance of her husband, to secure payment of administration expenses which directed that form of deed should include an assignment of rent, to secure payment of note and that principal should be paid out of the whole estate, should be construed as directing payment of

the principal out of the corpus of the estate and not out of the income.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of Nancy Ray Lair, deceased, on the first account of John W. Lair, trustee, wherein John W. Shnell and others filed objections. From an adverse order, John W. Lair appeals.

Reversed with directions.

A. W. Brunton, of Los Angeles, for appellant.

Charles W. Cradick and William H. Haupt, both of Los Angeles, for respondents.

WOOD, Justice.

The will of Nancy Ray Lair, who died on September 7, 1934, was admitted to probate on October 18, 1934. In this will she left all her property, excepting clothing, jewelry and household furniture, to her husband, John W. Lair, as trustee. The will provided that the entire net income received from the trust estate should be "paid" to John W. Lair during his life and upon his death the trust estate should go to certain named relatives. Among the provisions of the will are the following: "This is a trust for maintenance, and I direct that the income from the trust estate be paid to the beneficiaries hereunder by my Executor, beginning from the date of my demise and continuing until distribution of the trust estate to the Trustee. (e) It is my desire that this trust be maintained for the purpose of providing the income therefrom to my said husband as long as he shall live, and I therefore do not desire that any part of my real property be sold by my said trustee, and I direct that the whole thereof be retained in the trust estate. (f) I direct my said trustee to pay all insurance, taxes and assessments against said property before using any of the income therefrom, so as to keep the title to said property clear."

John W. Lair, who was named executor as well as trustee, filed a petition in the probate court on July 2, 1936, asking for an order of the court authorizing the execution of a trust deed upon certain real property of the estate to secure the payment of the sum of $850 to be borrowed for the use of the estate in paying the expenses of administration. On July 22, 1936, the court authorized the execution of the trust deed, and in its order directed the executor to execute a deed of trust on the property therein described in favor of John Letoile "on the usual and customary form, wherein the Security-First National Bank of Los Angeles is named as trustee, which said form includes an assignment of rents, to secure the payment of said note * * *; that the interest, principal and insurance premiums shall be paid out of the whole estate of said decedent". The deed of trust was thereafter executed.

The executor presented his final account and petition for distribution on August 17, 1936. This petition was granted by the court by its order on September 10, 1936, in which order the estate was distributed to John W. Lair as trustee in accordance with the terms of the will. No reference was made in the order to the trust deed above mentioned. The first account of the trustee was filed with the court on June 20, 1939. Objections to this account were filed by beneficiaries who were to take the trust estate upon the death of John W. Lair, and upon hearing the report and the objections thereto the court ordered that John W. Lair be charged with the sum of $850 and ordered that he pay this sum to the trust estate to discharge the principal of the note and trust deed which had been previously executed before any sum could be paid to himself for his support. On this appeal the trustee claims that the court erred in making this order.

[1] The trust estate consisted of real property of the approximate value of $5,500. The executor, being also the beneficiary of the income from the estate, collected the rents from the real estate during the course of administration, out of which he paid "all insurance, taxes and assessments" as directed in the will, and from the balance of the rents received he paid to himself for his own support the sum of $995.63. This sum was used for his support during the period from September 7, 1934, to July 2, 1936. The executor was justified in making these payments to himself from the income. The beneficiary of a trust for maintenance is entitled to the income during the administration of an estate. Estate of Mackay, 107 Cal. 303, 40 P. 558. The will before us specifically provided that the trust is one for maintenance and that income from the trust estate should be paid to the beneficiary from the date

of the demise of the testatrix. In receiving for himself the income after the payment of "insurance, taxes and assessments" the appellant acted in accordance with the provisions of the will.

[2-4] The order authorizing the execution of the trust deed and the order for distribution to the trustee both became final long before the hearing on the first account of the trustee. It was not necessary to set forth in the order for distribution that any part of the estate distributed to the trustee was in fact encumbered by a trust deed. Since it was necessary to raise funds to pay the expenses of administration, the probate court unquestionably acted properly in authorizing the execution of the trust deed for the purpose of obtaining the funds. The expenses of administration are chargeable against the principal of the estate and may not be deducted from the income. Estate of Dare, 196 Cal. 29, 235 P. 725. The interest on the $850 was properly paid by the beneficiary, but the court erred in compelling him to pay the principal before receiving further income.

[5, 6] Respondents refer to a statement contained in the findings of the trial court "that by order of this court heretofore made, it was ordered that the said encumbrance be paid from the income from the whole of said estate". This statement was merely the conclusion of the trial court and as such it was erroneous. Respondents also refer to the language used by the court in its order authorizing the execution of the trust deed, in which it is said that the deed should be executed in the usual and customary form used by a bank named in the order, "which said form includes an assignment of rents, to secure the payment of said note". The reference to the assignment of rents to secure the payment of the note was inserted for the protection of the party lending the money. The order of the court expressly provided that the principal should "be paid out of the whole estate". The order should be construed as directing the payment of the principal out of the corpus of the estate and not out of the income.

The order is reversed and the superior court is directed to settle the account in accordance with the views herein expressed. The appellant shall recover costs of appeal from the respondents.

We concur: MOORE, P. J.; McCOMB, J.

39 Cal.App.2d 23

CITY OF NEWPORT BEACH et al. v. FAGER et al., and three other cases.

Civ. 12497.

District Court of Appeal, Second District. Division 2, California.

May 8, 1940.

Hearing Denied July 3, 1940.

1. Navigable waters ⇐37(4), 39(3)

Owners of upland had no right of access to waters of nearby bay over filled in tidelands, and hence title of grantees of state to such tidelands was superior to title of such owners. St.1919, p. 1011; St.1927, p. 125; St.1929, p. 1704; St.1935, p. 1493.

2. Navigable waters ⇐39(3)

The littoral owner of uplands upon a navigable bay has no right of access to waters of bay over intervening tidelands, whether filled or unfilled, which have been granted by the state to a city in trust for purpose of improving such bay in furtherance of commerce and navigation, though littoral owner may not be deprived of right of access as against a stranger.

3. Navigable waters ⇐37(2)

The Legislature may free reclaimed tideland from the public trust when such land is no longer required for navigation, commerce or fisheries, and when to do so will not substantially impair the public interest in the lands and waters remaining.

4. Navigable waters ⇐36(7)

The statute authorizing the bringing of suit against the state to quiet title to tidelands manifests intent to free the land involved from the public trust under which it had theretofore been held, in view of prior grants by state to the city, divesting state of all interest except interest as the sovereign in protecting the public trust. St.1935, p. 1493.

5. Navigable waters ⇐36(3), 37(4)

The fact that tideland is artificially raised above the line of mean high tide does not operate to divest the state of its title thereto nor change the character of such tidelands, and hence city to which such land was conveyed obtained good title to land artificially filled above the line of mean high tide.

6. Navigable waters ⇐37(4)

Where title to filled tideland had vested in city, subsequent fixing of line of mean

high tide could not detract from earlier grants of title.

7. Navigable waters ⇐39(2)

The littoral rights of an upland owner who does not own title to submerged land or tideland in front of his property are subject to termination at will by any disposition which the state may choose to make of such submerged lands or tidelands.

8. Constitutional law ⇐280
Eminent domain ⇐2(10)
Navigable waters ⇐39(3)

The right of access of littoral owners to nearby bay over intervening tidelands was always subordinate to paramount right of the state, and hence such owners were not deprived of any property right by grant of such tidelands to city and American Legion Post. St.1919, p. 1011; St.1927, p. 125; St. 1929, p. 1704; St.1935, p. 1493.

9. Navigable waters ⇐44(2)

Where tideland was artificially filled, such land was not to be treated as an "accretion" to which adjoining upland owners were entitled.

See Words and Phrases, Permanent Edition, for all other definitions of "Accretion".

10. Navigable waters ⇐44(2)

In order for littoral owner to be entitled to accretions forming upon upland, such "accretions" must have been the result of natural causes and must have been formed gradually and imperceptibly, and accretions added by artificial means do not inure to benefit of littoral owner but remain in the state or its successor.

11. Appeal and error ⇐877(6)

In actions by city and American Legion Post to quiet title to lands from the state against adjoining littoral owners, defendants could not attack findings settling title as between the two plaintiffs, on ground that conveyance to city violated statute. Gen.Laws 1937, Act 5233, § 862.2.

Appeal from Superior Court, Orange County; Benjamin F. Warmer, Judge.

Separate actions by the City of Newport Beach and Newport Harbor Post No. 291 of the American Legion against Robert Fager and others, against Alice Simmons and others, against Leta Pauline Chapman and others, and against Mary Grace Rendleman and others, to quiet title to land, consolidated for trial. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting.

Owen E. Kupfer, of Los Angeles, for appellant Brookie M. Kupfer.

Loren A. Butts and H. B. Cornell, both of Los Angeles, for all other appellants.

Roland Thompson and Rutan, Mize & Kroese, all of Santa Ana, for respondents.

WOODS, Justice.

Actions were commenced by the City of Newport, Beach and Newport Harbor Post No. 291 of the American Legion to quiet title to certain parcels of land abutting upon the shore of Newport bay. A peninsula extending in an easterly direction from the mainland separates Newport bay from the Pacific ocean and the land in question is part of this peninsula, facing northerly toward the bay. The actions were consolidated for trial and a judgment was entered in favor of the plaintiffs, from which defendants have prosecuted this appeal.

The defendants are the present and former owners of lots in a subdivision known as block 109, section B, Newport bay. The official subdivision map shows that in 1905 the lots were bounded on the north by an alley. This alley was never actually improved but was officially abandoned in 1908. The land in controversy consists principally of reclaimed tideland which was filled as a result of certain dredging operations carried on by the city between 1918 and 1923. In 1917 the United States War Department established a bulkhead line in the bay which was located parallel to and about 260 feet northerly of the center line of the alley. The material from the dredging operations was deposited in the area between such bulkhead line and the northerly boundary of block 109. After the land was filled, the City of Newport Beach constructed a street designated as Bay avenue, which is 50 feet in width, parallel to and 100 feet northerly of the center line of the alley shown on the subdivision map. Ninth and Tenth streets, which constitute the easterly and westerly boundaries of block 109, were likewise extended through such filled area to the bulkhead line.

Each defendant claims title to, or at least the right of access to navigable water over, a strip of land between the northerly boundary of his lot and the bulkhead line,

bounded easterly and westerly by the northerly prolongations of the lot lines. Defendants' claims are based upon asserted rights as littoral owners of the upland. The city claims title to the land in question by virtue of certain legislative grants as well as by private deed of the portion of the upland found by the court to have existed between the northerly boundaries of the lots in block 109 and the line of mean high tide. The several legislative grants upon which the city bases its claim of title are as follows: In 1919 the state granted to the city all tideland and submerged land within the city bordering upon or in front of the upland then owned by the city. (Stats.1919, ch. 494, p. 1011.) In 1927 the state granted to the city all tideland and submerged land bordering upon, in and under Newport bay and situated below the line of mean high tide, which had not been previously granted to the city. (Stats.1927, ch. 70, p. 125.) In 1929 the state granted to the city all tidelands, submerged lands and filled lands within the corporate limits of the city, situated below the line of mean high tide, which had not been previously granted to the city. (Stats.1929, ch. 813, p. 1704.) The American Legion claims title as the grantee of the City of Newport Beach to that portion of the land in question lying between the northerly boundary of the alley and the southerly boundary of Bay avenue in front of the lots owned by defendants.

[1] The defendants contend that when the area in question was in a state of nature the northerly boundary of their lots was the line of the mean high tide of the Pacific ocean in Newport bay and that such line was to the south of the alley above referred to. The trial court found that at all times there was upland between the northerly boundary of defendants' lots and the line of the mean high tide. Defendants now contend that these findings of the trial court are not supported by the evidence, but we find it unnecessary to pass upon this contention, for if such findings were held to be unsupported by the evidence defendants' claims would nevertheless be defeated under settled principles of law relative to the rights of littoral owners.

The decision in Koyer v. Miner, 172 Cal. 448, 156 P. 1023, 1025, is determinative of the present appeal so far as the asserted littoral rights of the defendants are concerned. In that case plaintiff, who owned land bounded by the line of ordinary high tide in San Pedro bay, sought to quiet title to certain reclaimed tideland in front of his property and to restrain defendants from maintaining structures on such filled land which prevented his free access to the navigable waters of the bay. The tidelands bordering on plaintiff's property had been granted by the state to the city of San Pedro and had been reclaimed under an agreement between the city and defendant Miner. Miner agreed to erect a seawall on the harbor front line established by the federal government and to fill the land between such seawall and plaintiff's land, dedicating certain portions thereof for use as public streets; the remainder of such filled land was to be held by Miner in fee, or if the grant of the fee was invalid, then under lease for a term of fifty years. The other defendants claimed rights in the filled land as successors in interest of Miner. In concluding that plaintiff as a littoral owner had no right of access to the waters of the bay over such filled land, the court relied upon the case of Henry Dalton, etc., Co. v. Oakland, 168 Cal. 463, 143 P. 721, and quoted the following language therefrom: "* * * when the public authorities see fit to make improvements on the land below high-water mark for purposes of navigation, the riparian owner must yield thereto. * * * The littoral rights of the defendants * * * cannot impinge upon the control by the state of tidelands for the public purposes of navigation and fishery, or affect the public easement for those purposes. * * * If such improvements have the effect of cutting off access over said tidelands from the upland lot of the plaintiff, it is no ground of complaint, because as has been pointed out, it had no right as an upland owner to the free and unobstructed access to navigable waters over said tidelands as against the right of the state to at any time devote them to the improvement of the harbor of Oakland in aid of the public easement of navigation and commerce." It was further held that the only littoral right which plaintiff had by virtue of his ownership of the upland was the right of access to the waters of the bay and that since this sole incident of littoral ownership had been rightfully terminated by the harbor front improvement plaintiff had no right to question the use to which the state was devoting such tidelands.

[2] We are satisfied that the correct rule is that the littoral owner of uplands upon a navigable bay has no right of access to the waters of the bay over intervening tidelands, whether filled or unfilled, which have been granted by the state to a city in trust for the purpose of improving such navigable bay in furtherance of commerce and navigation. City of Oakland v. Buteau, 219 Cal. 745, 29 P.2d 177; People v. Southern Pacific R. Co., 169 Cal. 537, 147 P. 274. Although it is true that as against a stranger a littoral owner of upland bordering upon navigable waters may not be deprived of his right of access to such waters, no such right exists in favor of such littoral owner as against the state or its grantee in the exercise of a lawful use or purpose. Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; San Francisco Sav. Union v. R. G. R. Petroleum & Mining Co., 144 Cal. 134, 77 P. 823, 66 L.R.A. 242, 103 Am.St.Rep. 72, 1 Ann.Cas. 182. It is apparent that if the court had found defendants to be littoral owners the result would have been the same. No rights in the filled land involved in this action could have been asserted by the defendants as against the City of Newport Beach. In dredging the bay and filling the tidelands in question the city was carrying out a plan for the general development of the bay as a harbor and at the same time was improving the harbor front. The street construction on such land facilitated easy access to the waters of the bay by the general public and all of the improvements were in furtherance of the purposes for which the city held the land in trust.

[3, 4] It is contended by defendants that the court erred in finding that the land in question had been freed from the tideland trust under which it was held by the city. The record discloses that in 1935 the legislature adopted an act authorizing the bringing of a suit against the state to quiet title to the land involved in this action. (Stats.1935, ch. 448, p. 1493.) An action was thereafter commenced by the present plaintiffs against the state to quiet title to the land in accordance with their respective interests therein. A judgment was entered adjudging each plaintiff to be the owner of the portion of the land claimed by it free and clear of any public trust. It is within the power of the legislature to free reclaimed tideland from the public trust when such land is no longer required for navigation, commerce or fisheries and when to do so will not substantially impair the public interest in the lands and waters remaining. Atwood v. Hammond, 4 Cal.2d 31, 48 P.2d 20; Knudson v. Kearney, 171 Cal. 250, 152 P. 541. There is no showing that the land in question is required for navigation, commerce or fisheries, nor is there any evidence that the public interest in the remaining land and waters has been impaired in any way. The legislative act authorizing suit to quiet title is susceptible of but one construction, i. e., that it was the intent of the legislature to free the land involved from the public trust under which it had theretofore been held for, by virtue of the prior grants to the city, the state had divested itself of all interest in such land excepting its interest as the sovereign in protecting the public trust.

[5] Defendants further contend that the city never acquired title to the land in controversy. This argument is based upon the fact that the first legislative grant to the city covered only tideland and submerged land bordering upon or in front of upland then owned by the city, defendants asserting that at that time the city owned no upland in front of block 109. In the interval between the first grant and the subsequent grants the land in dispute was artificially filled to a point above the line of mean high tide so that when the later grants of tidelands, submerged lands and filled lands "below the line of mean high tide" were made, defendants argue that no title to the filled land above the line of mean high tide was conveyed. Our answer to this contention is found in the case of Miller v. Stockburger, 12 Cal.2d 440, 85 P.2d 132. In that case, the same contention was made with respect to a similar legislative grant conveying to the city of Long Beach "all the tide lands and submerged lands, whether filled or unfilled, * * * and situated below the line of mean high tide * * *". In disposing of such contention the court states at page 444 of 12 Cal.2d, 85 P.2d at page 134: "It would seem clear that the only lands which the legislature could possibly have had in mind [i. e., in using the words "filled or unfilled"] which were not included in the description 'tide lands and submerged lands * * * situated below the line of mean high tide' would be lands which formerly had been situated below said mean high tide line, but which at the time of the grant, had been filled in such manner

as not to lose their character as tideland or submerged lands." When in 1929 the legislature granted to the City of Newport Beach all tidelands, submerged lands and filled lands situated below the line of mean high tide such grant included so much of the filled land in question as had been formerly below the line of mean high tide. The fact that tideland is artificially raised above the line of mean high tide does not operate to divest the state of its title thereto nor does it change the character of such tideland. Patton v. City of Los Angeles, 169 Cal. 521, 147 P. 141. In the Patton case it was held that a legislative grant of all the tide and submerged lands within the city boundaries included tideland which had been artificially filled prior to the time when the grant was made.

[6] The legislature in 1931 fixed the line of mean high tide in front of lots 11 to 18, inclusive, in block 109 as being coincident with the bulkhead line. Contrary to the contention of defendants, this act cannot be construed as an abandonment of the portion of the filled land which is situated between the bulkhead line and the center line of the alley. The title to the filled land having vested in the city prior to 1931, the subsequent fixing of the line of mean high tide could not detract from the earlier grants of title.

[7, 8] Defendants assert that the effect of the judgment was to deprive them of their property rights without due process and without compensation, contrary to constitutional guarantees. It must be borne in mind, however, that the littoral rights of an upland owner who does not own title to the submerged land or tideland in front of his property are, under the law in this state, subject to being terminated at will by any disposition which the state may choose to make of such submerged lands or tidelands. Koyer v. Miner, supra; City of Oakland v. Buteau, supra. Defendants as littoral owners are being deprived of no property right since their right of access over the intervening tidelands to navigable water was a qualified right at all times subordinate to the paramount right of the state in which title to such tidelands was vested. No right of action exists in favor of a littoral owner whose right of access over the tidelands to navigable waters has been cut off by the disposition which the state has made of such tidelands. Koyer v. Miner, supra.

[9, 10] All of the evidence relating to the character of the major portion of the land in question shows that it is artificially filled tideland. There is therefore no merit in the argument of defendants that such land is to be treated as an accretion to which they, as the respective upland owners, are entitled. In order for a littoral owner to be entitled to accretions which may form upon the upland, such accretions must have been the result of natural causes and must have been formed gradually and imperceptibly. City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789. Accretions which have been added to the upland by artificial means do not inure to the benefit of the littoral owner but remain in the state or its successor in interest. Dana v. Jackson Street Wharf Co., 31 Cal. 118, 89 Am.Dec. 164; Patton v. City of Los Angeles, supra.

[11] The suggestion of defendants that the city was without power to convey title to the portion of the land claimed by the American Legion because of the asserted prohibition against such conveyance which is found in section 862.2 of the Municipal Corporation Bill (Deering, Gen.Laws, Act 5233) does not merit extended discussion. In no event could defendants have been prejudiced for, if the American Legion does not own the land under a valid deed from the city then such land is owned by the city. In either instance the land would be owned to the exclusion of any asserted claim of defendants, who are not on this appeal in position to attack the findings settling the title to the land as between the two plaintiffs. Fouch v. Johnston, 199 Cal. 437, 249 P. 852; Clapp v. Lorraine, 92 Cal.App. 270, 267 P. 911.

The judgment is affirmed.

I concur: MOORE, P. J.

McCOMB, J., deeming himself disqualified, did not participate in the decision.

39 Cal.App.2d 1

In re MARINOS' ESTATE.

MARINOS et al. v. MARINOS.

Civ. 11284.

District Court of Appeal, First District, Division 1, California.

May 8, 1940.

1. Wills ⇐751, 812

Under will making specific bequests of personalty and bequest of residue of personalty to sons and devise of all realty to wife, and providing that debts should "be paid out of my estate", the devise of realty to wife was not a "specific devise" and hence was subject to bear a proportion of the estate's debts and expenses of administration. Probate Code, §§ 750, 753.

See Words and Phrases, Permanent Edition, for all other definitions of "Specific Devise".

2. Wills ⇐756

A devise or bequest of all realty or all personalty is not a "specific devise or bequest" but is "general devise or bequest". Probate Code, §§ 750, 753.

See Words and Phrases, Permanent Edition, for all other definitions of "Specific Devise or Bequest" and "General Devise or Bequest".

3. Wills ⇐812

Under will making specific cash legacies to two sons and bequeathing all the rest of testator's personalty to two other sons, specific legatee was entitled to priority and to satisfaction out of proceeds of sale of other personalty, as against contention that he should be paid only out of cash on hand and that all other personalty should go to other sons even if there were no cash. Probate Code, § 751.

4. Wills ⇐816

Where cash legacy was payable out of proceeds of sale of personalty with preference over residuary bequest of personalty, and not merely out of cash on hand, beneficiaries of such legacies could object to ruling improperly exonerating real property from its proportion of the burden for debts of estate and expenses of administration.

5. Husband and wife ⇐273(4)

In the absence of expression of contrary intent, the entire community property, including interest of surviving widow, is subject to payment of debts and of expenses of administration after husband's death. Probate Code, § 202.

6. Wills ⇐827

If will designates that debts be paid from husband's interest in community property, wife's share of community property is exonerated if husband's share is sufficient. Probate Code, § 202.

7. Husband and wife ⇐273(4)
Wills ⇐827

Under husband's will providing that all debts and funeral charges should "be paid out of my estate", the words "my estate" could only refer to that estate or property over which husband had the right of testamentary control, not to wife's share of community property, notwithstanding recital that "all my property * * * is my own separate property", and hence wife's share of community property was properly exonerated from liability for debts and expenses of administration. Probate Code, §§ 202, 751.

8. Husband and wife ⇐273(4)
Wills ⇐830

A devise of "all my real property" to testator's wife, following cash legacies and bequest of "all the rest of my personal property" to sons, was not intended as a "residuary devise" within meaning of statutes making residuary devises primarily subject to payment of debts and administration expenses. Probate Code, §§ 125, 126; § 161, subd. 4.

The term "residuum" implies that something has been taken from the class of property involved, and what remains is the "residuum".

See Words and Phrases, Permanent Edition, for all other definitions of "Residuary Devise" and "Residuum".

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Dionisios Marinos, deceased, wherein Konstantinos D. Marinos filed accounts showing distribution opposed by Andreas D. Marinos and another. From a decree of final distribution, the objecting parties appeal.

Reversed and remanded.

William Farnum White, of San Francisco, for appellants.

Theodore L. Breslauer, of San Francisco, for respondent.

PETERS, Presiding Justice.

Andreas D. Marinos, a legatee and son of the decedent, and a partial assignee of Andreas, appeal from the decree of final distribution in the above-entitled estate. The controversy between appellants and respondent (the executor of the estate) arises over the fact that all of the personal property in the estate was consumed in the payment of debts and expenses of administration. If the real property (all devised to the widow) is chargeable with a proportionate part of such debts and expenses, appellants will receive a portion of Andreas' legacy. By the decree appealed from no portion of the debts and expenses was charged against the realty, with the result that Andreas and his partial assignee received nothing.

The facts are as follows: By his will the decedent devised and bequeathed his entire estate as follows:

"Second: All my property, real and personal, of every kind and character, and wheresoever situated, is my own separate property.

"Third: My will is that all my just and lawful debts and funeral charges shall, by my executor hereinafter named, be paid out of my estate as soon after my decease as shall to my executor be convenient and that my said executor expend for my funeral the sum of Two Hundred ($200.00) Dollars, and no more.

"Fourth: All the rest, residue and remainder of my estate and effects, of whatsoever nature and kind, and wheresoever situated, which at the time of my decease I may be possessed of or entitled to, and which is not hereinbefore disposed of, I give, devise, and bequeath as follows, to-wit:

"1st: To my beloved son, Anastasios D. Marinos, now residing in the City and County of San Francisco, State of California, the sum of Ten ($10.00) Dollars, and no more, for the reason that I have already given him Thirteen Thousand ($13,000.00) Dollars, and my promissory note for Two Thousand ($2,000.00) Dollars.

"2nd: To my beloved son Andreas D. Marinos, now residing in the City of Athens, Republic of Greece, the sum of Four Thousand ($4,000.00) Dollars, and no more.

"3rd: To my beloved sons, Konstantinos D. Marinos and John D. Marinos, now both residing in the City and County of San Francisco, State of California, all the rest of my personal property (except the furniture of the house and as hereinafter mentioned in paragraph fourth (4th), to be divided between them share and share alike.

"4th: To my beloved wife Stavroula D. Marinos, now residing in the City and County of San Francisco, State of California, all my real property, together with the furniture contained in my house, No. 22 Ringold Street, San Francisco, California."

The estate, which was in fact community property of the testator and his wife, consisted of two parcels of real property, undivided third interests in two other parcels of real property, $291.16 in cash, and certain shares of stock. The stock was sold in the course of administration for $1,450.34. During the course of administration the executor received $77.51 as dividends on the stock, and net income from the realty in the amount of $854.36. The gross value of the entire property, both real and personal, was a little over $23,400, of which one-half was awarded to the widow by virtue of her community property interest. Debts and expenses of administration, exclusive of executor's and attorney's fees, amounted to $1,473.28, and to $3,124.36 including such fees. Upon the hearing of the account and petition for distribution the executor and attorney waived fees in excess of the amount of approximately $1,200 cash then on hand, over and above debts and other expenses. The accounts of the executor showed that he had applied all of the personal property to the payment of the debts of the estate. Under the decree appealed from, all the remaining cash on hand ($1,199.97) was applied to the payment of executor's and attorney's fees.

The major contention of appellants is that the real property should bear a proportionate part of the debts and expenses of administration, and that the widow should either be compelled to pay into the estate a sum representing this proportion or that real property sufficient to pay this sum should be sold before distribution.

[1] We agree with appellants that the real property should bear a proportion of the debts of the estate and expenses of administration. Under the provisions of section 750 of the Probate Code resort is had to the estate of a testator to pay debts and expenses of administration as follows: (1) To property designated by the will to be thus applied; (2) to property not disposed of by will; (3) to property given to residuary legatees and devisees; and (4) "thereafter all other property devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate." See, also, sec. 753, Probate Code.

[2] It is to be noted that the section makes no distinction between realty and personalty as to the order of application of the assets of an estate to the debts and expenses of administration. Applying the section to the will here involved, it is to be noted that the testator did not designate specific property to be applied to the payment of debts and expenses of administration, merely directing that debts should "be paid out of my estate". Nor does the will fail to dispose of any property. Its provisions are clearly all-inclusive so as to include the entire estate of the testator. The holding of the trial court exonerating the real property cannot be sustained on the ground that the devise of all the real property to the wife is a specific devise, and therefore exempt from liability for debts and expenses under the last portion of section 750. A devise or bequest of all real property or all personal property is not a specific devise or bequest, but is general. This matter was exhaustively considered and discussed in Matter of Estate of Woodworth, 31 Cal. 595, at pages 601 to 604, and pages 610 to 614. See, also, Estate of Ratto, 149 Cal. 552, 86 P. 1107, and Estate of Painter, 150 Cal. 498, 89 P. 98, 11 Ann.Cas. 760. In 88 A.L.R. 553, there is an annotation entitled: "Bequest or devise of all testator's personal property or real property as general or specific." At page 554 of 88 A.L.R. it is stated: "The rule sanctioned, seemingly without dissent, by the cases, is that, in the absence of a clearly expressed intention of the testator to the contrary, a bequest of all of the testator's personal property, an aliquot portion of it, the remainder of the personal property, or any bequest in similar general terms, is a general and not a specific legacy." In reference to real property the rule in United States, contrary to the rule that existed at common law, is stated as follows (88 A. L.R. at page 560): "However, in the majority of cases decided in this country it is held that the question whether a testamentary gift of real estate is specific or general is to be governed by the same rule as where the subject of the gift is personal property; that is, that in the absence of a clearly expressed intention of the testator to the contrary, a devise of real property in general terms, such as 'all' of the testator's property, or the 'remainder' of the testator's property, will be held general, rather than specific." Various California cases are cited in support of this rule. Under these cases, the devise in subdivision 4th of paragraph fourth of the will, supra, devising "all my real property" to the wife must be held to be a general and not a specific devise. See, also, 11 Cal.Jur. Ten Year Supp. 588.

Respondent urges that under the will the $4,000 bequest to Andreas could be satisfied only from one-half the cash on hand at the testator's death—that is, from one-half of the $291.16, and that Andreas has no legal interest in the other personal property—the dividends and the stock. Apparently, it is the theory of the respondent that even if the real property should have been compelled to carry a portion of the burden of the debts and expenses of administration and was improperly exonerated therefrom, appellants are in no position to complain. It is contended that Konstantinos and John as the legatees of "all the rest of my personal property" except the furniture, are the only ones who could complain of the error, if one was made. This is on the theory that the legacy to Konstantinos and John was a bequest of the stock, and that the cash legacy to Andreas could be paid only from the cash on hand at the death of the testator. This presents a question of construction of the will. Section 751 of the Probate Code provides:

"The property of a testator, except as otherwise provided in this code, must be resorted to for the payment of legacies in the following order:

"(1) The property which is expressly appropriated by the will therefor.

"(2) Property not disposed of by the will.

"(3) Property which is devised or bequeathed to a residuary legatee."

[3, 4] It seems quite clear that the bequest to Konstantinos and John, considering its terms, and its position in the will immediately following the cash legacy of $4,000 to Andreas, reasonably means that the rest of the testator's personal property remaining after discharging the $4,000 bequest to appellant shall go to Konstantinos and John. To construe the will as providing that Andreas should get his $4,000 cash legacy only from cash on hand and that all other personal property was to go to Konstantinos and John even if there were no cash, would be to entirely disregard the priority obviously intended for Andreas. It is our opinion that the will directed that personalty remaining after discharging the $4,000 cash legacy was to go to Konstantinos and John. Under this analysis of the terms of the will the proceeds from the sale of the stock and the dividends are applicable to payment of the cash legacy as property which is expressly appropriated by the will to such payment within the meaning of section 751 of the Probate Code. It follows, of course, that appellants therefore may object to the ruling of the trial court improperly exonerating the real property from its proportion of the burden for debts and expenses of administration, and unduly and improperly burdening the personalty with these obligations.

[5-7] This disposes of all points urged by the appellants before the trial court and in their briefs filed before the oral argument. At the time of argument the court suggested two other points that had not been raised in the court below or in the briefs. The first of these is whether the community property interest of the wife should be charged with a proportionate share of the debts and expenses of administration. The law is clear that in the absence of an expression of a contrary intent, the entire community property, including the interest of the surviving widow, is subject to the debts and expenses of administration upon the death of the husband. Estate of Chanquet, 184 Cal. 307, 193 P. 762; sec. 202, Probate Code; see, also, Estate of Haselbud, 26 Cal.App. 2d 375, 79 P.2d 443; 11A. Cal.Jur., p. 491, sec. 358. The converse is also true—that is, if the will designates that debts should be paid from the interest of the husband, the wife's share of the community property is exonerated, if the husband's share is sufficient to pay all such debts and expenses. Thus, in Estate of Chanquet, supra, the will directed that the wife was to receive her one-half of the community property, and a life estate in the residuum of the estate "after paying and discharging all my debts, the cost of my last illness and burial, the cost of administration of my estate * * *". The Supreme Court reversed the court below, and held that the quoted phrase, when taken in connection with the other provisions of the will, should be interpreted to mean that the testator had designated that debts and expenses of administration must be paid out of the husband's share of the community property. In the instant case the testator declared, in paragraph second of the will, that: "All my property, real and personal * * * is my own separate property." Then in paragraph third he stated: "My will is that all my just and lawful debts and funeral charges shall, by my executor hereinafter named, *be paid out of my estate* as soon after my decease as shall to my executor be convenient * * *." (Italics ours.) The respondent argues that by the italicized portion of this paragraph the testator has definitely expressed his intention that debts and expenses should be paid out of his estate alone. Although the clause is not as clear as the comparable provision in the Estate of Chanquet, supra, we agree with this interpretation of this paragraph. In its correct sense the words "my estate" could only refer to that estate or property over which the testator had the right of testamentary control—it could not refer to the wife's share of the community property over which he had no such control. Appellants place some emphasis on paragraph second, declaring that: "All my property * * * is my own separate property", and contend that by that paragraph the testator declared that all the property, including the wife's share of the community, was his separate property. We cannot presume that the testator intended by this clause to attempt to will away his wife's share of the community property over which he must be presumed to know he had no power of testamentary disposition. What is probably meant by that clause is that "my property" refers to his share of the community, and that the testator intended to declare that no other person had

any interest in his share of the community property. In view of this construction of the terms of the will it must be held that the trial court properly exonerated the wife's share of the community property from liability for debts and expenses of administration.

[8] The second point raised at the time of oral argument must also be decided in favor of respondent. Appellants contend that the devise of "all my real property" to the wife, when considered with the bequest of "all the rest of my personal property" to Konstantinos and John is a residuary bequest, and that not only should all expenses of administration and debts of the estate be paid solely from the real property, under section 750 of the Probate Code, but that under section 751 of that code the executor must sell sufficient real property to satisfy the $4,000 bequest of Andreas in full. These two results would follow if appellants' construction of the will were correct. However, when the will is read as a whole, it seems to us that the devise of "all my real property" was not intended as a residuary devise within the meaning of sections 750 and 751 of the Probate Code. The will shows a studied attempt to treat the personalty and the realty separately. As already pointed out, the testator wanted Andreas to have $4,000 of the personalty and Konstantinos and John to have the balance of such personalty, if any should exist. But, when he came to the real property, he stated that "all my real property" should go to his wife. A residuary bequest is defined in section 161, subdivision 4, of the Probate Code as follows: "A residuary legacy embraces only that which remains after all the bequests of the will are discharged." In other words, the term "residuum" implies that something has been taken from the class of property involved, and what remains is the residuum. 54 Cal. Jur., p. 715; 69 Cor.Jur., p. 925, § 2093. Thus it has been held that a general residuary clause passes whatever may remain of the testator's estate after the defined devises and legacies have been satisfied. Estate of Hall, 183 Cal. 61, 190 P. 364; 26 Cal.Jur., p. 958, § 260. In the instant case nothing was taken from the real property at all—all of the real property was devised to the wife. There was nothing left after satisfying other devises of real property. The Probate Code itself recognizes the distinction between a true residuary clause and a devise or bequest of "all my property". Section 125 of that code provides that: "A devise * * * of all the testator's real * * * property * * * passes all the real * * * property which he was entitled to dispose of by will at the time of his death * *." Section 126 provides that: "A devise of the residue of the testator's real property * * * passes all the real * * * property * * * which he was entitled to devise * * * at the time of his death, not otherwise effectually devised * * * by his will." The general devise mentioned in section 125 must be held to be property "otherwise effectually devised" by the will within the meaning of section 126.

The decree of distribution is reversed and the matter remanded for proceedings not inconsistent with the views herein expressed.

We concur: KNIGHT, J.; WARD, J.

39 Cal.App.2d 42

PEOPLE v. ONE 1938 BUICK SEDAN, ENGINE NO. 43502146 et al.

Civ. 2292.

District Court of Appeal, Fourth District, California.

May 9, 1940.

1. Forfeitures ⇐5

One who claims a lien on automobile incurring forfeiture for violation of narcotic law has burden of proving the making of a reasonable investigation of automobile owner's moral responsibility, character and reputation, before creation of the lien, in order to be entitled to exemption from the forfeiture. Gen.Laws 1937, Act 5323, § 15.

2. Forfeitures ⇐5

Where a lienor claims lien on automobile which has been seized for violation of narcotic law and seeks exemption from forfeiture, question of extent and reasonableness of investigation made by lienor concerning owner's moral responsibility, character

and reputation, before creation of the lien is primarily a question of fact. Gen.Laws 1937, Act 5323, § 15.

3. Forfeitures ⇐5

The assignee of conditional sales contract covering automobile which was seized because of its use in violating state narcotic law, had duty on appeal to set out all evidence bearing on question of whether reasonable investigation of automobile purchaser's moral responsibility, character and reputation had been made, before the assignment was made, in order to enable the reviewing court to determine whether finding that no reasonable investigation was made was supported by the evidence. Gen.Laws 1937, Act 5323, § 15.

4. Forfeitures ⇐3

An assignee of a conditional sales contract covering automobile which is sought to be forfeited because of purchaser's use of automobile in violating narcotic law, is not entitled to use evidence obtained in investigation made by original conditional vendor concerning the character of the purchaser in support of the assignee's claim for exemption from forfeiture, unless the assignee makes inquiry of the seller concerning the information obtained by him, or otherwise obtains such information from the seller. Gen.Laws 1937, Act 5323, § 15.

5. Forfeitures ⇐3

Assignee of conditional sales contract covering automobile was not entitled to rely on investigation made by seller concerning moral responsibility, character and reputation of purchaser, in order to support assignee's claim for exemption from forfeiture of automobile which was used by purchaser in violating narcotic law, where seller's information concerning purchaser's character, reputation or moral responsibility was not obtained from seller by assignee. Gen.Laws 1937, Act 5323, § 15.

6. Forfeitures ⇐5

In proceeding for forfeiture of automobile because of its use by purchaser in violating narcotic law, evidence did not establish as a matter of law that assignee of conditional sales contract under which the automobile was sold conducted reasonable investigation of moral responsibility, character and reputation of purchaser so as to entitle assignee to avoid forfeiture and trial court's conclusion that the facts relied upon were legally insufficient to constitute reasonable investigation under circumstances was justified. Gen.Laws 1937, Act 5323, § 15.

7. Forfeitures ⇐5

Finding that right, title and interest in automobile of assignee of conditional sales contract under which automobile was sold was not created after reasonable investigation of moral responsibility, character or reputation of purchaser so as to entitle the assignee to avoid forfeiture of automobile which was used by purchaser in violating state narcotic law was sufficient on issue of reasonable investigation. Gen.Laws 1937, Act 5323, § 15.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Forfeiture proceeding by the People of the state of California against One 1938 Buick Sedan, Engine No. 43502146, and another. From an adverse judgment, defendant Bank of America National Trust & Savings Association appeals.

Affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and John E. Walter, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

This proceeding is one by the People of the State of California for the forfeiture of a 1938 Buick sedan, after the seizure of the automobile under the provisions of section 15 of the State Narcotic Act (Act 5323, Deering's Gen.Laws, 1937, p. 2600, Stats.1929, p. 380, as amended). The purchaser of the Buick automobile was a negro by the name of William J. Speed, and the conditional vendor was an automobile dealer by the name of Vincent E. Wood. Subsequent to the sale of the automobile Wood assigned the conditional sales contract to appellant. Issue was joined by the appellant on the ground that a reasonable investigation of the moral responsibility, character, and reputation of the purchaser had been made prior to the sale and the assignment, and on the further ground that the respondent's notice did not allege facts sufficient to constitute a cause of action. From an adverse judgment in the trial court appellant has perfected this appeal.

On March 19, 1938, Speed purchased from Wood the automobile involved herein. He was allowed $500 for a used car traded in, and signed a conditional sales contract for the balance of the purchase price. Wood had an agreement in writing with the appellant that he could discount such automobile contracts as the bank found acceptable and that he would receive immediate credit to his account for such contracts delivered to the bank, with the right in the bank to make an investigation of the desirability of such contracts and if the bank did not want to purchase any contract it could be rejected and the amount thereof charged back to Wood's account within fifteen days from the date of the credit allowed for that particular contract. It was stipulated by the respondent that the sale of the Buick automobile to Speed and the sale and assignment of the contract to the bank was bona fide in every respect and that neither Wood nor the bank had any knowledge that the automobile was or would be used to violate the Narcotic Act. On January 20, 1939, this Buick automobile was seized for a violation of the State Narcotic Act. In regard to this fact, Speed had placed the car in a private garage and after his arrest, two bindles of opium were found in the car. Speed later pleaded guilty to the charge of violating the State Narcotic Act and was imprisoned.

The position of the bank is that it claims it has an interest in the Buick under its conditional sales contract to the amount of $638.05, and that any equity or amount over this figure is correctly forfeited to the state. There can be no contention but that defendant automobile incurred a forfeiture and that the judgment is proper, unless appellant has established some affirmative defense to the forfeiture of its interest therein.

The main question on this appeal is whether appellant sustained the affirmative defense that its interest in the automobile was created after a reasonable investigation of the moral responsibility, reputation and character of the purchaser thereof. The discussion of this question may conveniently be divided into two parts, viz., the purported investigation made by the original owner of the automobile, and the purported investigation by the appellant prior to its purchase of the conditional sales contract.

[1-3] It is provided in the State Narcotic Act that one claiming a lien upon or title to an automobile incurring a forfeiture may prove that his interest therein was created after a reasonable investigation of the purchaser's moral responsibility, character and reputation, as an affirmative defense to, or an exemption from the forfeiture. The burden of proving that such an investigation was made rests upon the claimant. People v. One Pontiac 8 Sedan, 22 Cal.App.2d 503, 71 P.2d 302. Undoubtedly the question of the extent and reasonableness of such an investigation is primarily a question of fact, although certain investigations have been held insufficient as a matter of law. People v. One Harley-Davidson Motorcycle, 5 Cal.2d 188, 53 P.2d 970; People v. One Packard 6 Touring Sedan, 26 Cal.App.2d 150, 79 P.2d 130. Appellant does not, in its brief, set out all of the evidence bearing on the question of whether a reasonable investigation was or was not made. In view of a finding that no reasonable investigation was made, it rests upon appellant to set out all the evidence on the issue to enable this court to determine whether the finding is, in fact, supported. This court should not be required to search through the evidence to discover whether the evidence supports the findings and judgment, and without a more extensive showing by appellant, this court ordinarily would be required to conclude that the evidence does support the findings. However, we will point out portions of the evidence which bear upon this subject. The first phase of the asserted investigation was that claimed to have been made by the conditional vendor, Wood.

A Mr. Schaeffer, sales manager for Wood, met Speed through a negro employee of Wood, two years prior to 1938, and tried on several occasions to sell him a car. Speed owned or was then working in a shoe repair shop. He (Schaeffer) claimed that he had called at Speed's home on one occasion. When the Buick was sold to Speed, Wood obtained a purchaser's statement from him, which set forth his business and income. He gave a reference. Schaeffer talked to the reference and was unable to give any of the conversation except that he learned nothing detrimental to Speed's reputation. He also talked to an employee of a credit company, which company held a contract on the Dodge touring sedan that Speed traded in on the Buick.

He found that payments had been made promptly on the Dodge contract and that Speed was "O.K." as a financial risk. Schaeffer later, and after the contract was signed, telephoned a credit association and obtained a report from them about his credit rating. Briefly, the substance of the information obtained by the investigation made by appellant bank was that the branch manager had checked over the purchaser's statement which had been turned over to him by Wood; obtained a report on credit rating from the Merchants' Credit Association of Santa Barbara; talked to a William Boykin, the reference above mentioned, and was advised by him that he had known Speed for the past fourteen years and that he did not know anything wrong about him. The branch manager was questioned as to whether or not the credit association reports would show any arrest or conviction for crimes. His answer was that he had obtained these reports for the past fourteen years and that "plenty" of the reports did show arrests and criminal convictions for crimes which came to the attention of the association through its members. Another witness testified that he had never seen criminal records reflected in such reports.

Respondent then showed by the evidence that Speed had, prior to the sale of the car in question, been convicted of the crime of grand larceny and served a term in the United States prison at Leavenworth upon such conviction; that he was a panderer and his wife was a prostitute; that he had had numerous arrests for vagrancy, the particular acts of vagrancy being that he was a panderer and a lewd and dissolute person; that he was reputed to have been engaged in the narcotic traffic prior to the time of his arrest and the seizure of the instant automobile.

The evidence of the arresting officer in this regard was to the effect that he was acquainted with this 1938 Buick sedan, and the circumstances under which he became acquainted with it were, that he had made several efforts to apprehend Speed; that on January 19, 1939, he received information that Speed was leaving Santa Barbara for Bakersfield with $20 worth of opium to be delivered at 906 Eleventh street in that city; that he checked on this information and found that the money had been sent; that he checked on a telephone call that had been put in, and with a government inspector went on the "spot or stake-out" about five minutes after midnight on the 20th of January; that Speed's car passed them on one of the streets in Bakersfield and that he parked his car in a garage, locked the doors and crossed the street to the address above mentioned, where he stayed for about twenty minutes; that he came back to the garage, opened the doors, and took out a suitcase from the rear of the car, went to the glove compartment of the car and took out a small package, relocked the car and went back into the house. At about 2:30 o'clock in the morning the officers raided the house and found Speed and two women, including Speed's wife, smoking opium. He arrested them, searched the car, and subsequently found the opium above mentioned. Speed admitted that he bought the opium in Santa Barbara from some Italian; that he was an ex-convict; that his wife was working as a prostitute; and that he was a pimp. Speed told the officer that he was going to plead guilty to the charge of transportation of narcotics since October, 1938.

Respondent further introduced evidence in rebuttal that the address given to the conditional seller by Speed was fictitious and that this was known to appellant through the report of an insurance company affiliate made in connection with the latter's investigation of Speed as an insurance risk.

Appellant now claims that under these facts the investigation conducted was at least as much, if not greater than the investigation which would have been made concerning a conditional sales contract on an automobile by any reasonable person; that it exceeded the requirements of section 15 of the State Narcotic Act and that full compliance having been made, the judgment of the lower court should be reversed, giving appellant a judgment for the amount of its lien.

A review of the cases pertaining to the sufficiency of the investigation, or in other words what a reasonable investigation is under section 15 of the Narcotic Act, discloses that there are but few cases involving forfeitures. As collated, they are briefly as follows:

In People v. One Ford V8 Tudor Sedan, 12 Cal.App.2d 517, 55 P.2d 908, the rights of a conditional sales vendor and its assignor were in issue. The ground upon which the appeal was taken was that the record disclosed no evidence showing com-

pliance by the complainant or its assignor with the provisions of section 15(e) of the Narcotic Act. The evidence on the subject was not related, but the court sustained the State's contention and in disposing of the question said that because respondent had made no attempt to dispute any of the points made by the State with respect to the reasonable investigation of the responsibility, character and reputation of the purchaser, the decision of the trial court in favor of the respondent was not supported by the evidence. The appellate court reversed the judgment and ordered the car forfeited to the state.

In People v. One Lincoln 8 etc., 12 Cal. App.2d 622, 55 P.2d 925, the conditional vendor inquired at the purchaser's bank as to his financial standing and interviewed two references. One reference stated that the purchaser was "a good old soak" and the other told her he was "a very fine gentleman". In reversing the trial court on the question of the sufficiency of the evidence to justify the finding that the vendor had made a sufficient investigation as to the moral responsibility, character and reputation of the vendee, the appellate court held the investigation legally insufficient.

In People v. One LaSalle, etc., 23 Cal. App.2d 237, 72 P.2d 766, although no evidence was offered by the conditional vendor as to its investigation, the court held that the burden of proof was upon the claimant to show that the conditional vendor had made a reasonable investigation of the purchaser's responsibility, character, and reputation, and in the absence thereof, the State was entitled to a judgment of forfeiture without showing on its part that the vendor by conducting a reasonable investigation could have discovered facts which would have put a prudent seller on inquiry as to the possible legal or illegal use of the automobile.

In People v. One Pontiac 8 Sedan, supra, the rights and duties of an assignee of a conditional sales contract are clearly set forth. Although it was apparent that no investigation was made by the assignee, the court held that the State was not required to show that such an investigation would have developed knowledge of the intended illegal use.

In People v. One Plymouth Sedan, etc., 21 Cal.App.2d 715, 69 P.2d 1011, the registered owner loaned an automobile to a third party from whose possession it was taken for a violation of the State Narcotic Act. The appellate court affirmed the trial court's finding that a reasonable investigation had been made of the purchaser by the finance company. The evidence showed that the vendee was a butcher by trade and had been employed in a market; that his employer was visited by an agent of the finance company who made inquiry concerning his character and reputation and was assured that he was all right. A certain credit association had also assured the finance company that the purchaser was responsible.

In People v. One Harley-Davidson Motorcycle, supra, the vendor sold a motorcycle to a Chinese boy named Lee, after making what was contended to be a reasonable investigation. This consisted of obtaining the names of three references, one a 17-year-old Chinese boy and another the name of the Chinese firm by whom the purchaser was employed. The vendor inquired of the latter's employer only whether he was employed there. The Supreme Court held that such investigation was insufficient, and said: "The evidence as to efforts to check on the whereabouts and activities of Lee, made when he was found to be an offender, most strongly indicates that the seller of the motorcycle would not, as a reasonably prudent man, have entered into the contract if he had sought any reliable information about Lee." [5 Cal.2d 188, 53 P.2d 971.]

In People v. One Packard 6 Touring Sedan, 26 Cal.App.2d 150, 79 P.2d 130, the court held that there was no reasonable investigation, where an employee of the seller testified that he asked a garage man about the purchaser's character and financial status and was told that she was a very wonderful woman, had a good standing in the community, and came from a very nice, wealthy family, but the garage man testified that no such inquiry was made, that the only inquiry made of him was as to her credit standing, and that he knew her only as a customer and had no other information to give.

[4-6] Appellant claims that in the establishment of its claim of title or interest it is entitled to rely, not only upon the independent investigation made by it, but in addition, the investigation made by the original conditional vendor. We are inclined to the opinion that unless the assignee makes inquiry of the vendor as to the information obtained by him, or other-

wise obtains such information from him, the assignee would not be entitled to use such evidence in support of its claim. If the interpretation be otherwise, any original vendor might discover, after an incomplete investigation, that he had sold a car to a person who was not morally responsible and not possessed of a good character and reputation and was a reputed narcotic violator, and might thus avoid the liability of forfeiture by assigning his contract to a third party. Could it be claimed that the third party, the assignee, might then omit the necessity of an independent investigation of its own, and rely upon the original investigation of the vendor as the basis of its claim? We think not. For if it be otherwise, the purpose of this provision of the act pertaining to forfeitures could be easily defeated. We do not intend to convey the impression, however, that such evidence as was obtained by the vendor could not be used by the assignee in support of its claim, if it were properly communicated to the assignee as a part of its investigation prior to or at the time of the purchase of the contract by the assignee. The evidence in the instant case does not show any inquiry of the vendor by the assignee as to his investigation. Therefore, the results of his investigation would not be available to appellants. The only evidence bearing upon the subject which the vendor turned over to the assignee was the purchaser's statement above mentioned. This contained no information of the purchaser's character, reputation, or moral responsibility, but only furnished information through which an investigation might be made. To the average rational, thinking mind it will probably be conceded, if we accept the facts related as true, that Speed was not possessed of a good character, reputation and moral responsibility. In view of all the facts mentioned, it seems to us, if due inquiry had been made at the proper places and from the persons most likely to know his reputation for the traits involved, appellant might well have discovered that Speed was not possessed of those attributes above mentioned. We see no logical reason to hold that the trial court was not justified in concluding that the facts relied upon were legally insufficient to constitute a reasonable investigation under the circumstances. We are unable to hold, as a matter of law, that they were sufficient.

Appellant next argues that there was no finding by the trial court in reference to reasonable investigation. The court found: "IV. That the right, title and interest in said vehicle of Bank of America National Trust and Savings Association was not created therein after a reasonable investigation of the moral responsibility, character or reputation of said William J. Speed, the purchaser thereof, named in said conditional sales contract."

[7] This finding was sufficient on that issue. A similar finding was made in People v. One Lincoln 8, etc., supra, and was approved. We see no merit to this argument.

Finally, appellant contends that the notice of seizure and intended forfeiture proceedings filed by respondent did not state a cause of action under the act. Similar notices were approved by the appellate courts in many of the cases herein cited. In the case of People v. One 1933 Plymouth, etc., 13 Cal.2d 565, 90 P.2d 799, a notice practically identical was involved and approved, and it is therefore conclusive on this issue.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.



39 Cal.App.2d 52

GREEN v. GRIMES-STASSFORTH STATIONERY CO. et al.

Civ. 11292.

District Court of Appeal, First District, Division 1, California.

May 10, 1940.

1. Trade-marks and trade-names and unfair competition ⇐68(2)

The Unfair Practices Act is constitutional. Gen.Laws Supp.1935, Act 8781.

2. Trade-marks and trade-names and unfair competition ⇐92

A complaint attempting to state a cause of action under Unfair Practices Act and

seeking mandatory injunction ordering defendants to sell filing supplies to plaintiff at same price at which defendants sold such supplies to other dealers in plaintiff's neighborhood was demurrable, where complaint failed to allege that defendants sold to other dealers in same quantities as were involved at a discount, and that alleged price differences were not based on differences in grade, quality or quantity. Gen.Laws Supp.1935, Act 8781.

3. Pleading ⇐63

Where a party relies for recovery upon a purely statutory liability, it is indispensable that he plead facts demonstrating his right to recover under the statute, and the complaint must plead every fact which is essential to the cause of action under the statute.

4. Pleading ⇐63

Where a party relies on a statute which contains a limitation in the clause creating and defining the liability, such limitation must be negatived in the complaint.

5. Trade-marks and trade-names and unfair competition ⇐92

In action under Unfair Practices Act for mandatory injunction ordering defendants to sell filing supplies to plaintiff at same price at which defendants sold such supplies to other dealers in plaintiff's neighborhood, plaintiff's allegation that defendants' refusal to sell to plaintiff at a discount was wrongful and unlawful was a mere "legal conclusion" and insufficient to raise an issue of fact. Gen.Laws Supp.1935, Act 8781.

See Words and Phrases, Permanent Edition, for all other definitions of "Legal Conclusion".

6. Appeal and error ⇐882(5)

Where defendants' demurrers to complaint were sustained with leave to amend, and plaintiff did not take advantage of the right to amend, on plaintiff's appeal plaintiff could not object that defect in complaint could be cured by amendment.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action under the provisions of the Unfair Practices Act, Gen.Laws Supp.1935, Act 8781, by H. H. Green against Grimes-Stassforth Stationery Company and others, to obtain a mandatory injunction ordering defendants to sell certain filing supplies to plaintiff at the same price at which defendants sell such supplies to other dealers in the same neighborhood as plaintiff, and for actual and punitive damages. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Desser & Rau, of Los Angeles (Milton N. Sherman and Jack L. Rau, both of Los Angeles, of counsel), for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondents Grimes-Stassforth Stationery Co. and Carl Grimes.

George E. Farrand and Edward W. Tuttle, both of Los Angeles, for respondents Schwabacher-Frey Co. and William F. Johnston.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment of dismissal entered after the sustaining of demurrers of the two defendants to his second amended complaint.

The action was brought under the provisions of the Unfair Practices Act as amended in 1935, Stats.1913, p. 508, amended by Stats.1935, p. 1546; Deering's Gen. Laws, 1935 Supp., Act 8781, p. 2063, to obtain a mandatory injunction ordering defendants to sell certain filing supplies to plaintiff at the same price at which they sell such supplies to other dealers in the same neighborhood as plaintiff in Los Angeles, and for actual and punitive damages.

The second amended complaint alleges that the plaintiff maintains a retail store in Los Angeles selling stationery and filing supplies; that defendants are engaged in the business of selling stationery and filing supplies at retail and wholesale, and are jobbers and wholesalers of said supplies in Los Angeles; that defendant Grimes-Stassforth Stationery Company is the exclusive agent for the Shaw-Walker line of filing cabinets and supplies in the Los Angeles area and defendant Schwabacher-Frey Company for the Globe-Wernicke line of such supplies; that during the two years preceding the filing of the complaint plaintiff purchased supplies and stationery from the defendants, including supplies in the above lines, at the regular dealers' discounts of 33⅓ to 40 per cent on filing supplies, and 10 to 20 per cent on stationery supplies; that in November,

1936, defendants, with intent to destroy competition and to discriminate against plaintiff, refused to sell filing supplies of the above lines to plaintiff at the dealers' or any other discount, and demanded the retail price therefor, which plaintiff paid; that defendants still continue to demand the retail price for these supplies from plaintiff, while selling to other retail stationery stores located in the same neighborhood as plaintiff at the regular dealers' discount. Pertinent allegations of damage are made as to each defendant, and in a third cause of action it is alleged that defendants conspired to discriminate against plaintiff, and refused to sell to him at wholesale prices pursuant to such conspiracy.

[1] The constitutionality of the Unfair Practices Act is no longer open to question. Since the filing of the briefs herein, the Supreme Court has upheld the constitutionality of the act. Wholesale T. Dealers v. National etc. Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486; see, also, Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177, affirmed by the United States Supreme Court, Kunsman v. Max Factor & Co., 299 U.S. 198, 57 S.Ct. 147, 81 L.Ed. 122, holding constitutional the Fair Trade Act as amended in 1933, Stats. 1933, p. 793.

Section 1 of the Unfair Practices Act, supra, as amended in 1935, so far as is pertinent here, reads as follows: "It shall be unlawful for any person, firm, or corporation, doing business in the State of California and engaged in the production, manufacture, distribution or sale of any commodity, or product, * * * of general use or consumption, * * * with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, * * * who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another *after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity.* * *" (Italics ours.)

Respondents seek to sustain the action of the trial court in sustaining the demurrers on the ground that section 1 of the act, supra, only prohibits price discrimination between different localities or neighborhoods, and does not prohibit price discrimination as against individual dealers, which is the only discrimination alleged in the complaint. Respondents also urge that the complaint fails to state a cause of action within the above-quoted section 1 for the reason that the filing supplies of which they are the exclusive agents are not articles of "general use or consumption" within the meaning of the section.

We do not find it necessary to pass on these two points on their merits for the reason that there is a third attack made on the sufficiency of the complaint by respondents that seems to us to be sound.

Section 1, supra, provides that, in determining whether a dealer is guilty of price discrimination, an allowance may be made for the "difference, if any, in the grade or quality, quantity and in the actual cost of transportation" of the commodity. The complaint alleges that the defendants refused to sell filing supplies to plaintiff at dealers' discounts, and demanded and received the full retail price therefor, and that the defendants continue to demand the retail price for all purchases of these supplies sought to be made by plaintiff. The particular purchase alleged against respondent Grimes-Stassforth Stationery Company amounted to $2.20, while the particular purchase alleged against Schwabacher-Frey Company amounted to $3.21. The complaint further alleges that respondents are selling the designated filing supplies to other retail stationery stores located in the same neighborhood as plaintiff at dealers' discounts, but that the retail price was demanded from plaintiff, and a discount refused "with the wrongful and unlawful intent to discriminate against plaintiff", and "with the intent to destroy the competition of plaintiff in said articles". Respondents contend that the above allegations do not negative a difference in price based on the quantity purchased, and that it would appear from

the complaint that plaintiff is demanding the wholesale price for retail quantities.

[2-4] The complaint attempts to state a statutory cause of action predicated entirely upon the terms of the Unfair Practices Act. Under section 1, supra, it is not every difference in price that is made unlawful, but only those differences, made with the requisite intent, that cannot be justified after a proper allowance has been made for differences in grade, quality, quantity or cost of transportation. The complaint fails to allege that the respondents sold to other dealers in the same quantities as are here involved at a discount, and fails to allege that the price differences which are alleged were not based on differences in grade, quality or quantity. This was an essential allegation. Where a party relies for recovery upon a purely statutory liability it is indispensable that he plead facts demonstrating his right to recover under the statute. The complaint must plead every fact which is essential to the cause of action under the statute. Where a party relies on a statute which contains a limitation in the clause creating and defining the liability, as here, such limitation must be negatived in the complaint. These principles supported by authorities from many states are fully set forth in 49 Corpus Juris, sections 167 and 169, pages 151 and 153. See, also, 21 Cal.Jur., sec. 36, p. 60; 21 R.C.L., sec. 7, p. 443. In Bailey Trading Co. v. Levy, 72 Cal.App. 339, 344, 237 P. 408, 410, in considering a similar problem, the court stated: "In construing the complaint to determine what the answer to that question should be, we must keep in mind the proposition that the relief sought herein is one which is alone afforded or authorized by statute—that is to say, the plaintiffs are relying upon a right given solely by statute, and that the rule is that where an action is founded on a statutory right or a right deducible wholly from statute, the plaintiff must, by his complaint, bring himself squarely and clearly within the terms or provisions of the statute upon which he relies or must rely to state a cause of action. 'When a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must show the facts, and those facts which the statute requires as a foundation of the action must be stated in the complaint. * * In remedial actions founded on a statute such averments must be made as are necessary to prove the case within the statute.' Sutherland on Code Pleading and Practice, § 5630. See, also Dye v. Dye, 11 Cal. 163, 167, 168; Himmelman v. Danos, 35 Cal. 441, 448; County of San Luis Obispo v. Hendricks, 71 Cal. 242, 246, 11 P. 682."

[5] It cannot be successfully contended that the allegation that respondents refused to sell to appellant at a discount "with the wrongful and unlawful intent to discriminate" against appellant is a sufficient allegation. Under the statute, even though respondents intended to discriminate against appellant, if such discrimination was in fact predicated upon differences in quantity, no liability would attach to respondents. The allegation that the discrimination was "wrongful" and "unlawful" can in no way assist appellant. Such allegations are mere legal conclusions, and are surplusage, and insufficient to raise an issue of fact. 21 Cal.Jur., sec. 16, p. 31.

[6] The demurrers were sustained with leave to amend. Appellant did not see fit to take advantage of the right to amend, so cannot now object that the defect in the complaint could be cured by amendment.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.



39 Cal.App.2d 36

PEOPLE v. McCHESNEY.

Cr. 2098.

District Court of Appeal, First District, Division 1, California.

May 9, 1940.

Hearing Denied June 6, 1940.

1. Robbery ⇐24(5)

Testimony of complainant relative to holdup and turning of wallet over to defendant that he was afraid of the man and of the gun showed that complainant was forced, through fear of immediate and unlawful injury to his person, or property, to

turn over his money, and that every element of crime of "robbery" was established. Pen.Code, §§ 211, 211a, 212.

See Words and Phrases, Permanent Edition, for all other definitions of "Robbery".

2. Criminal law ⇐742(1)

It is duty of jury to pass upon credibility of witnesses, taking into consideration their manner and character of their testimony.

3. Robbery ⇐24(3)

Evidence, including positive and unequivocal identification by complainant, supported conviction of robbery while armed with a deadly weapon. Pen.Code, §§ 211, 211a, 212.

4. Criminal law ⇐855(1)

Where visitor at trial claimed to have heard juror say to another juror in lavatory during recess period "That fellow is guilty without even a trial," and juror who allegedly made statement and juror to whom remark was allegedly addressed denied that such a statement had been made, it was for trial court to determine whether remark had been made, upon defendant's motion to declare a mistrial upon ground of prejudicial misconduct.

5. Criminal law ⇐770(1)

In instructing a jury, trial court must cover different phases and aspects of a case and make clear the general principles of law applicable thereto.

6. Criminal law ⇐778(4)

Submission by defendant to District Court of Appeal of six instructions on presumption of innocence, which were not given at trial, and which stated correct principles of law, revealed no reversible error, where trial court gave statutory instruction on presumption of innocence and effect of reasonable doubt, and rules outlined in defendant's suggested instructions were fully and fairly covered by instructions given by trial court. Pen.Code, §§ 1096, 1096a.

7. Witnesses ⇐270(2)

In robbery prosecution, objection to question asked by defendant's counsel of complainant on cross-examination as to whether he was trying to mislead police department, by which counsel had reference to error in number of defendant's auto license given by such complainant when reporting robbery, was properly sustained.

8. Criminal law ⇐1170½(1)

In robbery prosecution, sustaining objection to attempt by defendant's counsel to impeach complainant in connection with scarf worn by defendant at time of robbery was not error, where questions relative thereto were permitted during another part of trial.

9. Criminal law ⇐713, 1171(1)

Where prosecuting attorney, in criticizing what seemed to be an inconsistent position on part of defendant's counsel in presenting defense to criminal charge, stated that it was not an unusual position for defendant's counsel, prosecuting attorney's statement transcended rules of propriety, but did not warrant reversal.

10. Criminal law ⇐1202(1)

In order to adjudge a defendant an habitual criminal, the test is not whether he has been twice or thrice convicted of felonies, but whether he has been twice or thrice convicted of felonies enumerated in provision of Penal Code defining habitual criminals, or denounced as such by the laws of the state. Pen.Code, § 644.

11. Criminal law ⇐1202(1)

Trial court erred in adjudging defendant who was convicted of robbery while armed with deadly weapon, an "habitual criminal" within meaning of Penal Code because of fact that he had been previously convicted of violation of provision of motor vehicle act punishing person who drives or takes vehicle without consent of owner, and had previously been convicted in Louisiana of breaking and entering a building in the nighttime, since prior convictions were not for an offense enumerated in the Penal Code. Pen.Code, §§ 459, 644; St.1923, p. 564, § 146.

See Words and Phrases, Permanent Edition, for all other definitions of "Habitual Criminal".

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

James McChesney was convicted of robbery while armed with a deadly weapon, and sentenced as an habitual criminal, and he appeals.

Conviction affirmed, but sentence based on adjudication that defendant was an habitual criminal annulled.

James McChesney, in pro. per., and J. B. Smith, of Hollywood, for appellant.

Earl Warren, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Dennis Hession, of San Francisco, for respondent.

WARD, Justice.

An appeal from a judgment of conviction upon one of two counts, and from the order denying defendant's motion for a new trial, upon a charge of robbery alleged to have been committed by defendant while armed with a deadly weapon. Defendant was acquitted upon the first count; upon the second, he was sentenced as an habitual criminal.

The facts relative to this second count are as follows: On December 15, 1938, at approximately twenty minutes past seven in the evening, complainant, who conducted a small market, was setting or installing the sliding doors in front of his establishment, preparatory to closing for the night, when defendant came from behind, placed his left arm partially around complainant, and with a gun at his ribs, informed him that it was a "hold-up" and asked for his money. Upon receiving a wallet containing two five dollar bills in United States currency, defendant marched the complainant, at the point of a gun, around the store, down to the end of a fence, which was about twenty-five or thirty feet below the market, to where an automobile was parked. There was a man in the car, who urged defendant to hurry, but before they drove away complainant had obtained the last four numbers of their automobile license—9190.

[1] Appellant attacks the sufficiency of the evidence, primarily upon the theory that the complainant was impeached upon cross-examination; also that there was no element of force or fear used toward the complainant when he parted with his property. This last contention may be first considered. Relative to the time of the hold-up and the incident of turning the wallet over to appellant, complainant testified that he was afraid of the man and of the gun. The evidence shows that he was forced, through fear of immediate and unlawful injury to his person or property, to turn over his money, and that every element of the crime of robbery was established. Pen.Code, secs. 211, 211a, 212.

[2] On cross-examination the complainant admitted that immediately after the hold-up, he had given the last four numbers of the automobile license to the police as 9290 instead of 9190. Subsequent to the robbery appellant was found driving a car under license number 8C9190, on the floor of which a loaded gun was found. It was the duty of the jury to pass upon the credibility of the witnesses, taking into consideration their manner and the character of their testimony.

[3] Appellant contends that the evidence was so palpably weak and unsatisfactory as to present a question of law whether or not the elements essential to constitute robbery were established. After reading the entire transcript of evidence, we are not impressed with this contention. It shows among other things that the complainant positively and unequivocally identified appellant as the robber. This leaves for consideration appellant's further argument that a conviction would not have resulted but for certain alleged misconduct on the part of the jury and the district attorney, and alleged errors of law in the instructions and on matters arising during the course of the trial.

[4] A visitor at the trial claimed to have heard a juror say to another party in the lavatory during a brief recess period, "That fellow is guilty without even a trial." The matter was reported to the court and an investigation conducted. The juror denied that such a statement had been made, as did a second juror to whom the remark was claimed to have been addressed. Defendant's motion to declare a mistrial upon the ground of prejudicial misconduct was denied. It was for the trial court to determine whether the remark above quoted had been made, or whether the visitor had misunderstood the statement. It also appeared that this juror, during the recess, endeavored to communicate with his mother by telephone. It may be noted in this connection that such juror, with the others, voted "not guilty" on the first count and "guilty" upon the second. The verdicts do not indicate that the juror was biased or prejudiced.

[5, 6] In instructing a jury, it is the duty of the court to cover the different phases and aspects of a case and to make clear the general principles of law applicable thereto. People v. Hardwick, 204 Cal. 582, 269 P. 427, 59 A.L.R. 1480. Appellant submits six instructions which were not offered at the trial and which were not given in the form presented in his brief. The instructions state correct principles of law which might be given in any criminal case in the sound discretion of

the trial judge. They involve questions of presumption of innocence, reasonable doubt, and particular instruction that it was each juror's duty to be satisfied to the exclusion of any reasonable doubt that the defendant was guilty. The court in its instruction read Penal Code section 1096. If such instruction is given, no further instruction on presumption of innocence or defining reasonable doubt need be given. Pen.Code, sec. 1096a. In addition, the court instructed as follows: "You are hereby further instructed if you are not satisfied from the evidence in this case beyond and to the exclusion of all reasonable doubt that the defendant is guilty of the crime of robbery either of the first or second degree as charged in the second count of the said information, it will then be your duty to find the defendant not guilty of the offense charged in the second count of said information." The rules outlined in appellant's suggested instructions were fully and fairly covered by the court. No exceptions were taken thereto and no further instructions requested.

[7, 8] Appellant's assignments of error in the court's decision upon the admissibility of evidence are trivial. Appellant now contends that certain questions propounded, to which objections were sustained, might, if allowed, have resulted in proof that the story of the complainant was a hoax. One of such questions is: "Were you trying to mislead the police department?" referring to the error in the number of the automobile license. Another related to an attempted impeachment in connection with the scarf worn by appellant at the time of the robbery, but questions relative thereto, as well as other questions, were permitted during another part of the trial.

[9] Appellant contends that certain remarks made by the assistant district attorney during his argument to the jury constituted prejudicial error; and he calls attention particularly to an innuendo directed against one of his counsel, Mr. Creely. In this connection the prosecutor stated in substance that although Mr. Creely had charged the police department with having deliberately "framed" appellant, he had, nevertheless, called three police inspectors to testify as witnesses for the defense, including inspector Marshall who had been especially active in collecting evidence against appellant. The prosecutor then went on to say: "As I mentioned a moment ago, the party who calls a witness vouches for his honesty and credibility, so Mr. Creely who vouches for him, at the same time is accusing him of framing his client. Now, that is a fine position for Mr. Creely to find himself in. *It is not unusual for Mr. Creely, not unusual.*" (Italics ours.) Mr. Creely's associate counsel assigned the use of the italicized portion of the remarks as misconduct and requested the court to instruct the jury to disregard them, but in ruling upon the request the court merely stated: "Take your exception." Although it cannot be said that a prosecuting attorney is guilty of misconduct in criticizing what seems to him to be an inconsistent position on the part of opposing counsel in presenting a defense to a criminal charge, it is evident that here the import attempted to be conveyed by the use of the italicized words was based upon something outside of the record. Obviously, therefore, in thus referring to opposing counsel the prosecutor transcended the rules of propriety; and while, standing alone, the misconduct complained of is not of such a flagrant character as to warrant a reversal, it is justly deserving of condemnation.

[10, 11] The trial court adjudged defendant to be an habitual criminal and sentenced him to be confined in one of the state prisons "for life * * * and that he be not eligible for release on parole until he shall serve a minimum of twelve years". The information alleged three prior convictions for which defendant served terms in prison, to-wit: In Louisiana, for "breaking and entering a building in the night"; in California, for violation of "section 146 of the Motor Vehicle Act of California"; in California, for committing a felony, "robbery of the first degree". Two of these convictions were not ones on which a judgment as an habitual criminal could be based. Violation of section 146 of the Motor Vehicle Act, St.1923, p. 564, is not such an offense as denounced in Penal Code section 644. The test is not whether one has been twice or thrice convicted of felonies, but they must be either among those enumerated in section 644, or denounced as such by the laws of this state. "Breaking and entering a building in the night time", as charged in the prior Louisiana conviction, is not comparable with California Penal Code, section 459, which provides that the entry must be "with intent to commit grand or petit larceny or

any felony". In Louisiana it is an offense to enter with intent to commit any misdemeanor. 16 Cor.Jur., p. 52; State v. Snowden, 174 La. 156, 140 So. 9. Under language set forth in the Louisiana conviction, we must assume that defendant was convicted of the least degree of offense enumerated in the Louisiana statute, that is, an unidentified misdemeanor. There is also a difference in California in degree of the felony in the entry of a house or building and the entry of a dwelling house or building in the night time, etc. Pen.Code, secs. 459, 460, 461. In order to establish prior conviction of a defendant, the statutory requirement (Pen.Code sec. 644) must be fulfilled. People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Lohr, 28 Cal. App.2d 397, 82 P.2d 615; People v. Sampson, 99 Cal.App. 306, 278 P. 492.

The judgment of conviction on the second count and the order denying the motion for new trial are affirmed; but the trial court's adjudication that appellant is an habitual criminal and the sentence based on such adjudication are annulled and said court is directed to pronounce a new judgment of sentence not inconsistent with the conclusions reached herein.

We concur: PETERS, P. J.; KNIGHT, J.



38 Cal.App.2d 711

METROPOLITAN CASUALTY INS. CO. OF NEW YORK v. MARGULIS et al.

MARGULIS et al. v. HERSHELL et al.

Civ. 11889.

District Court of Appeal, Second District, Division 1, California.

May 3, 1940.

Hearing Denied July 1, 1940.

1. Pleading ⇐129(1)

Defendants admitted material allegations of complaint by failing to deny them.

2. Pleading ⇐147

Under statute, the test in determining whether claim is proper subject of cross-complaint is whether the matter set up by the cross-complaint bears the necessary relation to the matter constituting the cause of action. Code Civ.Proc. § 442.

3. Pleading ⇐148

If matter sought to be set up by cross-complaint bears necessary relation to matter constituting the cause of action, it is immaterial that the relief sought by the cross-complaint is independent of that prayed for in the complaint. Code Civ.Proc. § 442.

4. Pleading ⇐148

A cross-complaint may not tend to diminish or defeat the plaintiff's recovery but may demand affirmative relief distinct from that prayed for by the plaintiff.

5. Pleading ⇐149

In action by surety for dedicators who dedicated public lands for streets and alleys, for an amount recovered by county from surety on bond securing dedicators' faithful performance of terms of agreement under which dedicators were obligated to construct improvements on the tract dedicated, cross-complaint filed by defendants and a corporation, to recover damages from third parties for breach of agreement between third parties and cross-complainants relating to installation of certain of the improvements was not "related" to the same transaction or contract as the matter constituting the cause of action in the main suit. Code Civ.Proc. §§ 389, 442.

See Words and Phrases, Permanent Edition, for all other definitions of "Related".

6. Parties ⇐51(1)

Strangers may be brought in through medium of the cross-complaint only when their presence is essential to complete determination of the controversy already before the court.

7. Parties ⇐51(3)

Where cause of action stated in original complaint was for recovery of moneys paid by surety on behalf of defendants, the trial court properly struck cross-complaint which attempted to add a stranger as a cross-complainant and to recover damages from third parties for breach of an agreement between the third parties and the cross-complainants, where the new parties were not necessary to the determination of the matter before the court in the main action.

8. Appeal and error ⇐1042(1)

Where surety brought action against dedicators of public lands for streets and

alleys for amount recovered by county from the surety on bond securing dedicators' faithful performance of contract under which dedicators agreed to construct improvements on tract dedicated, striking of cross-complaint which attempted to add stranger as a cross-complainant and to recover damages from third parties for breach of an agreement between them and cross-complainants relating to installation of improvements, was not prejudicial, since it would not preclude cross-complainants from proceeding in an independent suit against the cross-defendants for breach of contract. Code Civ.Proc. §§ 389, 442.

9. Pleading ⇐147

A "cross-complaint" can be maintained only when defendant seeks affirmative relief relating to or depending on a contract or transaction upon which the action is brought or affecting the property to which the action relates. Code Civ.Proc. §§ 389, 442.

See Words and Phrases, Permanent Edition, for all other definitions of "Cross-Complaint".

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Metropolitan Casualty Insurance Company of New York against J. Margulis and another for an amount recovered from the plaintiff by the County of Los Angeles on a bond given by the defendants to secure faithful performance of terms of an agreement under which defendants had agreed to construct improvements on a tract which was dedicated to public use, wherein J. Margulis and others filed cross-complaint against A. Hershell and others. From an order striking the cross-complaint, the cross-complainants appeal.

Affirmed.

Emmett A. Tompkins, of Los Angeles, for appellants.

Nutter & Rutherford, D. R. Jacobs, and Stephen Dietrich, all of Stockton, for respondents.

WHITE, Justice.

This is an appeal from an order granting a motion to strike a cross-complaint.

Metropolitan Casualty Insurance Company commenced the present action by filing a complaint alleging in substance that the defendants, J. Margulis and Jack Stullman, having theretofore subdivided a tract of land and prepared a map thereof containing a certificate of dedication to public use of streets, avenues and alleys shown on said map, entered into a written agreement with the county of Los Angeles whereby, in consideration of the acceptance by the county for public use of the streets, avenues and alleys so offered for dedication, said defendants, Margulis and Stullman, agreed to construct within one year certain improvements upon said tract, to-wit, grading and surfacing, curbs, sidewalks and storm drain; that said agreement further provided for the filing of a bond to secure the faithful performance of the terms of said agreement; that the defendants as principals, and the plaintiff, Metropolitan Casualty Insurance Company, as surety, made, executed and delivered to the county of Los Angeles such a bond in the sum of $15,650; that the defendants performed the work required by the agreement only in part; that the county subsequently commenced an action against defendants and the casualty company which resulted in a judgment against defendants and the casualty company for the principal amount of the bond, interest and costs, which the casualty company paid, and for which in the present action it seeks reimbursement from the defendants.

[1] Defendants filed an answer admitting, by failure to deny, all the material allegations of the complaint, but nevertheless denying the conclusion of law "that plaintiff is entitled to a judgment". At the same time there was filed by Margulis and Stullman, the defendants, and Margulis-Stullman Company, a corporation, a cross-complaint, naming A. Hershell, Max Rosenthal, Dorothy Rosenthal, Bank of America National Trust and Savings Association, and Stockton Savings & Loan Bank as cross-defendants, wherein it was alleged that cross-defendant Hershell held a mortgage on said tract in the sum of $72,500 which he had transferred to Stockton Savings & Loan Bank "as collateral security"; that cross-complainants sold a large number of lots in the tract on installment contracts and that the same were deposited with Bank of America "for collection as funds for A. Hershell and Max Rosenthal and Dorothy Rosenthal"; that "as part of the consideration of the cross-complainants transferring to Max Rosenthal, Dorothy Rosenthal and A. Hershell

all of the unsold lots and purchasers' contracts * * * A. Hershell, Max Rosenthal and Dorothy Rosenthal agreed in writing to install, at their own expense, sidewalks and curbs on the streets in said tract and to make, grade and surface the streets", but had failed to do so, whereupon the county of Los Angeles, as hereinbefore set forth, had recovered a judgment against the bonding company, to the damage of cross-complainants. Cross-complainants prayed for judgment against cross-defendants in the amount of $19,688.46, being the same amount for which plaintiff, Metropolitan Casualty Insurance Company, sought judgment against defendants.

Upon motion of the cross-defendants the court entered an order striking the cross-complaint, and from such order cross-complainants prosecute this appeal, contending that the court in so doing abused its discretion.

Authority for the filing of a cross-complaint must be found in either section 442 or 389 of the Code of Civil Procedure. Section 442 provides that "whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. * * *" Section 389, so far as here pertinent, provides that "when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, * * *".

In the instant case it should be noted that the cross-complaint was filed not only in the name of the two defendants in the action, but also on behalf of a third party who was a total stranger to the pending litigation. Also, that the cross-complaint attempted to set up a cause of action against cross-defendants for damages for breach of an agreement to install improvements, which agreement was entered into between cross-complainants and cross-defendants Max Rosenthal, Dorothy Rosenthal and A. Hershell, none of whom were parties to the pending suit, which was one by plaintiff surety on a bond to recover moneys paid on behalf of defendant principals. In such a situation, can defendants join with a stranger to the action and file a cross-complaint, not against the plaintiffs in the initial action, but against third parties, to recover damages for breach of an agreement to which the plaintiff was not a party? We think not. As was said in Alpers v. Bliss, 145 Cal. 565, 570, 79 P. 171, 173:

"Section 389, Code Civ.Proc., provides: 'The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed and summons thereon to be issued and served.' This section does not give the court power to bring into the action for determination a controversy between the defendant and strangers to the action, which is irrelevant to the action between the parties already before it, except for the purpose of making its determination of the controversy between the parties already before it complete, and without prejudice to the rights of others. The defendant cannot inject into the action a controversy between himself and an outsider, even though it affects the property to which the action relates, unless some party already before the court is interested in or will be affected by the determination of such controversy. 'The controversy' named in the concluding member of the above-quoted sentence is 'any controversy between the parties before it' named in the first clause, and includes a controversy presented by a cross-complaint as well as that presented by the original complaint. Winter v. McMillan, 87 Cal. 256, 25 P. 407, 22 Am.St.Rep. 243; Mackenzie v. Hodgkin, 126 Cal. 591, 59 P. 36, 77 Am.St.Rep. 209. See, also, East Riverside, etc., Dist. v. Holcomb, 126 Cal. 315, 58 P. 817; Boskowitz v. Thompson [144 Cal. 724], 78 P. 290. In either case the 'other parties' who may be brought in must be persons whose presence is essential to the complete determination of a controversy between parties who were already before the court. It is 'to that end' that the court is authorized to order a cross-complaint to be filed, and a summons thereon to be issued and served. * * *"

See, also, Brady v. Kobey, 27 Cal.App.2d 505, 81 P.2d 263.

[2-5] Under the provisions of section 442 of the Code of Civil Procedure, the test is whether the matter set up by the cross-complaint bears the necessary relation to the matter constituting the cause of action. True, if such relation is present, it is immaterial that the relief sought by the cross-complaint is independent of that prayed for in the complaint, and the cross-complaint may not tend to diminish or defeat the plaintiff's recovery, but may demand affirmative relief distinct from that prayed for by the plaintiff. The validity of the cross-complaint herein therefore depends upon whether it comes within the "contract" or "property" clauses of the section, and this must be determined from the facts surrounding the cause of action and not particularly from the form of the complaint. In the case before us the cause of action stated in the original complaint was for recovery of moneys paid by plaintiff surety company on behalf of defendants, while the cross-complaint attempted to add a stranger as a cross-complainant and to recover damages from third parties for a breach of an agreement between such third parties and cross-complainants relating to the installation of certain improvements. Instead of being "related" to the same transaction or contract, each claim is foreign to the other.

[6, 7] Neither is the cross-complaint justified by the provisions of section 389 of the Code of Civil Procedure, because, as heretofore pointed out, it is only when their presence is essential to a complete determination of the controversy already before the court that strangers may be brought in through the medium of a cross-complaint. Therefore, if for no other reason, the ruling of the trial court striking out the cross-complaint should be sustained, because the cross-complaint sought to bring in new parties not necessary to a determination of the matter before the court. Alpers v. Bliss, supra. In the original action plaintiff was not seeking any relief against the cross-defendants, nor could it. None of the cross-defendants was a party to the surety bond upon which the action was predicated. They were not concerned with nor could they be considered in the trial of any issue that might arise between plaintiff surety and the defendant principals on the bond. Further, no triable issue was raised by the pleadings before the court, because the answer of the defendants admitted all the material allegations set forth in the complaint.

[8] The ruling striking the cross-complaint works no prejudice upon cross-complainants, for the reason that it does not operate as a bar to any future action on their part. They are not precluded from proceeding in an independent suit against the named cross-defendants for breach of the contract allegedly existing between them and cross-complainants. Merchants Trust Co. v. Bentel, 10 Cal.App. 75, 76, 101 P. 31; Clark v. Kelley, 163 Cal. 207, 209, 124 P. 846; Andreson Co. v. Regenold, 166 Cal. 44, 47, 134 P. 999; Lewis v. Fox, 122 Cal. 244, 54 P. 823; Johnson v. Risdon, 89 Cal.App. 768, 265 P. 505.

[9] The rule in regard to the filing of a cross-complaint is thus succinctly stated in United Casting Co. v. Duncan, 44 Cal. App. 384, 388, 186 P. 403, 405: "A cross-complaint can be maintained only when the defendant seeks affirmative relief relating to or depending upon the contract, or transaction upon which the action is brought, or affecting the property to which the action relates. Persons having independent claims against each other, the relief authorized in one having no relation to that which can be given in the other, nor in any manner affecting it, are not permitted to settle them all in one action upon the sole ground that, as they are in court contending against each other, with respect to one case or dispute, they should at that time and place settle all other matters of controversy existing between them. Meyer v. Quiggle, 140 Cal. [495], 499, 74 P. 40; Clark v. Kelley, 163 Cal. 207, 209, 124 P. 846."

From the foregoing it follows that the order appealed from should be, and it is, affirmed.

We concur: YORK, P. J.; DORAN, J.

38 Cal.App.2d 719

TRAUB v. EDWARDS.
Civ. 11252.

District Court of Appeal, First District, Division 2, California.

May 6, 1940.

Hearing Denied July 3, 1940.

1. Statutes ⇐276(1), 277

The purpose of repealing a statute and yet saving rights of litigants in pending actions based upon such statute may be accomplished either by including an express saving clause in the repealing act or by an act passed at the same session of the Legislature showing intention that rights of litigants in pending actions be saved, without necessity of express saving clause or expression of such intention in the repealing act itself.

2. Statutes ⇐276(1)

Where acts provided that no cause of action should arise for alienation of affections, without saving rights of litigants which had theretofore arisen, but acts subsequently enacted at the same session and effective the same day provided that actions upon causes of action arising before effective date of the statute must be commenced within sixty days, intent was manifested to save rights accruing before effective date of the statutes, provided actions were brought within sixty days. Civ.Code, § 43.5, as added by St.1939, p. 1245, § 2; § 49, as amended by St.1939, p. 1245, § 1, and p. 3037, § 5; Code Civ.Proc. § 341.5, as added by St.1939, p. 1246, § 4, and p. 3036, § 2.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Philena Traub against Constance Edwards for alienation of affections. From a judgment for plaintiff, defendant appeals.

Affirmed.

Rosenshine, Hoffman, Davis & Martin, of San Francisco, for appellant.

John J. Taaffe, of San Francisco, for respondent.

SPENCE, Justice.

Defendant appeals from a judgment entered in favor of plaintiff in this action for damages for the alleged alienation of the affections of plaintiff's husband.

Said action was filed in 1938 and the judgment was entered in 1939. The notice of appeal was filed on September 15, 1939 and certain code amendments thereafter took effect on September 19, 1939. This appeal is presented on the judgment roll alone and no question is discussed in the briefs other than that of the effect of said code amendments upon actions for alienation of affections pending on September 19, 1939.

Defendant contends that "plaintiff's cause of action was destroyed by the repeal of the statute on which her cause of action depended". Defendant quotes the language found in Krause v. Rarity, 210 Cal. 644, at page 652, 293 P. 62, at page 65, 77 A.L.R. 1327, as follows: "By those cases the rule obtaining elsewhere has become thoroughly established in the law of this state that, when a right of action does not exist at common law, but depends solely upon a statute, the repeal of the statute destroys the right, unless the right has been reduced to final judgment, or unless the repealing statute contains a saving clause protecting the right in pending litigation."

Defendant then argues: First, that the right of action for the alienation of the affections of a husband did not exist at common law but was created by subdivision 1 of section 49 of the Civil Code as it existed prior to September 19, 1939 (Humphrey v. Pope, 122 Cal. 253, 54 P. 847; 13 Cal.Jur. 901); second, that plaintiff's right of action had not been reduced to final judgment and her action was still pending when the previously existing provisions of subdivision 1 of said section 49 relating to alienation of affections were repealed on September 19, 1939; and third, that there was no "saving clause in the repealing statute protecting plaintiff's right". It is upon these three points that defendant bases her contention that plaintiff's cause of action "was destroyed by the repeal of the statute" and that the judgment should therefore be reversed. Plaintiff apparently concedes the soundness of the first two points but contends that there was a saving clause and that there is therefore no foundation for defendant's contention. Before considering the code amendments which went into effect in 1939, we deem it appropriate to set forth certain general principles which we believe are applicable here.

[1] When it is the purpose of the legislature to repeal a statute and to save the rights of litigants in pending actions based

upon such statute, such purpose may be accomplished by including an express saving clause in the repealing act. But such rights may likewise be saved by any act passed at the same session of the legislature showing that the legislature intended that the rights of litigants in pending actions should be saved. Black on Interpretation of Laws, 2d Ed., pp. 424 and 425. It is not essential that there be an express saving clause (Gorley v. Sewell, 77 Ind. 316; Commonwealth v. Mortgage Trust Co., 227 Pa. 163, 76 A. 5), or that the intention to save the rights of litigants in pending actions appear in the repealing act itself. Baltimore & O. R. Co. v. Pittsburg, W. K. R. Co., 17 W.Va. 812. These principles are clearly set forth in the text above cited where it is said on page 424, "An express saving clause in a repealing statute is not required in order to prevent the destruction of rights existing under the former statute, if the intention to preserve and continue such rights is otherwise clearly apparent. Thus, if it can be gathered from any act on the same subject passed by the legislature at the same session that it was the legislative intent that pending proceedings should be saved, it will be sufficient to effect that purpose."

There is no conflict between the general principles above set forth and the decision in Krause v. Rarity, supra. The above-quoted language from the opinion in that case was used in a general discussion of the subject and not in relation to a situation such as is presented here. Language similar to that quoted above had been used in a previous opinion of the supreme court of appeals of West Virginia and was considered by that court in its later decision in Baltimore & Ohio R. Co. v. Pittsburg W. K. R. Co., supra, where it said at page 879 of 17 W.Va., "The language used by this Court in Curran v. Owens [15 W.Va. 208], that the legislative intent in such cases must be gathered from the repealing act itself, must be understood as applying to the circumstances of that case. In that case there was no act passed at the session of the Legislature referred to upon the subject, except the act containing the repealing section; and the legislative intent was in that case necessarily gathered from the repealing act itself."

We now turn to the situation presented by the legislation enacted at the 1939 session of the legislature. Three chapters of the statutes of that year have a bearing upon the subject under discussion. By chapter 128, section 49 of the Civil Code was amended so as to eliminate therefrom the provisions relating to alienation of affections and a new section, being section 43.5 of the Civil Code, was added to provide in part, "No cause of action arises for: (a) Alienation of affection." By chapter 129, which was filed with the secretary of state on the same day, a new section, being section 341.5 of the Code of Civil Procedure, was added to provide that "An action upon any cause of action arising before the effective date of this section from * * * alienation of affections * * * must be commenced within sixty days after the effective date of this section, but this provision does not revive an action the time for the commencement of which has expired prior to the effective date hereof." More than two months later, chapter 1103 was filed with the secretary of state. By this last-mentioned chapter, said section 49 of the Civil Code was amended and said section 341.5 of the Code of Civil Procedure was amended. The wording of said chapter 1103 was in all respects similar to the wording found in said chapters 128 and 129 in so far as it related to the subject of alienation of affections. Said three chapters went into effect on the same day, September 19, 1939.

[2] It is apparent from what has been said that there was no express saving clause in any of said chapters, expressly saving to litigants any rights which had theretofore arisen under the repealed portions of section 49 of the Civil Code relating to alienation of affections. It is equally apparent, however, that it was the intention of the legislature to save such rights provided that actions to enforce such rights were commenced within sixty days from and after the effective date of said chapters. In the last analysis the question is one of the intention of the legislature and we believe that the intention to save such rights was clearly manifested by the portions of chapters 129 and 1103 dealing with section 341.5 of the Code of Civil Procedure. While it is true that these provisions related directly to new actions rather than to pending actions, the legislature could not have intended to preserve the rights of litigants whose actions had not then been filed and to destroy the rights of

those whose actions had already been filed and were pending.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



39 Cal.App.2d Supp. 775

RIABOFF v. PACIFIC TELEPHONE & TELEGRAPH CO.

Civ.A. 1324.

Appellate Department, Superior Court, City and County of San Francisco.

March 15, 1940.

1. Telegraphs and telephones ⇐54(1)

If telephone and telegraph company is a "common carrier" within statute providing that obligations of common carrier cannot be limited by general notice, it is a "common carrier" only of messages entrusted to it for transmission and delivery, and is not a "common carrier" as respects its business of furnishing facilities by which one person transmits messages to another by word of mouth. Civ.Code, §§ 2168, 2174.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Carrier".

2. Telegraphs and telephones ⇐45

A telephone company is required merely to use ordinary care in preparing telephone directory and is liable as a "public service corporation" not as a "common carrier" for breach of its contract to include subscriber's names in the directory, since although a "telephone directory" is an essential instrumentality in connection with telephone company's public service, it relates only to company's business of furnishing facilities for transmission by subscribers themselves of their own messages, and as to such business company is not a "common" carrier within statute providing against limitation of liability by general notice. Civ.Code, §§ 2168, 2174; Gen.Laws 1937, Act 6386 § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Service Corporation" and "Telephone Directory".

3. Telegraphs and telephones ⇐54(1)

The rates charged for the services of a telephone company are conclusively governed by the Public Utilities Act, and, when such services are contracted for, the rates fixed, which are in part dependent upon the company's rule of limitation of liability filed pursuant to statute, represent the whole duty and liability of the company and become a part of the contract, and the rights and liabilities thereunder must be determined with reference to the law in effect. Civ.Code, § 2174; Gen.Laws 1937, Act 6386, § 14.

4. Telegraphs and telephones ⇐54(6)

Telephone company's rule limiting liability for error or omission in listings of subscribers in telephone directory to an amount not in excess of charge for the exchange service during effective life of the directory was part of subscriber's contract with company and, in absence of showing that rule was unreasonable, was binding upon subscriber so as to limit company's liability for alleged negligence in misspelling subscriber's name in the directory. Civ. Code, § 2174; Gen.Laws 1937, Act 6386, § 14.

Appeal from Municipal Court, City and County of San Francisco; Frank W. Dunn, Judge.

Action by Alexander Riaboff against the Pacific Telephone & Telegraph Company for damages resulting from defendant's alleged negligence in misspelling plaintiff's name in defendant's telephone directory. From judgment for plaintiff for $253.55, defendant appeals.

Reversed, with directions.

Pillsbury, Madison & Sutro, of San Francisco, for appellant.

George B. White, of San Francisco, for respondent.

FRITZ, Judge.

In this action a judgment in the sum of $253.55 was awarded plaintiff by reason of the alleged negligence of the defendant Pacific Telephone & Telegraph Company in erroneously spelling the name of the plaintiff in its telephone directory. Defendant does not deny the error but contends that by reason of its rule limiting liability for such error and the contract

entered into for the service to plaintiff, the judgment should not be greater than $52.15.

[1] Respondent contends that defendant is a common carrier and therefore comes within the provisions of section 2174 of the Civil Code, which provides that "the obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract". This may be true, although we do not so decide, to a limited extent. In this state there is a total absence of authority on the point but if it be true, defendant is a common carrier only of messages which are entrusted to it for transmission and delivery. Sec. 2168, Civ.Code. It is upon this theory that the decision in Parks v. Alta California Telegraph Co., 13 Cal. 422, at page 424, 73 Am.Dec. 589 (no longer authority in this state) rests, but as to the principal business of the defendant—the furnishing of facilities by which one person transmits to another messages by word of mouth, the great weight of opinion is that defendant is not a common carrier.

"The weight of authority is almost unanimous that telegraph and telephone companies, under the common law, are not common carriers." Jones, Telegraph and Telephone Companies, 2d Ed., pp. 24–25 and numerous cases there cited.

The appellant is governed by and is required under the Public Utilities Act (1937 Deering Gen.Laws, Act 6386, § 14) to file schedule of "rates, tolls * * * charges" etc. "to be collected or enforced, together with all rules, regulations, contracts * * charges" etc., "which in any manner affect or relate to rates, tolls, * * * or service". Concededly appellant complied with this requirement and among others was Rule and Regulation No. 14: "The company is liable for errors or omissions in the listings of its subscribers in the telephone directory in an amount not in excess of the charge for that exchange service during the effective life of the directory in which the error or omission is made."

The plaintiff made his application for service, which was accepted by the company on a printed form furnished by the company. The application contained the following language: "The Pacific Telephone & Telegraph Co. is requested to furnish the applicant, in accordance with its rates, rules and regulations on file with the Railroad Commission of the State of California, telephone service and facilities as detailed herein", etc.

The rule No. 14, hereinabove stated, was on file and in effect at the time of the application.

[2] We are of the opinion that the service contracted for by respondent does not come within the provisions of section 2174 of the Civil Code, supra. It is true that a telephone directory is "an essential instrumentality in connection with the peculiar service which a telephone company offers for the public benefit and convenience" (California, etc., Storage Co. v. Brundige, 199 Cal. 185, 188, 248 P. 669, 670, 47 A.L.R. 811), but it is likewise true that the preparation and delivery of such directory is in no way related to the business of transmitting and delivering messages entrusted to its care but is an established convenience and service for those of the public who use the facilities furnished for the transmission by themselves of their own messages. As to these the company is not a common carrier, is charged in the preparation of its directory with the exercise of ordinary care and is liable as a public service corporation for the breach of its contract to include its subscriber's name therein.

[3] The rates charged for such service are governed and fixed by the Public Utilities Act, supra. They cannot be varied or departed from and are in part dependent upon appellant's rule of limitation of liability. When such service is contracted for, the rate so fixed by law represents "the whole duty and the whole liability of [appellant]" (Western Union Tel. Co. v. Esteve & Co., 256 U.S. 566, 572, 41 S.Ct. 584, 586, 65 L.Ed. 1094) and "becomes a part of the contract, and the rights and liabilities under the contract must be determined with reference to the law in effect". Correll v. Ohio Bell Telephone Co., Ohio App., Oct. 10, 1939, 27 N.E.2d 173.

[4] In our opinion appellant's rule fourteen (14) aforesaid became a part of respondent's contract both by reference and by operation of law and, in the absence of any showing that such rule was unreasonable, was binding upon respondent.

In view of this determination, it is unnecessary to consider other points presented by appellant.

The judgment is reversed, with directions to the trial court to enter judgment for plaintiff against defendant in the sum of $52.15, appellant to recover its costs.

GRIFFIN, J., concurs.



40 Cal.App.2d Supp. 819

JOLLY v. THORNTON.

No. C. A. 4521.

Appellate Department, Superior Court, Los Angeles County, California.

April 24, 1940.

1. Chattel mortgages ⇐177(1)

Either a mortgagor or mortgagee of a motor vehicle may maintain an action against a third person to recover damages for its injury or destruction.

2. Chattel mortgages ⇐129

A chattel mortgage does not transfer title to the mortgaged property.

3. Chattel mortgages ⇐129

In spite of chattel mortgage, mortgagor remained owner of mortgaged automobile. Vehicle Code, §§ 67, 68; St.1935, p. 98, as amended.

4. Sales ⇐224

One who sells property which has been damaged does not by the transfer of title to the property transfer his cause of action for damages.

5. Chattel mortgages ⇐177(1)

Both mortgagor and mortgagee had cause of action against defendant whose negligence caused damage to mortgaged automobile and mortgagor's default, loss of possession by mortgagor, and subsequent sale of mortgaged automobile did not defeat mortgagor's right to recover damages.

6. Chattel mortgages ⇐177(1)
Parties ⇐51(4)

Although both mortgagor and mortgagee had cause of action against defendant whose negligence caused damage to mortgaged automobile but one recovery could be had, and defendant could protect himself against possibility of second suit and recovery by causing mortgagee or mortgagor to be brought in as party to action which has been begun by other party. Code Civ.Proc. § 389.

Appeal from Municipal Court of Long Beach; Charles D. Wallace, Judge.

Action to recover damages to an automobile by Henry I. Jolly against Kenneth N. Thornton. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Victor C. Folsom, of Los Angeles, for appellant.

Kelso, Berryman, Grua & Counts, of Los Angeles, for respondent.

BISHOP, Judge.

Admittedly due to the defendant's negligence plaintiff's automobile was wrecked and plaintiff brought this action to recover damages. A nonsuit was entered on the ground that it appeared that the plaintiff had placed a mortgage on his automobile, that he was in default at the time of the accident, and subsequently, but before this action was begun, the mortgagee took possession in order to enforce its mortgage lien and thereafter sold the mortgaged wrecked car in partial satisfaction of the mortgage debt. We have concluded that plaintiff, in spite of the facts shown, was entitled to recover, and that it was error to nonsuit him.

The facts may be stated with more particularity. The automobile in question, worth about six hundred dollars, was mortgaged to secure a note for $498.72, payable to Fred W. Gray Company in installments. The sum of $398.72 remained unpaid on the note when the accident occurred, one installment being overdue. Although the mortgage authorized the mortgagee to take possession in case of a default, the mortgagee had not exercised its right and the car was in the plaintiff's possession when it was wrecked. A short time after the accident and before this suit was commenced the mortgagee's insurer, acting on behalf of the mortgagee and in furtherance of rights given the mortgagee by the mortgage, took possession of the car, and the plaintiff has not possessed it, nor repaired it,

nor made further payments on the installment note since then.

In view of the stipulation "that the defendant was negligent and that in the event the plaintiff had any interest in the property at the time of the filing of this suit that such amount as the court should find, if any, would be paid by the defendant," it would seem that we are not concerned with events occurring subsequent to the commencement of this action. Further events, neither pleaded nor proven to have occurred before the complaint was filed, were stipulated to have taken place, however, and we shall include them in our consideration. That is, it appears that after taking possession of the car, the mortgagee's insurer sold it for $170, its market value in its wrecked condition, and thereafter made demand upon the plaintiff to pay $218 as the balance remaining upon the mortgage note.

[1-3] Upon the problem presented by this appeal we find no authority in point in this state, but here and elsewhere we find principles established that make certain the conclusion that should be reached. It is quite obvious, of course, that the plaintiff had established a case when he proved ownership of the car and the damage to it, and obtained the stipulation that the defendant's negligence was the cause of the damage. What fact that subsequently appeared defeated plaintiff's prima facie case? The fact that he had placed a mortgage on his car could have no such effect. There seems to be no conflict in the authorities on this point; the principle is universally recognized that "Either a mortgagor or mortgagee * * * of a motor vehicle may maintain an action against a third person to recover damages for its injury or destruction." 42 C.J. 762. See, also, 8 C.J.S., Bailments, § 56, page 371, and the notes in Harris v. Seaboard Air Line Co., 190 N. C. 480, 130 S.E. 319, 49 A.L.R. 1452, 1458, and Commercial Securities v. Mast, 145 Or. 394, 28 P.2d 635, 92 A.L.R. 194, 205. No reason appears, in this state, to give to a mortgage the effect of barring the owner's right to recover damages occasioned by a third party's negligence. It is elemental under our code that "a chattel mortgage does not transfer title to the mortgaged property." 5 Cal.Jur. 42. In spite of the mortgage, therefore, the plaintiff remained the owner of his car. In this connection we should not overlook a stipulation not heretofore mentioned, that at the time of the accident the Fred W. Gray Company was the "legal owner" of the car involved, and the plaintiff was the "registered owner." It is plain, however, that these terms were being employed in the special sense in which they are defined in sections 67 and 68, Vehicle Code, St. 1935, p. 98, as amended where a "legal owner" is stated to be "a person holding the legal title to a vehicle under a conditional sale contract or the mortgagee of a vehicle" and a "registered owner" is "a person registered by the department as the owner of a vehicle." It remains clear, therefore, that the plaintiff was the owner of the automobile that was wrecked, even though he had placed a mortgage lien on it, and the mere fact of the existence of the lien would not defeat his right to recover for damages inflicted upon his property.

Of significance on the point just discussed is the case of Conlin v. Coyne, 1937, 19 Cal.App.2d 78, 64 P.2d 1123, where the owner of real estate was held to have a cause of action for damages to his property, although it had been conveyed to a trustee to secure an obligation.

The next fact that appears, that the mortgagor was in default, does not furnish a reason for barring his recovery. Plaintiff's ownership in his car was not transferred by his failure to pay an installment of the note when due; neither the note nor mortgage so provided, nor could they legally do so. Blodgett v. Rheinschild, 1922, 56 Cal.App. 728, 737, 206 P. 674, 678. In city of Topeka v. Tuttle, 1870, 5 Kan. 311, 322, we find: "The plaintiff was undoubtedly the owner of the horses and carriage, and entitled to recover for injuries done to them, notwithstanding he had mortgaged them for more than they were worth, and the mortgage was then past due." To the same effect see Logan v. Wabash &c Ry. Co., 1890, 43 Mo.App. 71, and Martin v. Seabord Air Line Ry. Co., 1917, 108 S.C. 130, 93 S.E. 336.

Nor does the fact, further appearing, that before suit was filed the mortgagee had taken the property into his possession raise a legal obstacle to plaintiff's recovery. "We should also note the fact," said our supreme court in Podrat v.

Oberndorff, 1929, 207 Cal. 457, 459, 278 P. 1035, 1036, 63 A.L.R. 1308, "that the taking of possession by the mortgagee under his contract with the mortgagor does not give him title, but merely increases the value of his security." In Samuell v. Moore Mercantile Co., 1922, 62 Mont. 232, 233, 204 P. 376, 377, this question and answer appear where the court was reviewing a judgment of nonsuit:

"Is the mortgagor of personal property out of possession after condition broken entitled to maintain an action for damages against a third party by whose wrongful acts the property is destroyed, where the value of the property exceeds the amount due the mortgagee?

"The identical question was answered in the affirmative in Frankenthal v. Mayer, 54 Ill.App. 160, and we think upon correct principles. Under our statutes the mortgage creates only a lien. Section 5736, Rev.Codes. The mortgagee is not entitled to possession before default, unless expressly authorized by the mortgage itself. Section 5737, Rev.Codes. The title to the mortgaged property remains in the mortgagor until, by foreclosure or sale, * * * it is divested. * * * Until title passes, the mortgagor has an interest to the extent, at least, that the value of the property exceeds the mortgage debt, interest, costs, etc."

[4] The plaintiff, then, had a good cause of action up to the sale of the mortgaged car, which sale we assume, for it does not appear, was held pursuant to the terms of the mortgage. The sale would divest him of title to the car; would it deprive him of his cause of action? We are of the opinion that it would not. In the first place, one who sells property which has been damaged does not by the transfer of title to the property transfer his cause of action for the damages. The rule has been expressed with respect to real property thus: "Unless there is a provision for the transfer thereof, a right of action for permanent injuries to the property which exists in favor of the vendor does not pass to a purchaser under a conveyance so as to permit him to recover for such injuries." 66 C.J. 1087. The same conclusion with respect to mortgaged personal property is found in Millner v. Lankershim Packing Co., 1936, 13 Cal.App.2d 315, page 318, 56 P.2d 1295, page 1296, summed up in these words: "Appellant assails the judgment herein principally upon the ground that an assignment of a chattel mortgage does not carry with it a cause of action for a previous conversion, and with that contention of appellant we find ourselves in accord." Before instituting an action to recover for damages to his crop, the plaintiff in Missouri, &c Ry. Co. v. Gilbert, 1910, 61 Tex.Civ.App. 478, 131 S.W. 1145, had sold the crop, and the defendant contended that with the sale of the crop the plaintiff had parted with his cause of action. This was held not to be so; his right to recover damages to the crops he had owned when the injuries had been inflicted, survived the sale.

A different conclusion is not reached when the sale is not a voluntary one, by the owner, but is by way of a mortgage foreclosure. In Elvins v. Delaware &c Telephone Co., 1899, 63 N.J.L. 243, 43 A. 903, 76 Am.St.Rep. 217, the plaintiff Elvins was seeking to recover damages done to her trees which were located on mortgaged property. The defendant offered to prove that the mortgage exceeded the value of the property, at the time the trees were injured, and that the mortgage had been foreclosed and the property sold. The trial court's rejection of this proferred defense was approved.

[5, 6] We conclude, therefore, that both the mortgagor and mortgagee had a cause of action against the defendant whose negligence caused damage to the mortgaged property, and that a default, loss of possession and subsequent sale of the mortgaged property did not defeat the mortgagor's right to recover damages. It would be inequitable, of course, if both the mortgagor and mortgagee could recover the full amount of damages from the offending third party. It is generally held, however, that but one recovery can be had (see authorities first cited) and moreover a defendant can protect himself against the possibility of a second suit and recovery by causing the mortgagee or mortgagor to be brought in as a party to the action which has been begun. Section 389, Code of Civil Procedure.

For the reason given, the judgment is reversed, appellant to recover his costs of appeal.

SHAW, P. J., and SCHAUER, J., concur.

LOWEN v. FINNILA.

S. F. 16326.

Supreme Court of California.

May 14, 1940.

Rehearing Denied June 13, 1940.

1. Appeal and error ⇐930(3)
Trial ⇐359(1)

Whether special verdict was so inconsistent with general verdict as to control it as a matter of law was a question determinable on pleadings and findings of jury, and it was assumed for purpose of appeal that evidence was sufficient to support allegations of complaint and general verdict of jury.

2. Trial ⇐359(1)

Every reasonable intendment in favor of a general verdict must be indulged in order to reconcile all findings of jury, and general verdict must stand unless facts found by jury in answer to special interrogatories are so clearly antagonistic to it as to be absolutely irreconcilable; the conflict being such as to be beyond possibility of being removed by any evidence admissible under issues so that both general verdict and general findings cannot stand.

3. Trial ⇐359(1)

A special finding is inconsistent with general verdict only when as matter of law the special finding, when taken by itself, would authorize judgment different from that which general verdict will permit.

4. Negligence ⇐142

In action for scalding in bathhouse, where instruction, among others, was given that if in exercise of ordinary care plaintiff should have determined which faucet was hot and which was cold before using shower, and if he nevertheless used the shower, and such action proximately contributed to his injury, he could not recover, and jury returned general verdict for plaintiff, finding in response to special interrogatory that, at time of accident there were signs or letters plainly designating which faucet was hot and which was cold, was not irreconcilable with general verdict, and jury was deemed to have found that defendant was negligent and that his negligence was sole proximate cause of plaintiff's injuries.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by Jacob Lowen against M. A. Finnila for injuries inflicted by hot water in defendant's bathhouse. From a judgment for defendant, notwithstanding a general verdict for plaintiff, plaintiff appeals.

Reversed with directions.

Rehearing denied; CARTER, J., dissenting.

For prior opinion, see 93 P.2d 257.

Cross & Brandt, of San Francisco, for appellant.

Hone & Hone and Bronson, Bronson & McKinnon, all of San Francisco, for respondent.

SHENK, Justice.

The plaintiff sued to recover damages for personal injuries suffered as the result of alleged negligence of the defendant. The case was tried with a jury. Pursuant to the court's instructions, the jury returned a general verdict and an answer to a special interrogatory. Notwithstanding the general verdict for the plaintiff, the trial court upon motion rendered judgment for the defendant pursuant to section 625 of the Code of Civil Procedure. The plaintiff appealed.

[1-3] On this appeal we are not concerned with the question whether the evidence was sufficient to sustain the general verdict, nor the question whether, upon the evidence, it must be said as a matter of law that the plaintiff was guilty of negligence which proximately contributed to his injury and barred a recovery. The disposition of the appeal is governed by the considerations surrounding the question whether the trial court correctly concluded that the special verdict was so inconsistent with the general verdict as to control it as a matter of law. That question is determinable on the pleadings and the findings of the jury. It is assumed for the purposes of this appeal that the evidence was sufficient to support the allegations of the complaint and the general verdict of the jury. Law v. Northern Assurance Co., 165 Cal. 394, 406, 132 P. 590, 596; 64 Cor. Jur., p. 1182. Every reasonable intendment in favor of the general verdict must be indulged in order to reconcile all findings of the jury. Thus, "the general verdict will stand unless the facts found by the jury in answer to special interrogatories, are so clearly antagonistic to it as to be absolutely irreconcilable; the conflict being such as to be beyond the possibility of being removed by any evidence admissible

under the issues, so that both the general verdict and special findings cannot stand". Under this test it has been determined that "a special finding is inconsistent with the general verdict only when, as a matter of law, the special finding when taken by itself would authorize a judgment different from that which the general verdict will permit". Law v. Northern Assurance Co., supra, 406-407; 38 Cyc., p. 1928; 24 Cal. Jur., pp. 906, 910-912.

In the complaint it is alleged that the defendant owned and conducted in San Francisco the premises known as the "Finnish Baths", for the use and convenience of patrons; that on October 10, 1936, the plaintiff entered the premises, paid the charge requested, and was directed to a private steam room; that in said room the defendant maintained for the use of patrons a shower having pipes and faucets for the use of hot and cold water. The complaint then contains the following allegations:

"That said shower bath was so carelessly and negligently constructed and maintained by the defendant, that the pipe carrying hot water to said shower bath, when the valve or faucet attached to said pipe was opened, first emitted from said shower cold water before emitting therefrom hot water, that said cold water, without any intermediate change in temperature, suddenly without notice or warning changed from cold water to hot water and that said shower emitted boiling, scalding water; that said defendant carelessly and negligently failed and neglected to notify the plaintiff which of said pipes leading to said shower carried hot water and which of said pipes carried cold water, or to designate by sign, writing or in any other manner, which of said pipes leading to said shower bath carried hot water and which of said pipes carried cold water thereto.

"That plaintiff had no knowledge of any kind as to which of said pipes carried cold water to said shower bath and which of said pipes carried hot water thereto; that desiring and intending to take a shower bath of cold water, and for the purpose of ascertaining which of said pipes carried and conducted cold water to said shower, plaintiff opened the faucet or valve attached to one of the said pipes leading to said shower bath; that when the water was emitted therefrom, plaintiff felt and tested the same with his hand and ascertained that the water flowing therefrom was cold water; that believing, as a result of said test, that said valve or faucet controlled the cold water flowing to said shower, plaintiff started to step into said shower; that said defendant so negligently and carelessly maintained and operated said shower that without any notice or warning of any kind whatsoever, scalding water suddenly flowed from said shower, impinging upon and striking the body of the plaintiff.

"That as a direct and proximate result of the aforesaid neglect, negligence and carelessness of defendant, plaintiff was severely scalded and burned. * * *"

The defendant denied the allegations charging negligence and interpose the affirmative defense of contributory negligence on the part of the plaintiff. The case was submitted to the jury upon the instruction, among others, that if the jury should find that the plaintiff "in the exercise of ordinary care, could or should have determined which faucet was hot and which was cold before using the shower bath, and you further find that Mr. Lowen did not so ascertain which was hot and which was cold, but nevertheless used the shower bath, and if you further find that such action on his part, if any, proximately contributed to his injury, then you are instructed that your verdict must be in favor of defendant." There was also submitted to the jury the following special interrogatory: "At the time and place of plaintiff's accident, were there any signs or lettering plainly designating as to which faucet was hot and which was cold? The answer is to be 'yes' or 'no' and signed by the foreman of the jury." The jury returned a general verdict for the plaintiff in the sum of $8,000 and answered "yes" to the special interrogatory. As noted, the court granted the defendant's motion for judgment on the ground that the general and special verdicts were inconsistent.

[4] The judgment herein may be sustained only if it may be said that under no circumstances within the issues could the defendant be held liable to a plaintiff who had turned on the hot water without any admixture of cold water. We think the case does not permit of so positive a statement. Such a statement would be tantamount to a declaration that a plaintiff could not recover even though it could be found that, irrespective of the plaintiff's negligence, the defendant's negligence was

the sole proximate cause of the injury. If under the pleadings evidence might be introduced showing the defendant's negligence, which, apart from any negligence on the part of the plaintiff, could be found to be the proximate cause of the injury, the judgment herein may not be sustained. It is apparent that under the issues of the defendant's negligence and the plaintiff's contributory negligence, the issuable facts might develop a situation where the defendant's negligence could be deemed to be the sole contributing and proximate cause of the injuries suffered by the plaintiff. In other words, it may not be said that, on the pleadings, the question of liability may be disposed of by an answer to the question contained in the special interrogatory submitted to the jury, namely, whether the designations of hot and cold were plainly indicated with reference to the shower taps. Therefore, if the jury found, as we must assume it did, that although the plaintiff was negligent the defendant also was negligent and that the negligence of the defendant was the sole proximate cause of the injury, the verdicts cannot be said to be so inconsistent as to be irreconcilable. The court's instruction covered the subjects of contributory negligence and proximate cause. If the special interrogatory had been as comprehensive, the ambiguity between the general and the special verdicts would have been obviated. On the record presented, we must conclude that there is no failure of consistency between the special and general verdicts, and that the intendments in favor of the general verdict should govern. By that verdict the jury must be deemed to have found that the defendant was negligent and that his negligence was the sole proximate cause of the plaintiff's injuries. On this record the answer to the special interrogatory was not irreconcilable with those findings. Judgment should have been entered in accordance with the general verdict. Tremble v. Tuman, 175 Cal. 696, 167 P. 142; Hudgins v. Standard Oil Co. of California, 136 Cal.App. 44, 28 P.2d 433; Koskela v. Albion Lumber Co., 25 Cal.App. 12, 142 P. 851.

The judgment is reversed with directions to the trial court to enter judgment for the plaintiff on the general verdict.

We concur: WASTE, C. J.; CURTIS, J.; GIBSON, J.; EDMONDS, J.; CARTER, J.

DE GARMO v. SHENBERG et al.

L. A. 17346.

Supreme Court of California.

May 14, 1940.

Rehearing Granted June 13, 1940.

1. Attorney and client ⇐75(1)

A client has the unrestricted right to change counsel unless counsel possesses an "agency coupled with an interest", which is an actual interest in subject matter of controversy as distinguished from a contingent interest in avails of the suit. Code Civ.Proc. § 284.

See Words and Phrases, Permanent Edition, for all other definitions of "Agency Coupled with an Interest".

2. Attorney and client ⇐75(1)

A motion for substitution of counsel is properly made in the tribunal where appeal is pending. Code Civ.Proc. § 284.

3. Attorney and client ⇐75(1)

On motion for substitution of attorneys on appeal in a proceeding to remove corporate directors, method of filling vacancies created by judgment of removal could not be collaterally attacked. Civ.Code § 306.

4. Appeal and error ⇐460(2)

A judgment removing corporate directors was self-executing, and appeals therefrom did not serve to stay its operation or preclude remaining directors from filling vacancies, and new board acting for and on behalf of corporation had right to determine who should serve as counsel for corporation on its appeal. Civ.Code, § 306.

5. Appeal and error ⇐460(1)

Where judgment is self-executing or has intrinsic effect, there are no proceedings to be stayed or to be affected by an appeal therefrom.

6. Appeal and error ⇐323(1)

The granting of motion for substitution of attorneys on appeal in proceeding for removal of corporate directors did not affect or destroy right of removed directors to prosecute individual and separate appeals from judgment of removal. Civ.Code §§ 306, 310.

In Bank.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by G. C. De Garmo against N. E. Shenberg and others to remove, as

directors of the Golden State Glass Corporation, named defendant and others. From an adverse judgment, N. E. Shenberg, Golden State Glass Corporation, and A. Goldman appeal. On motion for substitution of attorneys.

Motion granted.

Frank M. Gunter, of Los Angeles, for appellant N. E. Shenberg.

O. C. Sattinger, of Los Angeles, for appellant Golden State Glass Corporation.

Mitchell, Silberberg, Roth & Knupp, of Los Angeles, for appellant A. Goldman.

Biby & Biby, of Los Angeles, for respondent.

WASTE, Chief Justice.

Motion for substitution of attorneys.

This proceeding presents another phase of the troubled operating history of the appellant corporation. Recently we had occasion to consider some of its problems in Golden State Glass Corporation v. Superior Court, 13 Cal.2d 384, 90 P.2d 75, which proceeding in prohibition was ancillary to the above-entitled cause now pending here on appeal. Stripped of unessentials, the specific problem presently calling for solution has arisen out of the following circumstances. It appears that the plaintiff and respondent De Garmo, one of the four directors provided for in the articles of incorporation of the defendant and appellant corporation, and the owner of approximately one-third of its stock, commenced this action under section 310 of the Civil Code to remove as directors of the corporation the defendants and appellants Shenberg and Goldman, each of whom also owned one-third of the corporate stock. At the conclusion of a protracted trial the court below made findings which if sustained by the evidence, a matter not now before us but presentable at a later time upon the appeal proper, warranted the removal of said defendant directors under the cited code section. Accordingly, and as authorized by the code section, the trial court made and entered its judgment that "A. Goldman and N. E. Shenberg, each be and he is hereby removed from his respective office as a Director of the defendant corporation * * * and that said A. Goldman and said N. E. Shenberg each be barred from re-election during the period prior to December 1, 1940." Thereupon the defendants, i. e., the corporation, Goldman and Shenberg, filed separate notices of appeal to this court, each appearing by different counsel. Pursuant to stipulation, the three appeals have been brought up on a single transcript. The opening briefs have been filed in the corporate and Shenberg appeals. The required filing fee has not been paid in the Goldman appeal and technically it has no standing before the court. However, in passing, it may be stated that pursuant to stipulation Newby & Newby have been substituted as counsel for Goldman in place of the firm that filed the notice of appeal on his behalf.

Pursuant to corporate resolution authorizing the same, the present motion is made by Newby & Newby to also have themselves substituted in the place and stead of O. C. Sattinger as counsel for the appellant corporation in its appeal. Goldman, one of the removed directors who, as stated, already has designated Newby & Newby as his counsel upon his appeal, has filed an affidavit in support of the present motion wherein he deposes: "That he is a defendant and appellant in the above entitled action and has already substituted Newby & Newby as his attorneys, by and with the written consent of his former attorneys * * * which substitution has been filed; that he also desires Messrs. Newby & Newby to be substituted as the attorneys for the Golden State Glass Corporation in the above entitled action, in lieu of O. C. Sattinger, that affiant has for several years last past, been and is now the owner of one-third of the outstanding capital stock of the Golden State Glass Corporation; that N. E. Shenberg is the owner of one-third of said stock and G. C. De Garmo is the owner of the remaining one-third of said stock and has been such owner at all the times herein mentioned; that affiant has not acted or attempted to act as a director of the Golden State Glass Corporation since the judgment of removal was rendered on February 20th, 1939, and he does not now claim to be a director of said corporation; that after the entry of said judgment of removal, N. E. Shenberg [the other removed director] organized or caused to be organized the Republic Glass Company and ever since has been and now is operating said glass corporation as a competitor of the Golden State Glass Corporation; * * *." In the face of Sattinger's refusal to be substituted out as

counsel for the corporate appellant this motion became necessary.

[1, 2] It is axiomatic that a client has the unrestricted right to change counsel unless the latter possesses "an agency coupled with an interest", i. e., an actual interest in the subject-matter of the controversy as distinguished from a contingent interest in the avails of the suit. Sec. 284, Code Civ.Proc.; Estate of Cazaurang, 1 Cal.2d 712, 714, 36 P.2d 1069; Echlin v. Superior Court, 13 Cal.2d 368, 372, 90 P.2d 63, 124 A.L.R. 719. A motion for substitution is properly made in the tribunal where the appeal is pending. Jacobus v. Jacobus, 208 Cal. 562, 563, 282 P. 796.

[3] Several affidavits and counteraffidavits, containing many charges and countercharges, have been filed in support of and in opposition to the motion for substitution. It is not our inclination, nor in many particulars our present province, to determine the innumerable factual and legal problems thus raised. Suffice it to say, that upon the giving and entry of the judgment for the respondent De Garmo removing as corporate directors the appellants Goldman and Shenberg, said De Garmo together with the fourth or remaining director, and purporting to act under the provisions of section 306 of the Civil Code, appointed two other persons to fill the two vacancies created on the board of directors by the trial court's judgment of removal. In view of our conclusion to be presently announced, it is immaterial whether the filling of said vacancies preceded or followed the noticing of the appeals from said judgment of removal. Nor do we think that upon this motion for substitution the method of filling the vacancies may be here collaterally attacked. From time to time following the filling of such vacancies other changes were made in the board of directors as a result of resignations and subsequent appointments by the remaining directors. To here detail these several personnel changes on the board would serve no useful purpose.

On March 15, 1940, the board of directors, as then constituted, adopted a resolution which, in part, declared that:

"Whereas, said appeal purporting to be for and on behalf of said corporation is being prosecuted by said O. C. Sattinger without the consent of said corporation and contrary to its best interest:

"Now Therefore, Be It Resolved: That the said O. C. Sattinger be and he is hereby notified not to pretend to represent said corporation in any capacity whatsoever and especially in said action No. 428700, or upon said appeal, L.A. No. 17346;

[4] "Be It Further Resolved: That the President of this corporation be and he is hereby authorized and directed to sign and file a stipulation on behalf of the Golden State Glass Corporation substituting the said Newby & Newby as attorneys for said Corporation in said action, and upon said appeal; and if the said Sattinger refuses to sign said stipulation, the said President is hereby authorized and directed to take all necessary or proper legal steps to effect said substitution in the manner provided by law."

As already shown, Goldman, one of the removed directors, now favors such substitution. It thus appears that the substitution is desired by the present board of directors of the appellant corporation and by the owners of two-thirds of its stock. However, inasmuch as O. C. Sattinger has refused to join in the stipulation for substitution authorized by the foregoing corporate resolution, this motion as therein contemplated and sanctioned has been made to substitute Newby & Newby in his place and stead. As already intimated, it is immaterial in our opinion whether the appeals from the judgment removing the directors Shenberg and Goldman preceded or followed the filling by the two remaining directors of the vacancies thus created, for said judgment must be held to be self-executing and the appeals therefrom did not serve to stay its operation. Consequently said appeals would not preclude the remaining directors from filling the vacancies and the new board, acting for and on behalf of the corporation, has the right to determine who shall serve as counsel for the corporate entity upon its appeal.

[5] In 2 California Jurisprudence 438, section 195, the rule is generally stated to be that "Where a judgment is self-executing, or has intrinsic effect, there are no proceedings to be stayed, or to be affected by an appeal therefrom." In Hibernia S. & L. Soc. v. Belcher, 4 Cal.2d 268, 273, 48 P.2d 681, 683, this court held that "An order removing an executor, administrator, guardian, or receiver is self-executing. The appeal taken from such order in the instant case did not restore his powers."

In Dulin v. Pacific W. & C. Co., 98 Cal. 304, 305-307, 33 P. 123, 124, at a stockholders' meeting one Clugston was declared elected a corporate director whereupon Dulin, the plaintiff, commenced an action against the corporation and Clugston under section 315 of the Civil Code to set aside the election of Clugston and to confirm Dulin's election as a director. After trial, the court entered judgment that the plaintiff Dulin and not Clugston had been elected and that the latter was not a director. For all practical purposes the judgment was analogous to that here involved removing the appellant directors. Clugston appealed and contended, as is substantially urged here, that the appeal stayed the judgment. This court declared, in part, that:

"There are many judgments, however, which are self-executing, or which have an intrinsic effect, upon which there are no proceedings to be stayed, and which will not be affected by an appeal therefrom. A judgment granting or dissolving an injunction, or determining the status of an individual, granting or denying a divorce or an annulment of marriage, quieting title to a tract of land, setting aside the execution of a deed, are instances of such judgments. In Walls v. Palmer, 64 Ind. [493] 496, a judgment had been rendered suspending the petitioner from practicing as an attorney, and it was urged that an appeal therefrom had the effect of restoring him to his right to practice during the pendency of the appeal. The court, however, held that to give that effect to the appeal would be to reverse the judgment of the suspension before the appeal was judicially decided; saying: 'The effect of the appeal and supersedeas is to stay the judgment of suspension as it is, and prevent further proceedings against the petitioner. It does not reverse, suspend, or supersede the force of the judgment. That remains in all respects the same. The judgment itself requires no further execution than its own terms. It executes itself except as to the collection of costs, which is stayed by the appeal and supersedeas. The only effect of an appeal to a court of error, when perfected and while pending, is to stay execution upon the judgment from which it is taken.' And herein should be observed the distinction between the effect of an appeal from a judgment in staying further proceedings thereon, and its effect in depriving the judgment itself of any efficacy as evidence of the fact determined. The appeal suspends its force as a conclusive determination of the rights of the parties, but the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment itself, and does not destroy or impair its character.

"The purpose of the present application is not to prevent the court from taking any action to enforce its judgment, but to prevent Dulin from acting as one of the directors of the corporation. His assuming to be such director, while it may be in consequence of the judgment, is not a proceeding upon the judgment. * * * The court limited its action to ascertaining the result of the election, and did not grant any relief in the premises other than to confirm the election of Dulin, and to declare that Clugston was not elected. No other proceedings have been had or attempted in the court below upon this judgment, and the judgment itself does not contemplate or authorize any other proceedings, or any process to enforce it."

The foregoing case has been frequently cited with approval.

[6] In conclusion, it should be stated that the granting of this motion merely serves to work a change of counsel for the corporation upon its appeal from the judgment removing directors Shenberg and Goldman. In no way does such substitution affect or destroy the right of said removed directors to prosecute their individual and separate appeals from said judgment of removal.

The motion is granted and Newby & Newby are hereby substituted as counsel for the appellant Golden State Glass Corporation in the place and stead of O. C. Sattinger.

We concur: SHENK, J.; CURTIS, J.; CARTER, J.

39 Cal.App.2d 15

RAPPAPORT v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 12598.

District Court of Appeal, Second District, Division 2, California.

May 8, 1940.

1. Courts ⇐50

One department of superior court had jurisdiction to order official court reporter to prepare transcript of his notes of trial of action in another department of such court pursuant to written agreement between him and plaintiff as to compensation, in view of constitutional provision vesting superior court, not particular department thereof, with jurisdiction over such matters. Code Civ.Proc. §§ 953a, 953b; Const. art. 6, § 6.

2. Appeal and error ⇐1097(5)

The Supreme Court's holding that one department of superior court had no power to interfere with proceeding, properly assigned to and pending before another department thereof in accordance with court rules, by order vacating such other department's order directing court reporter to prepare transcript of his notes of trial in department entering vacation order, is law of case, and District Court of Appeal is bound thereby on writ of review. Code Civ.Proc. § 953a; Const. art. 6, § 6.

3. Certiorari ⇐69

An order of trial court, adjudged to have acted within its jurisdiction, must be affirmed on writ of review without further inquiry. Code Civ.Proc. § 1074.

4. Courts ⇐57(1)

After arrangements are made for official court reporter's compensation, it is his duty to deliver transcript of his notes of trial to court clerk with reasonable promptness, and, on his failure to do so, it is incumbent on court to require performance of such duty. Code Civ.Proc. §§ 953a, 953b.

5. Courts ⇐57(2)

A superior court judge acted within court's jurisdiction in ordering official court reporter to prepare transcript of his notes of trial of action in such court, pursuant to written agreement between reporter and plaintiff, on plaintiff's payment of reporter's compensation as provided therein, without considering validity of such contract or parties' rights thereunder, as it was outside court's functions to inquire into personal arrangements between plaintiff and reporter respecting compensation for transcript. Code Civ.Proc. §§ 953a, 953b.

6. Courts ⇐57(1)

The superior court had jurisdiction to order official court reporter to prepare transcript of his notes of trial of action in such court in accordance with written agreement between plaintiff and reporter, without giving notice to defendant, who had stipulated for extension of time to prepare transcript until date subsequent to that of such order. Code Civ.Proc. §§ 953a, 953b.

7. Contempt ⇐26

The continued failure of superior court's official reporter to comply with court's order to prepare transcript of his notes of trial of action in such court was contempt of court's authority, though there was no evidence of willful disobedience of order. Code Civ.Proc. § 953a; § 1209, subd. 5.

8. Contempt ⇐67

On writ of review to determine whether superior court exceeded its jurisdiction in making order adjudging official court reporter guilty of contempt in failing to comply with order, which court had power and jurisdiction to enter, for preparation of transcript of his notes of trial of action in such court, attention of District Court of Appeal is confined to consideration of question whether there was any substantial evidence before superior court to sustain its jurisdiction to punish petitioner for contempt. Code Civ.Proc. § 953a; § 1209, subd. 5.

9. Contempt ⇐23, 24

To sustain order adjudicating person guilty of contempt in disobeying court order, there must be notice or actual knowledge of such order and act ordered done must be within contemnor's power to perform. Code Civ.Proc. § 1209, subd. 5.

10. Contempt ⇐28(1)

Averments of official superior court reporter's answer, to citation for contempt in disobeying order of judge of one department of such court to prepare transcript of his notes of trial of action in another department thereof, that judge of such other department advised contemnor that his agreement with plaintiff in such action for preparation of transcript was void, that it was impossible for him to comply with order

without suffering complete physical collapse or serious financial loss, and that immediate preparation of balance of transcript would require 60 days' work exclusively thereon, without any income from any source, offered no valid excuse for his noncompliance with order. Code Civ.Proc. §§ 953a, 953b; § 1209, subd. 5.

11. Contempt ⇐67

On writ of review to determine whether superior court exceeded its jurisdiction in making order adjudging court reporter guilty of contempt in failing to comply with court's order to prepare transcript of his notes of trial of action in such court, burden was on petitioner to prove his alleged inability to comply with such order. Code Civ.Proc. § 953a; § 1209, subd. 5.

Proceeding by Samuel Rappaport for a writ of review to determine whether the Superior Court in and for the County of Los Angeles exceeded its jurisdiction in making orders requiring petitioner to prepare the balance of the record of a proceeding reported by him and adjudging him guilty of contempt in failing to comply with such previous order.

Orders affirmed.

Maurice C. Sparling, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Asst. Co. Counsel, and Delvy T. Walton, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

A writ of review having been issued, this matter is now before us for decision as to whether or not the respondent court exceeded its jurisdiction in making the two orders by which petitioner is aggrieved.

Petitioner is an official court reporter of respondent court. Prior to the 19th day of April, 1938, department 12 of said court had for 59 days conducted a trial of the action of William V. Davis. Petitioner reported 52 days of said proceedings. From the judgment entered in favor of the defendant Davis, plaintiff took an appeal by the alternative method. Code Civ.Proc. sec. 953a. On said 19th day of April, said plaintiff filed her written request for the preparation of a transcript in which she stated that personal arrangements had been made with the court reporters relative to their compensation. Code Civ.Proc. sec. 953b. Contemporaneously, said plaintiff and petitioner, by writing, agreed that petitioner would furnish his portion of the transcript and that plaintiff would pay petitioner a small portion of the statutory fees as the work of issuing the transcript progressed, and in the event of her ultimate success by judgment or favorable compromise, she would pay petitioner the full statutory fees for his work. A duly executed waiver of the undertaking required by said code section was filed by petitioner.

It does not appear that plaintiff ever failed to perform her obligations under the agreement as subsequently modified. But, notwithstanding her promptness, after more than seven months had passed from the date of the agreement, petitioner had transcribed but a small portion of his notes of said trial. She sought to expedite her appeal by invoking the aid of the court. On January 4, 1939, in response to an order to show cause why he should not be compelled to proceed with said transcription, the judge of department 34 of said respondent court before whom the order was returnable, made and entered its order that petitioner "proceed immediately with the preparation of the balance of the record reported by him . . . and that the same be prepared in accordance with the written agreement heretofore made between the said reporter and appellant Edna J. Williams upon payment by her of the said reporter's compensation, as provided in said agreement and the said amendments thereto".

Petitioner having failed to comply with said order, the same judge cited petitioner to show cause why he should not be adjudged guilty of contempt. But, before the hearing of said citation, to-wit, on the 28th day of February, 1939, the judge in said department 12 of said court, upon the application of petitioner, entered an order for the purpose of vacating said order of department 34. Forthwith said plaintiff applied to this court (Division I) for a writ of review for the purpose of determining the validity of said order of department 12. After decision annulling said order by this court (Williams v. Superior Court, 91 P.2d 152) the Supreme Court upon a hearing annulled said order made in department 12 on February 28th. See, Wil-

liams v. Superior Court, 14 Cal.2d 656, 96 P.2d 334, for more complete details. Upon a remand to the superior court, said citation theretofore issued by said department 34 came on for hearing on January 26, 1940, together with a motion of petitioner to vacate said first order of January 4, 1939. Petitioner's motion was denied but after two continuances, said contempt citation was heard on the 4th day of March, 1940, in said department 34, following which petitioner was found guilty of contempt and he was ordered to pay a fine of $500 and to be confined in the county jail until said order of January 4th, 1939, should be complied with. Aiming to effect a reversal of said judgment of contempt, petitioner has asked for this review. The questions for determination are as follows:

1. Did respondent court have jurisdiction to order petitioner to prepare said transcript "in accordance with the terms" of a contingent agreement, which is contrary to public policy and void?

2. Did the judge of department 34 exceed his jurisdiction by interjecting his order into a proceeding which had been previously assigned to and was regularly pending and undetermined before department 12 of the same court?

3. Did the court have jurisdiction to enter its said order of January 4, 1939, without first giving notice to the respondent Davis?

4. Did department 34 have jurisdiction to make said order of January 4, 1939, summarily ordering specific performance of the written portion of an unadjudicated, partly oral and partly written contract in a collateral and quasi-criminal proceeding?

5. Did department 34 have jurisdiction to make such an order as that of March 4, 1940, adjudging petitioner guilty of contempt?

[1-3] 1. Petitioner contends that the Supreme Court decided only that department 12 had no jurisdiction to vacate said order of January 4th. But in reaching that very conclusion the Supreme Court must have determined that in making said order, department 34 did have jurisdiction. It could not have decided otherwise in view of the provisions of the Constitution which vests the superior court with jurisdiction over such matters and not in a particular department of said court. Constitution, art. VI, sec. 6. It was held (Williams v. Superior Court, 14 Cal.2d 656, 96 P.2d 334) that department 12 had no power to interfere with a proceeding pending in department 34 because the matter had been, in accordance with the rules of said trial court, properly assigned to and was pending before department 34. Since that holding is the law of the case, we are bound thereby. If it is adjudged that in making an order the trial court acted within its jurisdiction, the inquiry ends and the order must be affirmed. Bridges v. Superior Court, 14 Cal.2d 464, 94 P.2d 983; Fuller v. Board of Medical Examiners, 14 Cal.App.2d 734, 59 P.2d 171; Homan v. Board of Dental Examiners, 202 Cal. 593, 595, 262 P. 324; Code Civ. Proc., sec. 1074.

[4, 5] But petitioner contends that the court exceeded its jurisdiction in that the order required petitioner to prepare a transcript "in accordance with the written agreement" which is void as against public policy. It is conceded that the Supreme Court correctly held that the validity of the agreement could not properly be determined in the case before it but only in an appropriate action filed for that purpose. After arrangements are made for the reporter's compensation, it becomes his duty to deliver the transcript with reasonable promptness to the clerk (Gjurich v. Fieg, 160 Cal. 331, 116 P. 745) and upon his failure to do so, it is incumbent upon the court to require the performance of such duty. Code Civ.Proc., sec. 953a. By requiring petitioner to proceed with the transcription in accordance with the written agreement, department 34 was not considering the validity of the contract or the rights of the parties under it. Said order left the parties in "statu quo" in so far as it pertains to their rights or remedies. The purpose and effect of the order were to control the behavior of an adjunct of the superior court, to direct an official who had a clear duty under said section 953a. Having neither jurisdiction nor occasion to adjudge the rights of the parties under the contract, the judge directed his attention to the paramount issue before him, viz., to enforce the performance by the stenographic reporter of his said legal duty. If the court had ordered plaintiff to post a bond required by said section, or any other particular thing not specified in the agreement, it would

thereby and to that extent have attempted to adjudge the rights and the duties of the parties. It was outside of the functions of the court to inquire into the personal arrangements made between said plaintiff and petitioner with respect to the compensation of petitioner for his transcript. Thus, the judge of department 34 was acting clearly within the jurisdiction of the court in ordering the petitioner to proceed, as directed by said order of January 4th.

2. Petitioner's second contention is that department 34 by said order exceeded its jurisdiction by interfering with a proceeding which was regularly pending before department 12, where the law suit had been tried. But this is contrary to said decision of the Supreme Court which holds that department 34 did have jurisdiction to make said order because the proceeding had been duly assigned to department 34.

[6] 3. The contention that department 34 had no jurisdiction to enter said order of January 4th without first giving notice to respondent Davis, finds no support in law. It was not essential to the jurisdiction of the court that any notice be given to respondent. When the court's attention was directed to the fact that the petitioner had been remiss in the preparation of the transcript, it was a matter purely between the reporter and the court and the court could not do otherwise than to require petitioner to proceed with the transcribing of his notes. Such notice to appellee of the proposed proceedings of January 4th could neither add to nor take from the duty or the power of the court to perform the duty enjoined by the statute. Respondent had already stipulated to extend the time for the preparation of the transcript to February 28, 1939, practically eight weeks later than the day of the first order of department 34. A notice to him, therefore, of the court's intention to enforce the timely preparation of the transcript would have performed no useful office, for he would have no interest in the transcript until it should be finally presented for certification.

4. The fourth issue raised by petitioner has been answered in our discussion under the first proposition. We observed, however, that the record contains no evidence of the alleged oral agreement.

[7-9] 5. As to the jurisdiction of the court to adjudge petitioner guilty of contempt on May 4, 1940, petitioner contends that there is no evidence of wilful disobedience of said first order of January 4, 1939. Since the court did have jurisdiction to enter said order, it necessarily follows that continued failure of petitioner to comply therewith was a contempt of the court's authority. Code Civ. Proc., sec. 1209, subd. 5. Having such power and jurisdiction, our attention is confined to a consideration of whether there was any substantial evidence before said department 34 which would sustain its jurisdiction to punish petitioner for contempt. Bridges v. Superior Court, supra. In order to sustain an order for contempt, two essential facts must appear, namely: (1) there must be notice or actual knowledge of the order, for the disobedience of which citation for contempt has issued; and (2) the act ordered to be done must be within the power of the contemnor to perform. 5 Cal. Jur. 913, sec. 20.

[10, 11] The record clearly shows that petitioner had notice of the entry of said first order and he makes no claim that he did not have knowledge thereof. In the second place, there is no evidence of petitioner's inability to perform. His answer to the contempt citation discloses that immediately following the entry of the order of January 4, 1939, he presented his grievances to the judge of department 12, who advised him that said agreement for the preparation of the transcript was void; that it had been impossible for him to comply with the order without resulting either in complete collapse of his physical condition, with permanent injurious effects to himself and to his life, or in the alternative, without causing him serious financial loss, which he averred he would be unable to bear. He then proceeded to state that the immediate preparation of the balance of the transcript would require a period of 60 days exclusively upon said transcript without deriving any income whatsoever from any source, and necessitating his refusal to take any work of any nature whatsoever during said period, and that his physical and financial loss would be irretrievable. In nothing that he averred did petitioner offer any valid excuse or prove his inability to comply with the court's order. The burden of proving his inabil-

ity to comply with the order was upon petitioner. (In re Pillsbury, 69 Cal.App. 784, 232 P. 725) and he has failed to carry the burden. His claim that the time spent upon the preparation of said transcript would have been a total loss is absurd in view of his obligation. The fact that he was able to continue to perform as a court reporter after the order of January 4, 1939, demonstrates that he was qualified to read the notes necessary to complete the transcript which he had been ordered to prepare.

For the foregoing reasons, the orders are affirmed.

We concur: WOOD, J.; McCOMB, J.



38 Cal.App.2d 724

PEOPLE v. JONES et al.

Cr. 3321.

District Court of Appeal, Second District, Division 1, California.

May 6, 1940.

Robbery ⇐24(3)

Evidence *held* to authorize conviction of robbery on issue of identification of defendant as perpetrator of the crime.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Jack Jones was convicted of robbery, and he appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

DORAN, Justice.

On Saturday, September 23, 1939, between the hours of 9 and 9:30 o'clock at night, a robbery was committed by two negroes at the Caler's Market on West Jefferson boulevard in Los Angeles. One bandit entered the grocery department and took the money from the cashier, Ralph Robinson, at the point of a gun, while the other bandit stood in front of the store about 22 feet away from the victim. The two bandits then went over to the fruit and vegetable department in the front of the market, and the one who had taken the money from Mr. Robinson in the grocery department now took the money from the cash register in the fruit department. The other bandit stood nearby and held a gun. After they had taken the money the two men turned and ran.

The defendant and appellant, Jack Jones, was thereafter charged by information, together with one Felix Wiley, with two counts of robbery in connection with the above incident. The charges as to Felix Wiley were dismissed. Defendant entered a plea of "not guilty" and the cause was tried before a jury. It was the contention of the prosecution that the defendant Jack Jones was the bandit who stood in the front of the market while the grocery department was being robbed, and that he later joined the accomplice and held the gun while the clerk in the fruit department was being robbed.

The jury found the defendant guilty of both counts.

This appeal is from the judgment of conviction and from the order denying defendant's motion for a new trial.

It is contended, in effect, that the evidence is insufficient to sustain the judgment, and that misconduct of the district attorney prevented the defendant from having a fair and impartial trial. Valid support for both contentions is entirely lacking in the record.

It is argued with regard to the first contention that the evidence falls short of being sufficient because the four witnesses who were present in the market at the time the robberies were committed, were unable to identify appellant. If true, and if such evidence constituted the only evidence adduced at the trial, the argument would be well founded, for the four witnesses testified that defendant resembled the individual who committed the robbery. However, in addition to the finding by police officers of two guns hidden under a mattress in the home of a friend of the defendant, one James Mathews, whom the defendant visited that evening, the record reveals that a witness, Frank Miles, testified that a man by the name of "Joe" borrowed his car at "dusk dark" on the eve-

ning in question, at which time defendant and appellant Jack Jones, whom Miles knew by sight, was standing near. "Joe" and the defendant then drove away together in Miles' car. The witness Miles testified that the defendant returned later, alone, without the car, and informed him that he, Jones, had used the car in a "holdup"; and, further, that defendant then told him: "Here is what I want you to do. We will give you $30.00. Go out on the highway and call the police and tell them someone put a gun in your side and has taken your car."

Miles also testified that he was ordered by the defendant to accompany him and his wife to the home of James Mathews, at which time defendant's wife held a paper bag which, the defendant told him, contained "artillery". The guns found by the police officers were in a paper bag.

Incidentally, the description of the car used in the robbery corresponded to the description of Miles' car, which was an old Ford coupe with white wire wheels.

The foregoing brief and partial reference to additional evidence relied upon by respondent to sustain the judgment is sufficient to indicate the futility of appellant's argument.

The contention that certain alleged misconduct of the district attorney interfered with a fair and impartial trial, is trivial.

For the foregoing reasons the judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.



39 Cal.App.2d 32

WALTON v. KERN COUNTY.

Civ. 2530.

District Court of Appeal, Fourth District, California.

May 8, 1940.

Hearing Denied July 3, 1940.

1. Pleading ⇐275

Generally, where an action is prematurely brought, and original complaint must fall, the supplemental complaint has no place as a pleading.

2. Action ⇐65

Ordinarily, the plaintiff's cause of action must have arisen before filing of complaint, and he may not recover in a cause of action arising after suit is filed.

3. Action ⇐3

Where a right is purely statutory and is granted upon certain conditions, those conditions must be complied with.

4. Highways ⇐206
Limitation of actions ⇐127(15)

Where administratrix of estate of decedent commenced action against county for death of decedent allegedly caused by improper manner in which road was maintained by county, before county board of supervisors had acted upon claim against county and before expiration of 90 days provided by statute for board to act on such claim, action was prematurely brought, and complaint could not be amended after statute of limitations had run against filing of new complaint to show that claim had been rejected by failure of board to act upon it within 90 days. Pol.Code, § 4078.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Naomi Hope Walton, as administratrix of the estate of Edgar Earl Walton, deceased, against the County of Kern, State of California, for death of plaintiff's decedent which it was alleged resulted from improper manner in which a road was maintained by defendant. From judgment for defendant, the plaintiff appeals.

Affirmed.

C. T. Walton and Strother P. Walton, both of Fresno, for appellant.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for a death which, it is claimed, resulted from the improper manner in which a road was maintained by the defendant.

The accident and death in question occurred on December 24, 1937. A claim was filed with the defendant county on February 1, 1938, and it is conceded that no or-

der was ever made by the supervisors with respect to rejecting or allowing the claim.

The complaint was filed on March 7, 1938, and an answer was filed in April, 1938, the exact date not being disclosed by the record. On April 4, 1939, the defendant filed notice of motion for a judgment on the pleadings on the ground that the action was prematurely filed since the supervisors had had ninety days in which to allow or reject the claim. On April 6, 1939, the plaintiff filed notice of motion for permission to file a supplemental complaint, which was attached thereto, and which included an allegation that the claim had been rejected by the failure of the board of supervisors to act upon it within ninety days after it was filed. The two motions were heard together, the motion for leave to file a supplemental complaint being denied and the motion for judgment on the pleadings being granted. The plaintiff has appealed from the judgment.

[1, 2] The general rule is that where an action is prematurely brought, and the original complaint must fall, a supplemental complaint has no place as a pleading. Morse v. Steele, 132 Cal. 456, 64 P. 690; Lewis v. Fox, 122 Cal. 244, 54 P. 823. Ordinarily, a plaintiff's cause of action must have arisen before the filing of the complaint and he may not recover in a cause of action arising after the suit is filed. Kirk v. Culley, 202 Cal. 501, 261 P. 994. In Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940, 945, the court said: "Every complaint is predicated upon the theory that the plaintiff therein is entitled to judgment at the time of its filing."

The appellant concedes this general rule, but relies upon the case of Grant v. Sun Indemnity Co. 11 Cal.2d 438, 80 P.2d 996, as permitting a deviation from that rule under proper circumstances, and contends that such an exception should have been applied in this case, and the filing of the supplemental complaint permitted, because no prejudice would have resulted to the respondent and because the statute of limitations had then run against the filing of a new complaint. The case just cited was one to enforce a policy of indemnity insurance, the action having been filed prior to the time provided for in the policy, since an appeal from a prior judgment was still pending. During the trial, the court permitted the plaintiff to file an amendment to the complaint alleging the affirmance of the other judgment. While the court recognized the general rule to which we have referred, the action of the trial court in permitting the amendment was upheld, under the circumstances of that case, because the plaintiff therein had been compelled to bring the action without knowledge of the provisions of the policy, and on the further ground that the insurer could not repudiate the policy and at the same time rely upon one of its provisions.

[3, 4] No similar elements or conditions appear in the instant case to account for the filing of the complaint before the cause of action had arisen. Moreover, the appellant's cause of action was purely statutory and, under section 4078 of the Political Code, the failure of the board of supervisors to act upon the claim was not to be deemed equivalent to a rejection thereof until the expiration of ninety days. Where a right is purely statutory and is granted upon certain conditions those conditions must be complied with. Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580. At the time this action was filed but little more than one-third of the time allowed to the board of supervisors for passing upon the claim had expired and, under the statute, a cause of action did not then exist. In an affidavit presented at the hearing of appellant's motion for leave to file a supplemental complaint, one of the attorneys for the appellant stated that on February 14, 1938, he called the clerk of the board of supervisors of the respondent county by long distance telephone and was told that the claim had been referred to representatives of the county's insurance carrier, and that he drew the inference, although he admitted that he was not so told by the clerk, that the claim had been rejected by the board of supervisors. Not only was there no basis for that inference but the complaint, as filed, failed to allege that the claim had been rejected and affirmatively alleged that it had not yet been acted upon by the board of supervisors.

Nothing in the instant case brings it within the rule applied in Grant v. Sun Indemnity Co., supra, and no complaint setting forth a cause of action was filed or offered for filing until after the cause of action was barred by the statute of limitations. If it could be assumed that any unusual circumstances here justified the filing of an amended complaint or a supplemental complaint at any time it would still be necessary that the new complaint set

forth a cause of action at the time it was filed. This could not have been done at the time the supplemental complaint was offered, and no reversible error appears.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



38 Cal.App.2d 698

WALL v. BOARD OF REGENTS OF UNIVERSITY OF CALIFORNIA et al.

Civ. 12677.

District Court of Appeal, Second District, Division 2, California.

May 2, 1940.

1. Colleges and universities ⇐7
Prohibition ⇐6(2)

The board of regents of the University of California constitute a "corporation," and the District Court of Appeal had no right to interfere with its government where, from petition for alternative writ of prohibition to prevent board from continuing employment of an individual as instructor at university, it appeared that board was a normally functioning body. Const. art. 9, § 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Corporation".

2. Colleges and universities ⇐8

Conclusions reached by board of regents of the University of California with respect to employment of an individual as an instructor at the university are final, in absence of fraud or oppression. Const. art. 9, § 9.

3. Corporations ⇐393

In absence of fraudulent conduct on part of those who have been lawfully entrusted with management and conduct of the corporation's affairs, a court has no power or right to intermeddle with internal affairs of a corporation, and authority of a corporation's directors in conduct of corporation's business must be regarded as absolute when directors act within the law, and a court cannot substitute its judgment for that of the directors.

4. Corporations ⇐499, 513(1)

Before a private citizen can sue a public corporation for redress of grievances because of alleged fraud or oppression by directors of corporation, demand must first be made upon directors to repair the wrong done by the management, and where pleading fails to state that such demand has been made, and that petitioner has exhausted his legal remedies, his action will not lie.

5. Prohibition ⇐17

Petitioner was not entitled to an alternative writ of prohibition to prevent the board of regents of University of California from continuing employment and payment of salary of an individual employed as an instructor at the university, where petition did not indicate that petitioner's grievances had been made known to any member of board, or that a demand upon board would have been futile. Const. art. 9, § 9.

Proceeding by I. R. Wall against the Board of Regents of the University of the State of California, a public corporation, and others, wherein petitioner seeks an alternative writ of prohibition to prevent the Board of Regents from continuing the employment and the payment of salary of a certain person employed by the management of the university.

Petition denied.

Emery D. Martindale, of Los Angeles, for petitioner.

No appearance for respondents.

MOORE, Presiding Justice.

Petitioner seeks an alternative writ of prohibition to prevent the board of regents of the University of the State of California from continuing the employment and the payment of the salary of one Bertrand Russell, who has been employed by the management of said university.

The Constitution of the state of California reposes in the regents of the university full powers of organization and government of the university, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds. Art. IX, sec. 9 of the Constitution; Hamilton v. Regents

of the University of California, 219 Cal. 663, 28 P.2d 355.

[1-3] The board of regents constitute a corporation and from the petition it would appear that they are a normally functioning body. This being so, this court has no right to interfere with its government. The conclusions reached by the regents are final in the absence of fraud or oppression. "It is an elementary principle of law that a court has no power or right to intermeddle with internal affairs of a corporation, in the absence of fraudulent conduct on the part of those who have been lawfully entrusted with the management and conduct of its affairs. * * * The principle is so well settled and established in both federal and state jurisdictions that it seems unnecessary to give further citations." Consolidated Cement Corp. v. Pratt, 10 Cir., 47 F.2d 90, 93. The authority of the directors in the conduct of the business of a corporation must be regarded as absolute when they act within the law. The court cannot substitute its judgment for that of the directors. Hamilton v. United Laundries, 111 N.J. Eq. 78, 161 A. 347; Harris v. Brown, D.C., 6 F.2d 922; McConoughey v. Jackson, 101 Cal. 265, 35 P. 863, 40 Am.St.Rep. 53; McFarland v. McCowen, 98 Cal. 329, 33 P. 113; Merriman v. National Zinc Corp., 82 N.J.Eq. 493, 89 A. 764; Midland Savings & Loan Co. v. Dunmire, 10 Cir., 68 F.2d 249; United Milk Products Co. v. Lovell, 6 Cir., 75 F.2d 923.

[4, 5] Before a private citizen can sue a public corporation for redress of his grievances, because of the alleged fraud or oppression on the part of the directors of such corporation, demand must first be made upon the directors to repair the wrong done by the management, and where the pleading fails to state that such a demand has been made and that petitioner has exhausted his legal remedies, his action will not lie. Fornaseri v. Cosmosart Realty & Bldg. Corp., 96 Cal.App. 549, 274 P. 597; Hawes v. Oakland, 104 U.S. 450, 26 L.Ed. 827. Nothing in the petition indicates that the grievances of the petitioner have ever been made known to any member of the board of regents or that a demand upon the board of regents would have been futile.

For the foregoing reasons the petition is denied.

I concur: WOOD, J.

McCOMB, Justice (concurring).

I concur in the order denying the application for an alternative writ of prohibition. I can see no reason for filing a written opinion, which is contrary to the usual practice in such matters. The question of Dr. Russell's qualifications to act as an instructor at the University of California is one lying solely within the discretion of the board of regents, and their determination of his qualifications is final.

Experience has demonstrated that the people of the state have wisely vested this discretion in the board of regents, as it is a matter of international knowledge that the University of California has under the guidance of the board of regents become one of the great universities of the world and that the university possesses a faculty composed of educators of the highest standing.



38 Cal.App.2d 741

BRILL v. BRILL.

Civ. 6394.

District Court of Appeal, Third District, California.

May 6, 1940.

Hearing Denied July 3, 1940.

1. Marriage ⇐40(6)

As respects whether marriage was properly annulled on ground that, at time of marriage, wife had a former husband living from whom she was not divorced, it would be presumed under statute that former husband, who was alive some two years and four months before subsequent marriage, was alive at date of such marriage. Civ.Code, § 61.

2. Marriage ⇐40(6)

The annulment of marriage on ground that, at time of marriage, wife had a former husband living from whom she was not divorced, was not improper on ground of absence of showing that former husband had not obtained a divorce, where, at time wife left New York to obtain a divorce, there was pending an order to show cause why former husband should not be enjoined from

prosecuting an action for divorce in any state except upon statutory ground of adultery permitted in New York, and, since adultery is only ground for divorce recognized in New York, which is also a crime there, in absence of showing that wife had committed adultery, presumption of innocence was applicable. Civ.Code, § 61.

3. Evidence ⇐60

A presumption of innocence is applicable in civil as well as criminal cases.

4. Marriage ⇐40(6)

As respects whether annulment of marriage, on ground that wife had a former husband living from whom she was not divorced, was improper because of absence of showing that former husband had not obtained a valid divorce, it would be presumed that former husband did not violate order which required him to show cause why he should not be enjoined from prosecuting divorce action in any state except upon statutory ground of adultery permitted in New York, and attempt to divorce wife upon any other ground in another state. Civ.Code, § 61.

5. Evidence ⇐87

Presumptions are "evidence," and hence may be the basis for findings of fact. Code Civ.Proc. § 1957.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

6. Divorce ⇐62(2)

In order that Nevada acquire jurisdiction to grant a divorce, it must appear that person seeking relief was an actual and bona fide resident of Nevada for six weeks immediately preceding commencement of an action. Comp.Laws Nev. § 9460.

7. Divorce ⇐64

Under Nevada law, residence in state solely for purpose of obtaining a divorce is not sufficient to confer jurisdiction, but bona fide residence with intention of remaining must appear. Comp.Laws Nev. § 9460.

8. Divorce ⇐327

If divorce is granted by state of matrimonial domicile, and that state has first and full jurisdiction over question of divorce, and if rendered after regular service, rights of parties are fixed and such decree must receive full faith and credit in all other states, and, if one spouse removes from state of matrimonial domicile, the jurisdiction still remains to decree a divorce even through substitutional service and such decree is entitled to full faith and credit everywhere, but, if both leave the state of matrimonial domicile, such domicile ends and jurisdiction lapses and such state has no further concern.

9. Divorce ⇐327

If either spouse removes to another state and acquires a domicile, jurisdiction attaches in that state based on its interest in and right to fix matrimonial status of its new member by virtue of which it may decree such status, and after such length of service as it may prescribe, or for such causes as it may allow, a divorce decree may be granted effective in that state, but if made on substitutional service, and perhaps on personal service, if in evasion of laws of another state, decree is not entitled to full faith and credit in other states but will, by comity, be recognized if not detrimental to other states' policy or interest.

10. Divorce ⇐327

If applicant for divorce is a mere sojourner in a state in which other spouse is not domiciled, such state has no jurisdiction to grant divorce on substituted service and such decree, even though authorized by its own laws, is not entitled to full faith or credit as matter of right or comity, and actual residence of one spouse or the other in state in which decree is granted, being thus essential to jurisdiction to grant divorce, whether such domicile in fact exists may be collaterally inquired into where decree is sought to be used in another state.

11. Marriage ⇐60(7)

An Arizona marriage was properly annulled on ground that at time of marriage wife had a former husband living from whom she was not divorced under evidence disclosing that wife had gone to Nevada from New York for sole purpose of obtaining divorce and left Nevada almost immediately after decree was entered and did not return to Nevada, and that former husband appeared through an attorney in fact and interposed no particular defense. Civ.Code, § 61; Comp. Laws Nev. § 9460.

12. Courts ⇐23

Jurisdiction cannot be conferred by consent.

13. Marriage ⇐60(3)

The California court had jurisdiction to annul Arizona marriage on ground that wife had a former husband living from whom she was not divorced, where at least the hus-

band was a bona fide resident of California, and perhaps the wife also as appeared from marriage license. Civ.Code, § 61; Comp. Laws Nev. § 9460.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by William Hunsaker Brill against Nancy Pierson Brooks Macy Brill, for the annulment of the marriage between plaintiff and defendant. From a judgment annulling the marriage, defendant appeals.

Affirmed.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

Daniel M. Hunsaker, of Alhambra, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment of annulment of marriage.

The purported marriage between the parties hereto was annulled upon the ground that at the time of such marriage appellant had a former husband living from whom she was not divorced. From that order this appeal is taken.

In 1928, appellant was a resident of New York. In 1928 she married George H. Macy, and both resided in New York. On June 4, 1934, appellant commenced an action against Macy in New York from which it appeared that in 1930 she had obtained a decree of separation from Macy wherein he was ordered to pay her $15 a week for support and maintenance; she also set forth that during all of the times therein referred to she had continuously resided in the city of New York, and that Macy had brought an action in Connecticut against her for divorce on the ground of desertion; and prayed for an injunction against Macy restraining him from prosecuting such action. An order to show cause was issued, and according to the records, is still pending.

On October, 1934, Macy and appellant entered into a contract wherein Macy agreed to pay her a lump sum in lieu of support and maintenance as prescribed in the decree.

We next find appellant in Reno, where she arrived October 5, 1934. She was met at the depot by an attorney, whom she had employed to obtain a divorce for her,—having telegraphed him before she left New York. She immediately rented an apartment in Reno, and on November 21st, filed her action for divorce upon the ground of extreme cruelty.

Simultaneously with the filing of the complaint, defendant Macy filed his answer, through an attorney to whom he had, on November 7, 1934, some fourteen days prior to the commencement of the action for divorce in Nevada, given a power of attorney to represent him. On November 21, 1934, a decree was filed granting appellant a divorce upon the ground of cruelty from George Macy. Appellant remained in Reno until shortly before Christmas when she went to San Francisco and then to Hollywood, where she was New Year's eve. She remained in California until midsummer, returning to Reno over a week end, and later in the year spent about two weeks in Reno visiting friends. To various persons she stated her home was in New York and in her marriage license issued to herself and respondent in March, 1937, she gave her residence as Hollywood, although at the time of the trial of this action she claimed that she was then and at all times after October 5, 1934, had been a resident of Nevada. On January 28, 1937, appellant met respondent in Hollywood, and on March 29, 1937, they were married in Yuma, Arizona. This action for annulment was tried in the county of Ventura, California, the residence of respondent.

The first point urged for reversal is that the evidence is insufficient to support a finding that at the time of the marriage of respondent to appellant, she was then the wife of Macy. No direct evidence was adduced at the trial that Macy was living on the 29th of March, 1937, but respondent, in the absence of such evidence, relies upon various presumptions to support that fact.

Section 61 of the Civil Code provides that, "a subsequent marriage contracted * * * during the life of a former husband or wife * * * is illegal * * * unless:

"1. The former marriage has been annulled or dissolved. * * *

"2. Unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. * * *"

[1] Macy was alive on November 21, 1934, at which time his answer was filed in the case of Macy v. Macy, some two years and four months before the marriage of appellant and respondent, and it would therefore be presumed under the second subdivision of the foregoing section that he was alive at the date of the marriage of appellant and respondent. People v. Glab, 13 Cal.App.2d 528, 57 P.2d 588.

[2, 3] It is also claimed there is no showing that Macy had not obtained a valid divorce from appellant prior to her marriage to respondent. In this connection it will be recalled that at the time appellant left for Reno there was still pending in New York, an order to show cause directed to Macy why he should not be enjoined from prosecuting an action for divorce in any state, except upon the statutory ground permitted in the state of New York. As adultery is the only ground for absolute divorce recognized in New York, which is also a crime in New York, in the absence of any showing that appellant had committed adultery, the presumption of innocence was applicable. Such a presumption is applicable in civil as well as criminal cases. Jones on Evidence, vol. 2, sec. 195; Guidera v. Lapiana, 52 Cal.App. 460, 199 P. 557.

[4] It is also to be presumed that Macy did not violate the order to show cause and attempt to divorce appellant upon any other ground in another state.

[5] It would therefore appear there was sufficient evidence in the record in the absence of anything to the contrary, to justify the finding that Macy was living on March 29, 1937, and that he had not obtained a divorce against appellant prior to that date, and inasmuch as presumptions are evidence they may be the basis for findings of fact. Sec. 1957, Code Civ.Proc.; Stafford v. Martinoni, 192 Cal. 724, 221 P. 919.

The next point urged is that the divorce granted by the courts of Nevada was null and void.

[6] In order that Nevada acquire jurisdiction to grant a divorce it must appear that the person seeking such relief was an actual and bona fide resident of the state of Nevada for six weeks immediately preceding the commencement of an action. Appellant arrived in Reno, Nevada, on October 5, 1934. On October 1, 1934, she and her husband had in the state of New York, entered into an agreement whereby Macy agreed to pay to appellant the sum of $2,500 in full satisfaction of all claims for alimony, maintenance or further support from him. On November 21, 1934, a decree of divorce was granted in Nevada, and shortly thereafter appellant left Nevada as hereinabove set forth.

The trial court, in the cause now before us, found that appellant went to Nevada for the sole purpose of obtaining a divorce from George H. Macy, and almost immediately after she had obtained such divorce, left Nevada and did not again reside there prior to her purported marriage to respondent. The court also found that appellant's purported residence in Nevada was solely for the purpose of obtaining a divorce from Macy, and that her residence in Nevada was merely a simulated or pretended residence, and that she never had been a bona fide resident of or domiciled in Nevada.

[7] Section 9460 of the Nevada Compiled Laws requires that a plaintiff in an action for divorce shall have resided six weeks in that state before suit is brought, but the Nevada Supreme Court has held that residence in the state solely for the purpose of obtaining a divorce is not sufficient to confer jurisdiction, but that bona fide residence, with the intention of remaining must appear. Walker v. Walker, 45 Nev. 105, 198 P. 433. In De Bonchel v. Chandler, D.C., 296 F. 482, the factual situation was quite similar to the instant case. Plaintiff sued for breach of contract of marriage. The contract and breach were admitted but one of the defenses was that plaintiff was invalidly divorced from a former husband. The evidence showed a decree, regular upon its face, granted in Nevada upon substituted service, although with actual notice to defendant therein, the jurisdiction of the court resting upon plaintiff's residence in Nevada for the statutory period, the matrimonial domicile being in the state of Louisiana. To several, the plaintiff had declared Nevada to be her permanent home, while to others she stated she had gone to Reno merely to obtain a divorce. The Nevada divorce was held to be invalid, and the court in upholding that judgment, pointed out that while the Constitution of the United States required full faith and credit to judicial decrees of other states, and that principle was further supplied by the principle of comity, yet each state is given the right to regulate marriage and divorce within its borders.

[8] The court there also pointed out that if a decree is void under the laws of

the state where granted, it is void everywhere and subject to collateral attack. If, however, the divorce is granted by the state of the matrimonial domicile and that state has first and full jurisdiction over the question of divorce, and if rendered after regular service, the rights of the parties are fixed, and such decree must receive full faith and credit in all other states. But if one of the parties removes from the state of the matrimonial domicile, jurisdiction still remains to decree a divorce, even through substitutional service, and such decree is entitled to full faith and credit everywhere. If both leave the state of the matrimonial domicile, such domicile ends and the jurisdiction lapses, and such state has no further concern.

[9] If either spouse removes to another state and acquires a domicile, jurisdiction attaches in that state based on its interest in and right to fix the matrimonial status of its new member by virtue of which it may decree such status. After such length of service as it may prescribe or for such causes as it may allow, a decree may be granted, effective in that state; but if made on substitutional service, and perhaps on personal service, if in evasion of the laws of another state, it is not entitled to full faith and credit in other states, but will, by comity, be recognized if not detrimental to the other states' policy or interest.

[10] If the applicant for divorce is a mere sojourner in a state in which the other party is not domiciled, that state has no jurisdiction to grant a decree on substituted service. Kegley v. Kegley, 16 Cal. App.2d 216, 220, 60 P.2d 482; Warren v. Warren, 127 Cal.App. 231, 15 P.2d 556; Latterner v. Latterner, 51 Nev. 285, 274 P. 194; Presson v. Presson, 38 Nev. 203, 147 P. 1081; and such decree, even though authorized by its own laws is not entitled to full faith or credit as a matter of right or comity, and the actual residence of one party or the other in the state in which the decree is granted, being thus essential to the jurisdiction to make it, whether such domicile in fact exists, may be collaterally inquired into where the decree is sought to be used in another state.

[11, 12] In the instant case the facts show that Macy, the husband, appeared in the divorce action by an attorney, holding a power of attorney so to do. The fact this power of attorney was executed some two weeks prior to the filing of the complaint, and that the defendant interposed no particular defense, as well as the circumstances appearing in the record, suggests at least an attempt to confer jurisdiction upon the courts of Nevada by consent. It is unnecessary to dwell upon the rule that jurisdiction cannot be conferred by consent. Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069; Andrews v. Andrews, 188 U. S. 14, 23 S.Ct. 237, 47 L.Ed. 366.

[13] Appellant questions the jurisdiction of the courts of California to inquire into the matter, but inasmuch as at least one of the parties, Brill, was a bona fide resident of California, and perhaps both, as appears from the marriage license, the courts of California had jurisdiction to declare the marriage a nullity. Anderson v. Anderson, 7 Cal.2d 265, 60 P.2d 290; Sullivan v. Sullivan, 219 Cal. 734, 28 P.2d 914.

It would therefore appear that the judgment of the trial court was just and proper under the facts and circumstances as shown by the record, and should be affirmed. It is so ordered.

I concur: THOMPSON, J.



LAISNE v. CALIFORNIA STATE BOARD OF OPTOMETRY et al.

Civ. 2531.

District Court of Appeal, Fourth District, California.

May 15, 1940.

Hearing Granted June 17, 1940.

1. Licenses ⇐38

Where the law under which a board is proceeding requires such board having statewide authority to give an accused licensee notice of charges against him and requires that the board conduct a hearing and, if notice is given, hearing is held, and if evidence warrants such action, the board may suspend or revoke licensee's license, the board's action will be considered binding on licensee if he does not have the sufficiency of proceedings before board and its order tested in the courts in a mandamus proceeding, and, if licensee applies to courts for re-

lief, the proceedings before and order of board are not binding on the courts.

2. Constitutional law ⇐287
Mandamus ⇐172
Physicians and surgeons ⇐11(3)

If, after proceeding according to law and after giving an accused licensee notice of a hearing and actually holding a hearing, the State Board of Optometry issues its order revoking licensee's license, the order is a "final order" unless licensee seeks relief in the courts, and, if licensee seeks to have license restored by appropriate action in mandamus the question must be litigated and a trial de novo had, and thereby the due process clauses of State and Federal Constitutions are given effect. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

On petition for rehearing.

Petition denied.

For prior opinion, see 101 P.2d 787.

H. A. Savage and Lawrence W. Young, both of Fresno, for appellant.

Earl Warren, Atty. Gen., and Thos. I. Coakley and J. Albert Hutchinson, Deputy Attys. Gen., for respondents.

PER CURIAM.

Respondents have filed a petition for rehearing in which they call particular attention to our quotation from Nider v. City Commission of City of Fresno, Cal. App., 97 P.2d 293. They urge that this quotation, if permitted to stand in its present form, would establish the rule that only by an action in the courts could licenses issued by a board having statewide authority be revoked; that the courts must provide for notice of hearings before such board; that if this be true it would necessarily follow that such boards could have no authority to revoke such licenses independent of actions in the courts.

The quotation, when lifted from its context, might possibly be given such a meaning, but when read in connection with the balance of the paragraph and the opinion in which it appears, does not support any such conclusion.

In that paragraph we were speaking only of those cases in which a license had been revoked by a board having statewide jurisdiction and in which the licensee had asked a review of such order by the board in a mandamus proceeding filed in the courts. The statements in the quotation should be understood as applying only to a case in which a licensee applied to the courts for relief.

[1] It is settled by Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal.2d 75, at pages 80, 81, 87 P.2d 848, at page 853, that where, as here, the law under which a board is proceeding requires such board having statewide authority to give an accused licensee notice of charges against him, and further requires that board to conduct a hearing on those charges that it may thereafter take action, and, if the notice is given, the hearing is held, and if the evidence warrants such action, it may suspend or revoke the license of the licensee. It should follow that the action of the board should be considered final and binding on the licensee if he does not proceed to have the sufficiency of the proceedings before the board and its order tested in the courts in a mandamus proceeding.

The Drummey case makes it equally clear that if the licensee applies to the courts for relief the proceedings before and the order of the board are not binding on the reviewing court. It was there said:

"The state constitutional provision discussed, supra, prohibits the conferring of judicial power on such administrative boards. If it should be held that the board's action in cancelling or suspending an existing license is binding on the courts, if such action is predicated on conflicting evidence, we would be necessarily holding that such board is exercising at least quasi-judicial powers. It is the essence of judicial action that finality is given to findings based on conflicting evidence. If the statute be so construed it would violate the state Constitution. Moreover, for a purely administrative board to deprive a person of an existing valuable privilege without the opportunity of having the finality of such action passed upon by a court of law, would probably violate the due process clause of the federal Constitution. Although there is some confusion in the federal cases, the more recent decisions by the United States Supreme Court have indicated that if binding fact-finding

power is conferred on purely administrative boards, and if the courts in reviewing the administrative board's actions do not exercise an independent judgment on the facts as well as on the law, then the party adversely affected, at least where constitutional rights are involved, has been deprived of due process. * * *

"In view of these principles, it necessarily follows that the court to which the application for mandate is made to secure the restoration of a professional license must exercise an independent judgment on the facts."

[2] The reasoning in the Drummey and other cases cited in our opinion have led us to the following conclusions: If, after proceeding according to law, and after giving an accused licensee notice of a hearing and actually holding a hearing, a board having statewide authority issues its order revoking the license of a licensee, such order possesses finality unless the licensee seeks relief in the courts. If, however, the licensee seeks to have his license restored by appropriate action in mandamus in the courts, then the question must be litigated and a trial de novo must be had. Thus the due process clauses of the state and federal Constitutions are given full force and effect. Const.Cal. Art. 1, § 13; Const.U.S.Amend. 14.

The petition for rehearing is denied.



39 Cal.App.2d 157

ALEXANDER v. MAYER et al.

Civ. 2551.

District Court of Appeal, Fourth District, California.

May 17, 1940.

1. Appeal and error ⇐430(1)

Where record on appeal did not show that notice of entry of order appealed from was ever served upon appellant, appeal would not be dismissed on ground notice of appeal was not given until nearly two years after entry of order appealed from. Code Civ.Proc. § 953a.

2. Appeal and error ⇐707(1), 934(3)

On appeal from order setting aside default judgment and permitting defendants to file answer and cross-complaint, plaintiff was required to furnish District Court of Appeals with copies of papers used on the hearing in the trial court, and, in the absence of such a record, every presumption was in favor of order as made. Code Civ.Proc. § 951.

3. Appeal and error ⇐635(1)

On appeal from order setting aside default judgment and permitting defendants to file answer and cross-complaint, where record did not include a copy of proposed answer and cross-complaint and, except for judgment roll which disclosed no error, clerk's transcript was not sufficiently authenticated, appeal was dismissed for want of a record which would support appeal. Code Civ.Proc. § 951.

4. Judgment ⇐160

Where a verified answer denying material allegations of complaint was presented with defendants' motion to set aside default judgment and for permission to file answer and cross-complaint, such answer supplied any deficiency in affidavits of merit which were filed in support of motion and which did not allege that defendants had fully and fairly stated all facts of case to their counsel.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by R. Alexander against L. E. Mayer and another for damages to real property. From an order setting aside a default judgment and granting defendants leave to file their answer and cross-complaint, plaintiff appeals. On defendants' motion to dismiss appeal and, if that motion should be denied, for a diminution of the record.

Appeal dismissed.

H. E. Schmidt, of Bakersfield, for appellant.

T. H. Werdel, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action for damages to real property. Summons was served on the defendants on January 13, 1938, and their default was entered by the clerk on January 25, 1938. A judgment by default for the full amount prayed for was entered on Feb-

ruary 4, 1938. On February 23, 1938, the defendants filed notice of a motion to set aside and vacate the judgment taken under default together with an application for permission to file an answer and cross-complaint which, the application stated, was presented therewith. This motion and application were argued on February 28, 1938, and submitted to the court. On March 8, 1938, the court made an order granting the motion to set aside the default judgment and granting defendants "leave to file their answer and cross-complaint accompanying their application to set aside said default". From that order, this appeal was taken by the plaintiff on January 4, 1940.

After a substitution of attorneys, the respondents moved in this court to dismiss the appeal and, in the event that motion should be denied, moved for a diminution of the record asking to have made a part of the record a certified copy of their verified answer and cross-complaint, which is alleged to have been filed in the trial court on February 23, 1938, to be now in the custody of the clerk of the trial court and to have been before the trial court when the order appealed from was made, but which was not included in the record presented to this court. In connection with the alternative motion there is presented to this court a photostatic copy of this answer and cross-complaint which shows that the same was served on the attorney for appellant on February 23, 1938, and which the clerk of the trial court has certified is a true and correct copy of the original on file in his office.

The only record filed in this court is a typewritten "Clerk's Transcript on Appeal" which includes, among other things, in addition to the judgment roll, the notice of the motion to set aside the judgment and the application for permission to file an answer and cross-complaint, three affidavits in support of the motion to set aside the judgment, an affidavit in opposition to that motion, and two minute orders. The verified answer and cross-complaint which was served on February 23, 1938, and which is mentioned in the application for permission to file the same and in the order of the court which is appealed from, is not included in the so-called clerk's transcript and was not among those documents mentioned by the appellant in his request to have a transcript prepared.

[1-3] The motion to dismiss the appeal was based upon the contention that this court is without jurisdiction to consider the appeal since a notice of appeal was not given until nearly two years after the entry of the order appealed from. The record before us, if considered, would not support a dismissal on that ground since it nowhere appears in this record that a notice of the entry of this order was ever served on the appellant. (Sec. 953a, Code Civ.Proc.) But it further appears that this appeal should be dismissed since there is no record here which would support the appeal. Section 951 of the Code of Civil Procedure requires the appellant, in such a case as this, to furnish this court with copies of the papers used on the hearing in the court below. In the absence of such a record every presumption is in favor of the order as made. While the purported clerk's transcript includes certain affidavits which may have been used on the hearing of the motion which resulted in the order appealed from it does not include a copy of the proposed answer and cross-complaint which was served and filed, and which the trial court's order indicates was used and, except with respect to the judgment roll, this transcript is not sufficiently authenticated, either as required by the rules of court or any provision of law, to permit it to be here considered. It contains a certificate by the clerk stating that the foregoing is a transcript of the records and files in his office prepared pursuant to the notice of appeal, and that each of the copies shown is a full, true and correct copy of the document of which it purports to be a copy. The only certificate of the trial judge is as follows: "Approved and allowed." Nothing in this certificate in any way informs us whether or not the papers copied in the transcript were used upon the hearing, or whether or not other papers and matters not included therein were there used. The only authenticated record we have before us is the judgment roll, which does not disclose any error in making the order appealed from. Under these circumstances there is no record before us which would sustain the appellant in his appeal. Guyot v. Cassab, 118 Cal.App. 742, 5 P.2d 912; Salinas v. Riverside Finance Co., 126 Cal.App. 675, 14 P. 2d 1025; Mason v. Coalinga Union H. S. Dist., 31 Cal.App.2d 317, 87 P.2d 921; Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748.

[4] It would further appear that if the record were to be so corrected as to show the papers used on the hearing, it would

not sustain the only point raised by the appellant. His opening brief has been filed and the sole ground urged for reversal is that the affidavits of merit filed in support of the motion to set aside the default judgment and for permission to file an answer and cross-complaint were deficient in that they did not allege that the defendants and respondents had fully and fairly stated all the facts of the case to their counsel. It appears that a verified answer denying the material allegations of the complaint was presented with the application for relief, and it is well settled that in such a case the answer supplies any deficiencies in the affidavit of merits. Shively v. Kochman, 23 Cal.App.2d 420, 73 P.2d 637; Waybright v. Anderson, 200 Cal. 374, 253 P. 148. Since the appeal should be dismissed it is unnecessary to act upon the alternative motion for a diminution of the record.

The appeal is dismissed.

We concur: MARKS, J.; GRIFFIN, J.



39 Cal.App.2d 140

READ v. MILLS BLDG. CO.

Civ. 11175.

District Court of Appeal, First District, Division 2, California.

May 17, 1940.

Hearing Denied July 16, 1940.

1. Mortgages ⇐375

The statute changing the general statute of limitations on actions on certain bonds, notes, debentures and on mortgages and deeds of trust to six years instead of four years after maturity of bonds, notes and debentures does not affect statutory limitation of three months after foreclosure sale for commencement of action for deficiency judgment. Code Civ.Proc. § 337, subd. 1; §§ 336a, 580a.

2. Mortgages ⇐375

Action to recover deficiency judgment not commenced until approximately 10 months after time of sale under trust deed securing bond was barred since statute changing general statute of limitations on actions on bonds and trust deeds securing the same to six years instead of four after maturity of such bonds did not change statutory limitation of three months for instituting action for deficiency judgment. Code Civ.Proc. § 337, subd. 1; §§ 336a, 580a.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Daniel Read against the Mills Building Company to recover a deficiency judgment on certain bonds issued by the defendant. From a judgment for plaintiff, defendant appeals.

Reversed.

Hearing denied; CARTER, J., dissenting.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (Noel A. Troy, of San Francisco, of counsel), for appellant.

David C. Dutton and Snook & Snook & Chase, all of Oakland, for respondent.

SPENCE, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff in an action brought to recover a deficiency judgment on certain bonds issued by defendant.

The bonds in question were secured by a deed of trust and, after default, the trust property was sold by the trustee on August 27, 1936. Plaintiff's action to recover the deficiency was not commenced until June 17, 1937, being approximately ten months after the time of the sale. Defendant interposed several defenses including the defense that the action was barred by the provisions of section 580a and of subdivision 1 of section 337 of the Code of Civil Procedure. The trial court found that the action was not so barred and entered its judgment in favor of plaintiff.

One of the main questions involved on this appeal is stated by defendant as follows: "Is an action for a deficiency judgment on bonds issued by a corporation and sold to the public and secured by a trust deed which is not commenced within three months after the date of sale under the trust deed barred by section 580a and subdivision 1 of section 337 of the Code of Civil Procedure"? Defendant contends that said question should be answered in the affirmative and we are of the opinion that this contention must be sustained.

Section 580a of the Code of Civil Procedure, relating to actions for deficiency judgments, was enacted in 1933 and pro-

vides in part, "Any such action must be brought within three months of the time of sale under such deed of trust or mortgage." Subdivision 1 of section 337 of the Code of Civil Procedure, relating to actions on obligations founded on instruments in writing, was amended in the same year and the proviso then added reads as follows: "provided that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage". Said section 580a and certain other sections were reenacted in 1935 for the purposes expressed in section 9 of chapter 650 of the statutes of that year (page 1807) but such reenactment is of no importance in this discussion.

Plaintiff apparently concedes that if there had been no further legislative enactments, said sections would have barred the present action even though the bonds and deed of trust had been executed prior to 1933. Palo Alto Mutual B. & L. Assoc. v. Cook, 17 Cal.App.2d 193, 61 P.2d 499; Reynolds v. Jensen, 14 Cal.App.2d 558, 58 P.2d 687. He relies, however, on chapter 614 of the Statutes of 1935 and argues that his action was not barred by the three months' limitation found in the above-mentioned sections. We will set forth the provisions of said chapter 614 of the Statutes of 1935 (page 1740), omitting only subdivision 2 of section 337, which has no application here. Said chapter reads as follows:

"Section 1. A new section is hereby added to the Code of Civil Procedure to be numbered 336a, and to read as follows:

"336a. Within six years. 1. An action upon any bonds, notes or debentures issued by any corporation or pursuant to permit of the Commissioner of Corporations, or upon any coupons issued with such bonds, notes or debentures, if such bonds, notes or debentures shall have been issued to or held by the public. 2. An action upon any mortgage, trust deed or other agreement pursuant to which such bonds, notes or debentures were issued. Nothing in this section shall apply to bonds or other evidences of indebtedness of a public district or corporation.

"Sec. 2. Section 337 of the Code of Civil Procedure is hereby amended to read as follows:

"337. Within four years. 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in section 336a of this code; provided that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage."

[1, 2] Plaintiff takes the position that since the enactment of said chapter 614, the only limitation upon any action on bonds, such as those involved here, is the limitation of six years found in the new section 336a of the Code of Civil Procedure. We believe this position to be untenable. The effect of the enactment of said chapter 614 was to change the general statute of limitations on actions upon certain bonds, notes, debentures and upon mortgages and deeds of trust securing the same to six years instead of four years after the maturity of such bonds, notes and debentures. In our opinion, said enactment did not affect in any manner the limitation of three months after the time of sale for the commencement of an action, such as the present one, for a deficiency judgment as prescribed by said section 580a and said subdivision 1 of said section 337.

If the legislature had changed from four years to six years the general statute of limitations prescribed by the original section 337 on all actions founded upon instruments in writing and had left unchanged all portions of said section 580a and of said subdivision 1 of said section 337 relating to actions for deficiency judgments, it would have been entirely clear that plaintiff's action for a deficiency judgment would have been barred as it was not brought within the prescribed three months' period. As we view the legislation in question, plaintiff is in no different position here than he would have been if such had been the legislation enacted. The legislature left entirely unchanged all portions of said sections relating to limitation

on actions for deficiency judgments and merely changed the general statute of limitations with respect to actions on certain written instruments. The words "except as provided in section 336a", as found in the new subdivision 1 of said section 337, obviously prescribe an exception to the general four-year statute of limitations, but these words do not relate to or modify in any way the three months' limitation found in said subdivision 1 or the three months' limitation found in said section 580a, both of which limitations relate to actions for deficiency judgments. We cannot agree with plaintiff that the change made by said chapter 614 showed an intention on the part of the legislature to change the period of limitations on actions for deficiency judgments on bonds of the class under discussion.

In view of the conclusions which we have reached, it appears unnecessary to discuss the other points raised by defendant.

The judgment is reversed.

We concur: NOURSE, P. J.: STURTEVANT, J.



39 Cal.App.2d 161

PEOPLE v. ALCANTARA et al.

Cr. 531.

District Court of Appeal, Fourth District, California.

May 17, 1940.

Criminal law ⇐1169(11)

Where accused testified that he had not been convicted of a felony, error in admission of record showing that accused had been convicted of "attempted second degree robbery" and was sentenced to serve one year in the county jail was harmless, where accused's counsel stipulated in presence of jury that record showed that accused was convicted of "second degree robbery", since record which was admitted tended to show true fact concerning prior conviction.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Constance Alcantara, George Pillar, and Robert Digino were convicted of grand theft, and they appeal.

Affirmed.

Morris B. Chain, of Bakersfield, for appellants.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from judgments pronounced upon defendants after verdicts finding them guilty of grand theft.

The defendants admit there is sufficient evidence to support the verdicts and judgments. But one error of law is urged here.

While Constance Alcantara was on the witness stand the district attorney asked him if he had been convicted of a felony, to which he replied that he had not. Later in the trial the county clerk of Kern county was called as a witness. He produced the records of the superior court of that county in the case of People v. Constance Alcantara. These records were finally received in evidence over the objection of defendants. During the argument over the admissibility of the record of conviction, a counsel for defendants made the following statement in open court: "We will stipulate the record shows he has been convicted of second degree robbery, and sentenced to serve a year in the County jail."

The court records admitted in evidence show that Alcantara was convicted of "Attempted Second Degree Robbery" and was sentenced to serve one year in the county jail. It is now agreed that it was error to admit this record.

We cannot regard this error as prejudicial. Defendants' counsel had admitted that the record showed that Alcantara had been convicted of second degree robbery. The record showed that he had been convicted of attempted second degree robbery, a lesser offense. Before the admission of the record, the jury was in possession of the information that the record in question showed that Alcantara had been convicted of a greater crime. The record tended to correct a mistaken assumption indulged in during the trial and showed the true fact concerning the prior conviction. We cannot see how prejudice can be predicated upon this error in admitting the record in evidence when that record showed that

Alcantara had been convicted of a lesser crime than his counsel admitted in the presence of the jury. Under these circumstances the error was harmless, if not actually beneficial to defendants.

The judgments are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



38 Cal.App.2d 579

In re DAVIS' ESTATE.

DAVIS v. DAVIS.

Civ. 11348.

District Court of Appeal, First District, Division 2, California.

May 21, 1940.

Hearing Denied June 20, 1940.

1. Descent and distribution ⇐71(3)

In special proceeding under Probate Code to declare heirship, any person may appear and file a written statement setting forth his interest in the estate, and no other pleadings are necessary. Probate Code, § 1080.

2. Descent and distribution ⇐71(7)

Where special proceeding under Probate Code to declare heirship was tried in court below on mutual belief that whether plaintiff was estopped to deny validity of defendant's divorce from first husband and subsequent marriage to deceased was an issue, and evidence covering the issue was admitted without objection and upon plaintiff's invitation, plaintiff could not object for first time on appeal that issue was not properly pleaded. Probate Code, § 1080.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

On petition for rehearing.

Petition denied.

For prior opinion, see 101 P.2d 761.

Daniel M. Potter and George S. Hupp, both of Los Angeles, for appellant.

Rea, Free & Jacka and Irvin A. Frasse, all of San Jose, for respondent.

PER CURIAM.

In his petition for a rehearing counsel for appellant takes us to task because we did not cover the point relating to the failure of respondent to plead an estoppel. He cites authorities to the general rule that the party relying upon estoppel must plead it otherwise it will be deemed waived. Like all other rules of law and procedure this one has its exceptions.

[1, 2] There are so many grounds upon which appellant's argument shatters that we will be content with stating them without expansion of the reasons controlling the principles. (1) The proceedings were taken under section 1080 of the Probate Code to declare heirship. That section permits any person to appear and file a written statement setting forth his interest in the estate. "No other pleadings are necessary". The defendant-respondent complied with the terms of this section. (2) The case was tried in the court below upon the mutual belief that estoppel was an issue, and the evidence covering the issue was admitted without objection, and upon the invitation of appellant. He may not object for the first time on appeal that the issue was not properly pleaded. 2 Cal.Jur. p. 239; Woody v. Security Trust & Savings Bank, 137 Cal.App. 29, 32, 29 P.2d 898. (3) The appellant, having invited the trial of the issue of estoppel, filed an opening and a closing brief in which he failed to mention the question of pleading. This point was raised in the oral argument for the first time. When a question is raised in this manner by an appellant to defeat a judgment there is greater reason why it should be disregarded than when it is raised by the respondent to support the presumption of the validity of the judgment. Here neither the trial court nor the respondent was given an opportunity to consider the question whether in a special proceeding under section 1080 of the Probate Code, it is necessary to plead the facts of estoppel. For these reasons the question should not be heard here when raised for the first time on the oral argument.

The petition is denied.

39 Cal.App.2d 149

PEOPLE v. CHERRY.

Cr. 3343.

District Court of Appeal, Second District, Division 1, California.

May 17, 1940.

1. Criminal law ⇐37

Although the law will not punish a person for a crime which he would not have committed but for the inducements of an officer, it is only when the intent originates with officer and when defendant is induced to commit a crime which was not contemplated by him, that such "enticement" or "entrapment" may be urged as a defense.

See Words and Phrases, Permanent Edition, for all other definitions of "Enticement" and "Entrapment".

2. Criminal law ⇐37

Acts of police officers, having information that bets on horse races were being made at establishment where defendant was employed, in requesting that defendant phone in a bet on a particular horse, did not constitute "entrapment" which would constitute a defense to a prosecution for receiving, holding and forwarding a bet on result of a horse race, where defendant admitted that he was engaged habitually in accepting and placing bets on horse races in violation of law. Pen. Code, § 337a, subd. 3.

3. Criminal law ⇐37

It is no defense to perpetrator of a crime that facilities for its commission were purposely placed in his way, or that criminal act was done at the decoy solicitation of persons seeking to expose the criminal, or that detectives feigning complicity in act were present and apparently assisting in its commission, especially where offense is one habitually committed and solicitation merely furnishes evidence of a course of conduct.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Robert L. Cherry was convicted of receiving, holding, and forwarding a bet or wager on the result of a horse race, and he appeals.

Affirmed.

Leland E. Zeman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Appeal by defendant from a judgment of conviction on two counts for the violation of subdivision 3, section 337a of the Penal Code, which section, generally speaking, denounces as a crime the receiving, holding or forwarding of any bet or wager upon the result, among other things, of any horse race. By appropriate waiver of jury and pursuant to stipulation of the parties, the cause was submitted to the trial judge upon the transcript of testimony taken at the preliminary examination.

There is no dispute as to the facts, which epitomized are that upon the afternoon of February 7, 1940, defendant was engaged at his occupation of clerk and meat cutter in a combination grocery store and market in the city of Los Angeles. A police officer entered the store, purchased from the defendant a package of cigarettes, and inquired as to whether defendant knew where the officer could make a bet, to which the defendant responded that he did not know, but that he had the telephone number of a bookmaker. The officer thereupon said that he would go up the street and see if he could make his bet there, but returned shortly and asked the defendant if the latter would phone in a dollar bet on a particular horse. Thereupon the defendant wrote down upon a piece of paper, "One dollar to win, Alviso in the third," and proceeded to the telephone, where he called in the bet. The officer walked out of the store and returned a few minutes later, when defendant informed him, "That horse is scratched," whereat the officer said, "Well, make it one dollar to win on The Gob in the fifth race, then." Defendant received a one-dollar bill from the officer and returned to the telephone, saying, "Well, one dollar to win on The Gob in the fifth race." Thereupon another officer walked up and said to the defendant, "Give me one dollar to win on Brother Nibs in the third race," handing the defendant a dollar bill; and the defendant repeated the bet over the telephone, then turned round and said, "That horse is scratched, too," whereupon the second officer said, "Well, make it Billie Bane in the third, then, one dollar to win"; which name and race the defendant repeated over the telephone, turned around and said to the officers, "It

is O. K., one on Billie Bane to win in the third." At this time the defendant was arrested.

The officers testified that they approached the defendant because of information they had that bets on horse races were being made at the establishment where defendant was employed; while the defendant testifying as a witness in his own behalf, said that he had been in the habit of telephoning in bets for his associates and friends, but that he received no commission or compensation therefor. The defendant thus described his method of operation:

"Q. When you took this bet, what did you expect to do with the $2 that you took in from these officers? A. Well, the way the procedure always worked, depending on the result of the races that they bet on, this fellow" (referring to a representative of the bookmaker) "would have come by and if the horses had not won, why, he would have collected the $2, and if they had won, he would have given me the winnings for those.

"Q. And then you would have paid it to these men when they came back after it? A. That was the idea."

The single ground urged by appellant for a reversal is thus stated by him: "* * * that the penal offense of which he stands convicted was conceived, designed and executed by the arresting police officers." In other words, appellant bases his appeal on the ground that he is the innocent victim of an entrapment deliberately planned and carried out by the officers. The theory of appellant would seem to be that it is as much the duty of peace officers to prevent as it is to detect and punish crime, and where officers of the law originate the design to have a crime committed and have by artful means induced another, wholly innocent of criminal intent until by the officers his mind has thus been corrupted, to effect such design, the policy of the law is to condemn rather than encourage convictions thus brought about. It is true that when the criminal intent originates in the mind of the entrapping person, and the accused is lured into the commission of the offense in order to prosecute him, such entrapment will constitute a defense. People v. Hall, 133 Cal.App. 40, 45, 23 P.2d 783. The rule is thus stated by our Supreme Court in People v. Makovsky, 3 Cal.2d 366, 369, 44 P.2d 536, 537: "It is unquestionably true that decoys may not be used to ensnare the innocent and law-abiding into the commission of crime when the criminal design originates not with the accused but is conceived in the minds of officers, and the accused is by persuasion, deceitful representation or inducement lured into the commission of a criminal act. When an officer induces a person to commit a crime, which he would not have committed without such inducement, the law will not punish the person so lured into the crime. People v. Malone, 117 Cal.App. 629, 4 P.2d 287. Under such circumstances the government is estopped by sound public policy from prosecuting therefor. The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite and create crime for the sole purpose of prosecuting and punishing it. While decoys may be used to entrap criminals and to present opportunity to one intending to commit a crime, they are not permitted to ensnare the innocent into the commission of a crime when the criminal design originates not with the accused but is conceived in the minds of the officers, and the accused is by persuasion or inducement lured into a criminal act. Newman v. United States [4 Cir.] 299 F. 128; People v. Malone, supra."

However, the facts of the case before us do not bring it within the rule just announced. There is an utter lack of evidence that any persuasion or inducement was offered to appellant to accept the bet, outside of the ordinary conversation that would take place between a willing bettor and a willing stakeholder or bookmaker. In the case of People v. Rucker, 121 Cal. App. 361, 8 P.2d 938, the defendant was asked by a police officer to sell the latter morphine in consideration of the payment by the officer of the sum of ten dollars. When the officer asked the defendant for the drug, the latter, evidently not having any, left the officer and went outside, purchased the morphine, and returning, sold it to the officer. Under this state of facts it was held there was no entrapment of the defendant by the officer. See, also, People v. Barkdoll, 36 Cal.App. 25, 171 P. 440; People v. Tomasovich, 56 Cal.App. 520, 206 P. 119; People v. Heusers, 58 Cal.App. 103, 207 P. 908; People v. Rodriguez, 61 Cal. App. 69, 214 P. 452; People v. Caiazza, 61 Cal.App. 505, 215 P. 80; In re Moore, 70 Cal.App. 483, 233 P. 805; People v. Harris, 80 Cal.App. 328, 251 P. 823; People v.

Ramirez, 95 Cal.App. 140, 272 P. 608; In re Wong Poy, 113 Cal.App. 677, 298 P. 1029.

[1, 2] Conceding that when an officer induces a person to commit a crime which he would not have done without such inducement, the law will not punish the person so lured into the crime (People v. Tomasovich, supra), nevertheless, it is only where the intent originates with the officer and where the defendant is induced to commit a crime which was not contemplated by him, that such enticement or entrapment may be urged as a defense. People v. Norcross, 71 Cal.App. 2, 234 P. 438. During the era of prohibition it was consistently held that the furnishing of money with which to purchase liquor did not constitute entrapment. People v. Rodriguez, supra; People v. Caiazza, supra. Where, as here, the defendant by his own admissions was engaged habitually in the unlawful business of accepting and placing bets on horse races in violation of the law, as the officers appeared to have probable cause for believing, then it cannot be said that appellant's purpose to commit the crime was the result of anything that the officers did or said. The rule in this regard is thus set forth in State v. Spiker, 88 Kan. 644, 129 P. 195: "The fact that purchases were made by persons seeking to ascertain if appellant was engaged in the unlawful sale of intoxicating liquors constitutes no defense to the charge, nor does it render the testimony incompetent."

[3] In 16 Cor.Jur., pp. 88, 89, we find the following: "While it has been said that the practice of entrapping persons into crime for the purpose of instituting criminal prosecutions is to be deplored, and while instigation, as distinguished from mere entrapment, has often been condemned and has sometimes been held to prevent the act from being criminal or punishable, the general rule is that it is no defense to the perpetrator of a crime that facilities for its commission were purposely placed in his way, or that the criminal act was done at the 'decoy solicitation' of persons seeking to expose the criminal, or that detectives feigning complicity in the act were present and apparently assisting in its commission. *Especially is this true in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnishes evidence of a course of conduct.* Mere deception by the detective will not shield defendant, if the offense was committed by him free from the influence or the instigation of the detective." (Italics added.)

The situation presented in the case at bar may be summarized by saying that the defendant was in his own mind ready to commit the crime, and it was only the opportunity so to do that was suggested by the officer. This does not constitute entrapment as understood by the law.

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.



39 Cal.App.2d 115

PEOPLE v. PARKER et al.

Cr. 3319.

District Court of Appeal, Second District, Division 1, California.

May 15, 1940.

1. Robbery ⇐24(1)

In trial for attempted robbery, evidence *held* sufficient to sustain jury's finding in verdict of conviction that defendant was armed when he committed offense.

2. Criminal law ⇐829(1)

Refusal of defendant's requested instructions fully covered by instructions given was not error.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Neal W. Parker was convicted of attempted robbery and grand theft from the person, and he appeals.

Affirmed.

William W. Larsen, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendants were charged in an information containing two counts with the crimes

of attempted robbery and grand theft from the person. They were likewise charged in both counts with being armed with a deadly weapon at the time of the commission of the offenses and at the time of their arrest. Defendant Williford pleaded guilty to the charge contained in count II of the information and admitted that he was armed at the time he committed the offense and at the time of his arrest. Appellant was found guilty of the crime of attempted robbery, as charged in count I of the information, the jury finding that he was armed at the time of the commission of said offense, but that he was not armed at the time of his arrest. He was also found guilty of the crime of grand theft from the person, as charged in count II of the information, the jury finding as to this count that appellant was not armed either at the time he committed the offense or at the time of his arrest.

This appeal by defendant Parker alone is from the judgment of conviction, and from the order by which his motion for a new trial was denied.

[1] The only point of contention on this appeal is that "the verdict stating that the defendant was armed at the time of the commission of the offense charged in count I of the information is erroneous as being contrary to the evidence in the case and to the law". However, appellant admits that the testimony as to whether or not he was armed at the time of the commission of the offense charged in count I is contradictory.

Mrs. Kabaker, the complaining witness in the attempted robbery count, testified that on the 1st of August, 1939, at approximately 11 o'clock in the evening, she drove her automobile into the garage at her home and when she was partly therein she heard hurried steps outside in front of the garage; that she closed the door and as she emerged from the garage, the appellant walked up to her holding a gun and said, "This is a stickup"; that she became angry and told appellant to wait a moment, whereupon she turned and fled up the street to the entrance to her home. She identified appellant as the man who held her up, and she testified that he had a gun in his hand but that she did not know what kind.

Miss Mickle, a neighbor of Mrs. Kabaker, testified that on the night in question she stepped outside her kitchen door and stood on the step; that she saw a car coming from the left; that it was being driven by Mrs. Kabaker, who turned to go into her garage; that as she entered the garage another car came around the corner which was to the right of Miss Mickle; that when Mrs. Kabaker was half way into the garage she stopped a moment to get a better start; that the second car then drove up with two young fellows in it and stopped; that appellant Parker jumped out and paced back and forth before Mrs. Kabaker's garage and waited for her to come out, at which time he walked up to her and said, "This is a stickup"; that "I saw his hand come out" and he held in it what appeared to be a gun; that this gun resembled exhibit I (a .32 Harrington-Richards gun). She also testified that when Mrs. Kabaker started to run away from them, both of the boys ran toward their machine, hopped in and drove away; that the gun which appellant held in his hand was not a silver gun; that it was not shiny but a dull black, the same color as exhibit I; that the light in front of her garage shone in such a way that it cast a sidelight on the gun, on appellant's face and right side, and on Mrs. Kabaker.

Three guns were introduced in evidence, i. e., exhibit I, a .32 Harrington-Richards pistol, which was found in the top of the defendants' automobile after their arrest and which defendant Williford admitted belonged to him; exhibit II, a toy pistol found lying on a shelf back of the seat of defendants' coupe which Williford said belonged to his sister; and exhibit III, a large Frontier gun which was recovered by the arresting officers from a toilet in a drive-in stand where defendants stopped after committing the alleged offenses, which gun appellant stated belonged to his father. According to the arresting officers' testimony, when they first questioned appellant he said he used a cap pistol when he attempted to hold up Mrs. Kabaker, but he later admitted using the .32 Harrington-Richards gun. In the presence of appellant, defendant Williford was asked by one of the arresting officers if appellant used a cap pistol in the attempted holdup, and he said "No", and when asked which gun appellant used, he replied that appellant used his (Williford's) gun, and that appellant did not use his own gun because it was too large. Appellant stood mute when asked if this were true, but he

testified at the trial that he used a cap pistol in his attempt to rob Mrs. Kabaker.

From this it readily appears that there was susbtantial evidence upon which the jury based its verdict that appellant was armed at the time he committed the offense charged in count I of the information.

Appellant also contends that "where the entire question for the jury was the determination of whether or not defendant-appellant was armed as charged in the information, it was the duty of the trial court to fully instruct the jury in this regard."

[2] A review of the instructions which were given reveals that the trial court properly instructed the jury as to the law of the case, and that the instructions which appellant requested and the court refused to give were fully covered by the instructions given.

There being no error in the record, the judgment and order appealed from are, and each of them is, affirmed.

We concur: DORAN J.; WHITE, J.



39 Cal.App.2d 154

PEOPLE v. SMITH et al.

Cr. 3337.

District Court of Appeal, Second District, Division 1, California.

May 17, 1940.

1. Criminal law ⇨1159(2)

It is only when the evidence upon which a conviction is based can be said to be inherently improbable and therefore amount to no evidence at all that an appellate tribunal can, as a matter of law, disturb the finding of the trier of facts thereon.

2. Larceny ⇨65

Evidence supported conviction of two women of grand theft.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Dorothy Smith and Gladys Murphy were convicted of grand theft, and they appeal.

Affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

WHITE, Justice.

This is an appeal from the judgment and an order denying a motion for a new trial following the conviction of the defendants by the court sitting without a jury of the crime of grand theft.

Narrating the evidence most favorable to the prosecution, as we are required to do following a guilty verdict or decision, the record discloses that on the evening of November 12, 1939, the complaining witness, after leaving his nephew, who drove away in an automobile was walking on Mariposa street in the City of Los Angeles when, he testified, defendant Dorothy Smith "came running up the street and banged into me, grabbed me on the coat lapels and wrestled with me and said, 'Come on, I will give you a good time.'" As he pushed defendant Smith away from him the complainant discovered that his wallet, containing $45 and some bank checks, was missing. He immediately started in pursuit of defendant Smith, who was running up an embankment adjacent to the street, and overtaking her, he commenced struggling with her in an effort to regain his wallet. In the course of the encounter Gladys Murphy appeared on the scene and said, "She ain't got that wallet"; whereupon defendant Smith exclaimed, "Your wallet is on the ground." Complainant then picked up his wallet from the ground and discovered that his money had been abstracted therefrom, whereupon he recommenced his struggle with defendant Smith in an effort to retrieve the money, at which time defendant Murphy entered the fray, saying, "Look here, Mister, if you don't stop I'll call the law." At this stage, the complaining witness testified, he started to yell, "Help," and immediately two police officers appeared on the scene. The defendant Smith stated to one of the officers that she wanted to speak to him alone, whereupon he took her aside and returned with money in the amount of $21, consisting of two ten-dollar bills and a one-dollar bill,

which according to the officer were handed to him by the defendant Smith. The police officer testified that he said to her, "Where is the rest of the money?" to which she replied, "I don't know. Maybe I threw it away, maybe I lost it." Thereupon the officers, with the aid of a flashlight, found another ten-dollar bill on the ground. Defendant Murphy had in her possession $14, which added to the $31 just referred to totals the exact sum allegedly lost by the complainant. The police officer further testified that he and another officer were cruising in a radio car when they observed defendant Gladys Murphy standing near the intersection of Wilshire Boulevard and Mariposa. They thereupon parked their automobile some distance back and observed her. She lighted a cigarette and suddenly ran up the incline on the southeast corner. Propelling their car in the direction taken by the defendant Murphy, the officers heard someone cry out what sounded to them like "police". Emerging from their car and going up the incline, the officers discovered complainant and the two women engaged in a struggle, at which time the complaining witness stated, "These women snatched my purse from me down on the corner."

Defendant Smith testified that the complaining witness had propositioned her and that they went up the incline behind a billboard for the purpose of having sexual intercourse, and the complainant gave her the money which was taken from her by the police officer. She denied ever giving any money to her codefendant, Gladys Murphy, the latter of whom testified that the $14 found in her purse was not given her by defendant but represented wages she had earned, working for a doctor.

The complaining witness' nephew, whom he had just left prior to the encounter with defendants, testified that immediately after his uncle left him and he was entering his automobile, he saw two women approaching Mariposa street, and that one of them, whom he identified as defendant Smith, started to run in the general direction taken by his uncle, while defendant Murphy approached his automobile and said to him, "Hello, sweet," or "honey", "How about a good time?" This witness thereupon entered his automobile and drove away.

[1, 2] The single ground urged by appellants for a reversal is that the judgment is contrary to the law and the evidence. It challenges one's credulity and does violence to reason, in the face of the herein narrated testimony, to say that the same is equally as compatible with innocence as it is with guilt. In his search for corroborative evidence the trial judge could not be indifferent to that which showed the two defendants together, then one running in the direction taken by the alleged victim, while the other loitered in the immediate vicinity, accosting another witness, addressing him with endearing terms and the suggestion, "How about a good time?" Neither could the court be unmindful of the testimony of the officer that defendant Murphy was standing nearby and suddenly went to the aid of her codefendant when the scuffle started between the latter and the complainant. Further, the fact that part of the money was found upon the ground casts aspersions upon the verity of defendant Smith's contention that the complainant willingly gave her the money. A significant circumstance is also presented in the fact that the total amount of money recovered from the defendants equalled exactly the amount lost by the alleged victim. Finally, the trial judge was not required to believe the defendants' version of what occurred at the scene of the alleged crime. He was the sole and exclusive arbiter of the value and weight of the evidence, of the effect thereof, and of the credibility of the witnesses who testified in the case. It is only when the evidence upon which a conviction is based can be said to be inherently improbable and therefore amount to no evidence at all that an appellate tribunal can, as a matter of law, disturb the finding of the trier of facts thereon. The appeal is without merit.

Judgment and order affirmed.

We concur: YORK, P. J.; DORAN, J.

39 Cal.App.2d 106

ISENBERG v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 12483.

District Court of Appeal, Second District, Division 1, California.

May 14, 1940.

Hearing Denied July 12, 1940.

1. Criminal law ⇐1081

Where accused was convicted of misdemeanors in justice's court and, immediately after pronouncement of judgment, gave oral notices of appeal to superior court, but written notices of appeal were not filed until eight days after rendition of judgment, the statute providing that a departure from form or mode prescribed by Penal Code in respect to any proceeding shall not render proceeding invalid, unless defendant has been prejudiced, did not absolve accused from necessity of filing notice of appeal in writing within time prescribed by law. Pen.Code, §§ 1404, 1468; Rules for Criminal Appeals to the Superior Court from Inferior Courts, rule 2.

2. Criminal law ⇐1081

Notice of an appeal in criminal case from inferior court to superior court of the county must be in writing and must be filed within five days after rendition of judgment or order which it is sought to have reviewed. Pen.Code, § 1468; Rules for Criminal Appeals to the Superior Court from Inferior Courts, rule 2; Const. art. 6, § 1a, subd. 5.

3. Criminal law ⇐1081

Where accused was convicted of misdemeanors in justice's court and, immediately after pronouncement of judgment, gave oral notices of appeal to superior court, but written notices of appeal were not filed until eight days after rendition of judgment, notices of appeal were insufficient to give superior court jurisdiction of appeal, and notices could not be validated by stipulation or other action of parties to proceedings, or by order of court. Pen.Code, § 1468; Rules for Criminal Appeals to the Superior Court from Inferior Courts, rule 2; Const. art. 6, § 1a, subd. 5.

4. Criminal law ⇐1081

Where accused was convicted of misdemeanors in justice's court, the fact that oral notices of appeal to superior court were given at time that judgment of justice's court was pronounced and that such notices were noted by clerk on docket did not authorize superior court to proceed with case on appeal, where written notices of appeal were not filed until eight days after rendition of judgment. Pen. Code, § 1468; Rules for Criminal Appeals to the Superior Court from Inferior Courts, rule 2; Const. art. 6, § 1a, subd. 5.

5. Criminal law ⇐1081

Where, through inadvertence or mistake of a party or his attorney, notice of appeal in a criminal case is not filed within time limited by law, neither trial nor appellate court can afford relief thereafter by permitting the filing of a tardy notice of appeal. Pen.Code, § 1468; Rules for Criminal Appeals to the Superior Court from Inferior Courts, rule 2; Const. art. 6, § 1a, subd. 5.

6. Criminal law ⇐1081

The only effective notice of appeal to superior court from conviction in inferior court is one given in writing by defendant or his counsel and filed with clerk, or in certain cases with magistrate, within five days after rendition of judgment or order from which appeal is taken. Pen.Code, § 1468; Rules for Criminal Appeals to the Superior Court from Inferior Courts, rule 2; Const. art. 6, § 1a, subd. 5.

Original mandamus proceeding by J. W. Isenberg against the Superior Court of Los Angeles County and the Appellate Department thereof, and the Honorable Hartley Shaw and others, Judges thereof, to compel the Appellate Department of the Superior Court to hear and determine certain appeals.

Demurrer of respondent court sustained, alternative writ discharged, and peremptory writ denied.

For prior opinion, see 99 P.2d 369.

Ray Howard, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, for respondent Superior Court.

WHITE, Justice.

[1] A rehearing was granted in this cause, that we might give further consideration to petitioner's contention that the provisions of section 1404 of the Penal Code absolve him from the necessity of filing a notice of appeal *in writing* within the time prescribed by law. We are satisfied that the provisions of the cited section have

no application to the proceedings here under review and are of the opinion that the proper conclusions were reached in our former opinion, 99 P.2d 369, on all points raised. We therefore adopt said opinion as a part of this opinion upon rehearing. The former opinion follows:

"Mandamus to compel the Appellate Department of the Superior Court of Los Angeles County to hear and determine certain appeals.

"The record presents the following facts: Petitioner was convicted in the justice's court of San Jose township in Los Angeles county, on July 28, 1939, of certain misdemeanor violations charged in four complaints filed against him. On said date and immediately following the pronouncement of judgment, petitioner, as defendant in said cases, gave oral notices of appeal, which were entered by the clerk in the docket of the justice's court of said township. Thereafter, some eight days later, on August 5, 1939, defendant filed written notices of appeal and subsequently perfected his record, and the causes came before the appellate department of respondent court, wherein decision was rendered on September 14, 1939, holding that the written notices of appeal had been filed too late, that the oral notice could not correct this tardiness, and that said appellate department of the superior court was therefore without jurisdiction to pass upon said appeals. Thereupon petitioner sought and obtained from this court an alternative writ of mandate and respondent court has filed a general demurrer to the petition.

"It is the contention of respondent court that rule 2 of the rules of the judicial council of the state of California pertaining to criminal appeals to the superior court from inferior courts establishes the correctness of the decision of such court in holding that it was without jurisdiction to proceed with the appeals herein. In this claim respondents must be upheld. Subsection 5 of section 1a of article VI of the Constitution of this state expressly authorizes the judicial council to adopt rules of practice and procedure for the several courts not inconsistent with the rules that are now or that may hereafter be in force. To give effect to this constitutional provision, the legislature in furtherance thereof amended section 1468 of the Penal Code in 1935 to provide that 'Appeals to the superior courts shall be heard and determined, the decisions thereon shall be remitted to the inferior courts *and the records on such appeals shall be made up and filed* in such time and manner as shall be prescribed in rules to be promulgated by the Judicial Council * * *.' (Italics added.) Pursuant to the authority thus conferred, the judicial council promulgated rules for 'Criminal Appeals to the Superior Court from Inferior Courts', which rules became effective on July 1, 1936. Among those rules we find rule 2 providing in the following language the manner in which an appeal shall be taken to the superior court:

" 'An appeal to the Superior Court of the county in which such inferior court is located is taken by filing written notice of appeal in the court wherein the judgment or order appealed from is rendered, within five days after the rendition of such judgment or order. Such written notice of appeal shall be filed with the clerk of said court, or, if there be no clerk, with the magistrate therein presiding. The date of such filing shall be the effective date of the taking of such appeal. If such notice of appeal is not filed as aforesaid within the time required, such appeal shall be void and of no effect.'

[2, 3] "From the foregoing it is at once apparent that the notice of appeal must be in writing and the same must be filed within five days after the rendition of the judgment or order which it is sought to have reviewed. Having been filed eight days after rendition of the judgment, the notices of appeal herein simply amounted to what has been characterized as 'a tardy notice of appeal' (People v. Megugorac, 12 Cal.2d 208, 82 P.2d 1108), and the same cannot be validated even by stipulation or other action of the parties to the proceedings, or by order of the court. The language of rule 2, supra, of the judicial council is plain and unequivocal. It is definite both as to the form of the notice of appeal to the superior court from a judgment or order of an inferior court and as to the time within which such notice must be filed. In People v. Lewis, 219 Cal. 410, 413, 27 P.2d 73, and cases therein cited, it was held that 'the requirements as to the date for filing notices of appeal are mandatory and jurisdictional in both civil and criminal actions'.

[4-6] "The suggestion that when the oral notices of appeal were given at the time judgment was pronounced, and were by the clerk written in the docket as follows, 'Oral Notice of Appeal Given', the

requirements of the law were satisfied, is answered by the language used in People v. Lewis, supra: 'The execution and filing of notice of appeal is done by a party or his attorney, and is not an act of the court. Where through inadvertence or mistake of a party or his attorney notice of appeal is not filed within the time limited by law, neither the trial court nor the appellate court can afford relief thereafter by permitting filing of a tardy notice.' The only effective notice of appeal is one given in writing by the defendant or his counsel and filed with the clerk, or in certain cases with the magistrate, within five days after rendition of the judgment or order from which the appeal is taken."

For the reasons herein stated, the demurrer of respondent court is sustained; the alternative writ heretofore issued is discharged; and a peremptory writ is denied.

We concur: YORK, P. J.; DORAN, J.



39 Cal.App.2d 109

SPENCER v. SCOTT et al.

Civ. 6410.

District Court of Appeal, Third District, California.

May 14, 1940.

As Modified on Denial of Rehearing June 13, 1940.

Hearing Denied July 12, 1940.

1. Automobiles ⇐244(20)

Evidence that owner of host's automobile had brakes repaired before starting on trip, but that brakes, except emergency brake, were slightly defective, that automobile was following preceding automobile on straight, three-lane highway at 40 miles per hour, and that host released accelerator when approximately 250 feet behind preceding automobile and applied brakes when approximately 80 feet from preceding automobile, and that automobile suddenly skidded on wet pavement into middle lane and collided with automobile approaching from opposite direction, did not show "willful misconduct" by host, and hence host was not liable for guest's injuries. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

2. Automobiles ⇐181(1)

In determining a host's liability for injuries sustained by guest in automobile accident, while each case must be determined on its particular facts, "willful misconduct" by host requires proof of conduct much more reckless and flagrant than that which would constitute mere carelessness or negligence. Vehicle Code, § 403, St.1935, p. 154.

Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

Action by Mrs. H. P. Spencer against H. M. Scott and others, and W. B. Griffith, sued as second Doe, for injuries sustained while plaintiff was riding in an automobile as the guest of defendant Merle B. Peterson. From a judgment for plaintiff, defendant Merle B. Peterson appeals.

Reversed.

H. K. Landram, of Merced, for appellant.

C. Ray Robinson, W. Eugene Craven, and Willard B. Treadwell, all of Merced, for respondent.

Mr. Acting Presiding Justice THOMPSON delivered the opinion of the court.

Merle B. Peterson has appealed from a judgment of $5,473 and costs which was rendered against him in an automobile casualty case. The plaintiff was injured while riding with him as a guest. It is asserted the evidence fails to support the finding of the trial court that the accident occurred through the wilful misconduct of the appellant.

The appellant and Miss Laura Scott drove from Merced to Berkeley in a Dodge sedan automobile owned by her father. Just prior to leaving Merced the brakes of the machine were relined and adjusted at a garage. After those repairs were completed Miss Scott noticed that the brakes were still "a little loose". She returned to the garage the same afternoon for gasoline and told the mechanic that the brakes seemed to be too loose. She did not direct him to again adjust the brakes, but she assumed that he did so. The brakes were still too loosely adjusted. She testified in that regard: "They were a little tighter, but weren't tight enough when I started on the trip." The following day she drove the car to Berkeley. The appellant accompanied her. On the way of Los Banos she discovered that the

brakes were still "a little bit loose". It was necessary to force the lever nearly down to the footboard to stop the machine. She informed Mr. Peterson of that defect. The car also had an emergency brake which was in good mechanical condition. She said she did not notice that an application of the brakes caused the machine to pull away from a straight course toward either side.

At Berkeley the following day, Miss Scott picked up her sister and her friend, the plaintiff, Mrs. H. P. Spencer. They started about 12:30 p. m. to drive back to Merced by way of San Jose. It was raining and the pavements were wet. The appellant, Merle B. Peterson, was driving the car. Miss Scott sat by his side. The respondent occupied the rear seat. Mr. Peterson testified regarding the condition of the brakes:

"Q. And when you applied the brakes the first time, there was a tendency to pull to the left? A. Just a little. * * *

"Q. But they were out of adjustment, is that the way you describe it? A. Well, slightly out of adjustment to the extent that one brake may have been a little tighter than the other."

It had ceased raining but the pavement was still wet. As the vehicle left San Jose on a three-lane highway, a passenger bus traveled ahead of it at the rate of 25 or 30 miles an hour. The appellant was driving at the rate of about 45 miles an hour. He may have reached a speed of 50 miles an hour. A truck and trailer was approaching from the south along its proper easterly lane. An automobile driven by Laura Griffith was following behind the truck and trailer in the easterly lane at a distance of about 200 feet or more. The center lane was then unoccupied. A couple of other vehicles passed, going north, along their proper side of the highway. There was then no other traffic in that vicinity. As the appellant's car reached a point about 250 feet behind the passenger bus, and was traveling comparatively slowly, Mr. Peterson, realizing he would soon overtake it, released his accelerator, and reduced the speed of his car. He made no attempt to pass the bus, nor to turn his machine into the center lane. There is no evidence that he applied the brakes forcibly as in an emergency. There is no evidence of an emergency until after the brakes were applied. The appellant merely slackened the speed of his machine as he approached the bus which preceded him. He released the accelerator when he reached a point about 250 feet behind the bus. He began to apply his brakes when he was about 80 feet away. His machine never reached a point closer than 40 feet from the bus.

It appears that at the same time Mr. Peterson began to slacken the speed of his car as he approached the bus the driver of the northbound Griffith car was engaged in attempting to pass the truck and trailer which preceded it. For that purpose Laura Griffith was then operating her car along the center lane of the highway. As she passed the southbound bus on her left and the northbound truck and trailer on her right, the appellant's machine suddenly skidded into the center lane and crashed into the Griffith car. As a result of the collision the respondent sustained a broken leg. Regarding the accident, Mr. Peterson testified:

"Q. You saw the car ahead of you for about 250 feet? A. Approximately 250 feet.

"Q. What speed were you traveling when you saw the car? * * * A. About 40.

"Q. And then what did you do? A. I released the accelerator completely.

"Q. And how fast was the car traveling in front of you at that time? A. Well, * * * I would say 25 or 30, proceeding very slowly. * * * I recall just beginning to slow down as the Chevrolet behind the truck was very close to the rear of the truck, beginning to pass [the truck]. * * *

"Q. At that time had you started to go around the southbound car? A. No, I didn't make any attempt to go around it.

"Q. Then as you came up, how close was the closest point that you approached the southbound car? A. Probably, maybe 40 feet, 40 or 50 feet.

"Q. At that time you applied your brakes? A. Just before that time.

"Q. Just before that you applied your brakes? A. Yes.

"Q. And the car then skidded to the left, did it not? A. Well, the action was, the brake action was quite effective in that as I applied the brakes slightly the car seemed to skid, sort of a skidding effect to the extreme left, directly in the path of the Chevrolet. * * *

"Q. I say, you skidded into the center lane? A. Yes, that is right. * * *

"Q. How far into the center lane did you skid before the impact occurred? A. Well, to the point of connection with the other car, I would say maybe four or five feet inside of the line. * * *

"Q. How far behind the car preceding you were you at the time you applied your brakes? A. My best judgment would be, I would say about maybe 80 feet."

Upon that evidence the court found that the accident was the result of appellant's driving his automobile at a reckless and excessive rate of speed "while in heavy traffic" constituting wilful misconduct on his part. Judgment was accordingly rendered against him, as we have previously stated.

[1, 2] Under the trend of authorities in California we are impelled to hold the findings and judgment are not supported by the evidence. We are convinced the evidence fails to show wilful misconduct on the part of Merle B. Peterson, the driver of the Scott car, and that the respondent, as a guest, may therefore not recover damages for the injuries which she sustained as a result of the accident on account of the prohibition of section 403 of the California Vehicle Code (St. 1935, p. 154). Porter v. Hofman, 12 Cal. 2d 445, 85 P.2d 447; Lennon v. Woodbury, 3 Cal.App.2d 595, 40 P.2d 292; Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.2d 988; Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279; Horning v. Gerlach, 139 Cal.App. 470, 34 P.2d 504; Rhoads v. Studley, 15 Cal.App.2d 726, 59 P.2d 1082. In all of the preceding cases, except the last one cited, judgments in favor of guests were reversed on the ground that the facts failed to constitute wilful misconduct. In the Porter case, supra, the definition of wilful misconduct is quoted with approval from the case of Norton v. Puter, 138 Cal. App. 253, 32 P.2d 172. While it is true that each case must be determined on its particular facts, it is necessarily true that wilful misconduct requires proof of conduct much more reckless and flagrant than that which would constitute mere carelessness or negligence. 4 Blashfield's Cyc. of Automobile Law, and Practice, Perm. Ed., p. 110, § 2322. Otherwise there would be no occasion for the adoption of section 403 of the Vehicle Code. In the Porter case the driver of the automobile was operating her car in rain on a wet highway at the rate of forty-five miles an hour. She turned her head and body as the machine reached a curve in the roadway to reprimand children who were playing with toys in the rear seat. She lost control of the vehicle, which skidded from the paved surface and overturned. In the Lennon case, supra, the driver of the machine was operating her car at the rate of 40 to 50 miles an hour on a wet highway in the rain. The machine skidded from the roadway into a ditch, injuring the guest. In the Turner case, supra, in support of the judgment, the respondent relied on proof of alleged defective brakes. It was claimed that the driving of a truck on a mountain highway under such circumstances constituted wilful negligence. In the Howard case, supra, the driver of the automobile was operating his car on a wet pavement in the rain. He suddenly turned his machine to avoid colliding with an approaching car, and his automobile skidded and overturned, injuring the guest. In the Horning case, supra, the guest fell from the machine and was injured when the left door of the car suddenly opened while the automobile was making a left-hand turn at a rapid rate of speed. The owner had previous knowledge of the defective door.

In the present case the owner of the automobile had taken the precaution to have the brakes of her car relined and adjusted immediately before setting out on the journey in which the accident occurred; she discovered after her departure that the brakes were still slightly defective; there was a mere tendency for the car to pull to the left when the brakes were applied; the machine was also equipped with an emergency brake in good condition; the car had not previously skidded on the wet pavement; the automobile was following a passenger bus on a straight, level, three-lane highway at the rate of only 40 or 45 miles an hour; there was no attempt to pass the bus nor to enter the middle lane of the highway; the accelerator was released at a distance of 250 feet behind the bus and the speed of the car was diminished; at a distance of 80 feet from the bus the brakes were applied; there was no apparent emergency; the skidding of the car could not reasonably be anticipated; when the machine reached a point about 40 feet from the bus, it skidded into the middle lane of the

highway, colliding with an approaching automobile and the guest was injured. Under such circumstances it may not be said the driver of the Scott car was guilty of wilful misconduct.

The judgment is reversed.

We concur: TUTTLE, J.; LEMMON, Justice pro tem.

On Petition for Rehearing.

PER CURIAM.

Upon petition for rehearing it is ordered that the opinion of this court appearing in 102 P.2d Appellate Decisions, page 554, be modified as follows:

On page 555, first column, lines 49 and 50 from the top, strike out the following: "apparently had not picked up its normal speed, and"

On page 556, second column, line 3 from the bottom, strike out the words: "without warning"

We have inadvertently referred to the automobile which preceded the defendant's car immediately before the accident occurred, as a "passenger bus". It appears that it was not a commercial bus, but merely an ordinary passenger machine. That erroneous reference to the identity of the machine seems to be immaterial. The character of that vehicle adds no force to the appellant's contention that the accident was the result of wilful misconduct. We are unable to escape from the conclusion that the facts of this case do not constitute wilful misconduct on the part of the driver of defendant's machine.

With the modifications above referred to, the petition for a rehearing is denied.



39 Cal.App.2d 91

CASEY v. DELELIO et al.

Civ. 11184.

District Court of Appeal, First District, Division 2, California.

May 13, 1940.

Rehearing Denied June 12, 1940.

Hearing Denied July 12, 1940.

1. Automobiles ⇐217(9)

A pedestrian who ran across street in front of moving street car while 30 feet from intersection, and was struck by automobile approaching in a course parallel with the street car, which was screened from view by the street car, was barred by contributory negligence from recovering from automobile driver.

2. Automobiles ⇐245(72)

In cases involving injury to pedestrian or one standing on highway, contributory negligence is usually a question for the court, where the injured person fails to look at all, looks straight ahead without glancing to either side, is in a position where he could not see, or takes no precaution at all for his own safety.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by John Casey against Charles Delelio and others for injuries suffered when struck by an automobile. From a judgment on a verdict for plaintiff against named defendant and another, named defendant and another appeal.

Reversed.

Hearing denied; CARTER, J., dissenting.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

John J. Taheny, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages for personal injuries and had a verdict for $6,000 and $5,000, respectively, against Charles and Alfredo Delelio to whom we refer herein as defendants, since the other defendants had a verdict against plaintiff and are not interested in the appeal. The defendants' appeal raises four separate questions, but we will confine our discussion to the first which relates to the charge of contributory negligence on the part of the plaintiff.

The facts concerning the accident are not in material dispute. At about 5:40 o'clock on the morning of January 13, 1938, the plaintiff walked northerly on the westerly side of Third street, in the city and county of San Francisco, crossed its intersection with King street, and then turned to his right in an easterly direction to cross Third street. At that point King street was occupied by the Southern Pacific Railroad Company with three sets of railway tracks which were used chiefly for switching purposes. The westerly side of Third from King to Townsend streets north was occupied by the Southern Pacific depot. It had a wide sidewalk and curbing throughout the block. The easterly side of Third street from King to Townsend was occupied by stores and other places of business. There was no defined or marked crosswalk at the intersection of Third and

King. What might be termed the point of the curb on the east side of Third was a little further south than that on the west. After crossing the railroad tracks, plaintiff looked to his left and to his right and saw a street car coming northerly on Third street and crossing the railroad tracks at that intersection upon the signal of the flagman stationed at that point. He then started easterly and ran across the street railway tracks to a point approximately between three and ten feet easterly from the most easterly rail where he was hit by defendants' automobile which was proceeding northerly paralleling the street car.

Negligence is charged to the defendants in the excessive speed at which the automobile was operated with insufficient or defective brakes, and with a failure to sound a horn. Their negligence in this operation of the vehicle will be assumed. In their attack upon the judgment the defendants charge that the plaintiff was guilty of contributory negligence as a matter of law in his attempting to cross the street at a point other than the crosswalk and in front of the moving street car which completely obscured his view from all northbound traffic to the east of the street car.

The plaintiff did not appear as a witness at the trial but in a deposition given soon after the accident he testified: "I don't know just where it did happen, no." Witnesses agreed that plaintiff fell where he was struck and was not carried forward by the automobile. The operator of the street car testified that the plaintiff fell right where he was hit and that that point was about thirty to thirty-five feet from the northerly property line of King street. The police officer who helped remove the plaintiff from the street testified that he was lying thirty feet from the intersection of King street. Another police officer, who was on the scene at the time, testified that the plaintiff was lying at a point even with the restaurant doors at a place on the easterly side of Third street. These doors were later shown to be thirty-two feet three inches from the intersection. The undisputed evidence is that plaintiff was not crossing the street at the intersection as that expression is defined in the Vehicle Act, but he was attempting to cross at a point approximately thirty feet north of such intersection.

By the same undisputed evidence the plaintiff was shown to have run into the place of danger without looking for traffic. The plaintiff testified in his deposition that he was crossing the street at "a mighty good gait", faster than a walk, "You wouldn't call it a long run, but I had a very good step. I remember that. I figured to get on the other side.

"Q. You were going faster than a walk? A. Oh, yes, faster than a walk; faster than an ordinary walk."

Plaintiff said he first saw defendants' automobile coming after he had passed in front of the street car. He testified: "I couldn't stop there then, because I was going at a fairly good rate, and my speed couldn't be stopped, and the street car,—I didn't actually know by looking at him, or looking at the street car, whether I was even across the tracks yet or not." And when asked the question: "When was it that you started to run"? he answered, "Well, when I got over the track that the street car was on, I seen then that he was coming toward me on the other side.

"Q. And it was how far away from you at that time? A. Well, it was probably a car length, or maybe a half a car length."

The "Restatement of Question Involved" appearing in respondent's brief rests on his construction of the testimony that "the plaintiff walked on a crosswalk across a car track in front of a street car which was slowly approaching thereon at a speed of 3 or 4 miles an hour, and kept looking at all times in the direction of approaching traffic, and cleared the track when the street car was about 19 feet away, at which time he observed the defendant's automobile to be at the rear of the street car or farther back, and was struck with terrific force by the defendant's automobile after the street car then had proceeded about 25 feet * * *". Unfortunately for plaintiff these facts do not appear in any evidence taken at the trial.

In the deposition of the operator of the street car who observed the plaintiff running across the street it appears that plaintiff started to run in front of the street car at about the time when he approached the northbound tracks, that he was approximately ten feet east of the easterly rail when he was hit, that he dropped to the pavement right where he was struck, that at the moment of the impact the street car had covered the intervening twenty feet so that he was directly opposite plaintiff at the moment he was struck, that the plaintiff was not carried forward by the automobile, and that he did not cease running from the time the witness first saw him ap-

proaching the southbound tracks of the street railway, until he was struck by defendants' automobile. The defendant, Charles Delelio, testified that as he was crossing the intersection at King street his automobile was about three feet to the east of the street car. All witnesses agreed that the point of impact was approximately from three to ten feet from the easterly rail. The plaintiff was hit by the left front fender and bumper of the automobile, and the same evidence demonstrates that the plaintiff did not yield the right of way to the approaching automobile, and that having first discovered that there was no traffic coming southerly on Third street, he left this place of safety and ran into a position of danger without taking any precautions for his own safety before doing so. As he went forward across the street he voluntarily placed the screen of the moving street car between himself and all approaching traffic from the south, and because of this it became impossible for him to observe any of the traffic coming northerly on Third street alongside of or to the rear of the moving street car.

[1, 2] The facts of this case bring it squarely within the principle stated in White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086, 1091, where the court said: "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court." A case very similar to the case at bar is Anderson v. Market Street Ry. Co., 116 Cal.App. 282, 2 P.2d 529. Many others are cited in 8 California Jurisprudence Ten-Year Supplement, pages 400 and 983. As long as the doctrine of contributory negligence as a matter of law is to be recognized it must be applied to a case such as this where the undisputed evidence shows that plaintiff voluntarily placed himself in a position where he could not see danger approaching from a point where a reasonable man must have anticipated it.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

In re LAWRENCE'S ESTATE. *

Civ. 12499-S.

District Court of Appeal, Second District, Division 1, California.

May 15, 1940.
Hearing Granted July 12, 1940.

Wills ⇐862

Under will, directing executors to use entire residue of testator's property for purchase of annuity payable to friend of testator for life, recommending annuity contract providing for repayment of unused principal to executors if annuitant died before all money used in purchasing annuity was consumed, and bequeathing money so refunded to named charitable institutions, such friend became "residuary legatee" of estate, and lapse of gift to him on his death before that of testator destroyed remainder to charities. Probate Code, §§ 92, 140.

See Words and Phrases, Permanent Edition, for all other definitions of "Residuary Legatee".

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

In the matter of the estate of Philip E. Lawrence, deceased. From a decree directing distribution of the whole estate among Charles Lawrence and others, testator's heirs at law, the Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles and another appeal.

Affirmed.

Waldo & Waldo, of Pasadena (G. E. Waldo, of Pasadena, of counsel), for appellant Church Home for Children.

Ticknor & Maxwell, of Pasadena, for appellant David and Margaret Home.

Thomas W. Cochran and E. D. Yeomans, both of Los Angeles, for respondent heirs.

PER CURIAM.

The testator, a single man, eighty years of age, died on July 1, 1938, leaving a last will and testament which was admitted to probate on August 26, 1938, and letters testamentary issued to J. J. Farnsworth and Ezra Farnsworth, who were named therein as executors.

Said last will and testament provided for the disposition of testator's estate in the following terms:

* Subsequent opinion 108 P.2d 893.

"Third: I direct that all the residue and remainder of money and property left by me at the time of my death (after payment of all my just debts and funeral expenses), shall be, by my executors used to purchase or contract for an annuity in favor of and payable to my friend Walter C. Black, now residing at 200 West Avenue 33rd, Los Angeles, California, during the remainder of his life. I recommend that such annuity be purchased from the Equitable Assurance Company of New York but if in the judgment of my executors it is unwise at the time such annuity is purchased to so deal with said company, my executors are to use their judgment in that event as to where they will purchase such annuity. I further recommend that such annuity contract shall be one that will provide for repayment to my executors of the principal unused in the payment of annuities in event of the death of the said Walter C. Black before all of the money thus used in purchasing annuity has been consumed under such contract.

"Fourth: In event that refund of principal, as provided in the Third paragraph hereof, is made, I give, devise and bequeath all of such moneys so refunded, to the Church Home for Children of the Protestant Episcopal Church of the Diocese of Los Angeles, now located at 940 North Avenue 64th, Los Angeles, California, and to David and Margaret Home, now located at LaVerne, California, in equal parts, share and share alike.

* * * * *

"In Witness Whereof, I have hereunto set my hand and seal this 1st day of April, 1937, in Los Angeles, California.

"Phillip E. Lawrence."

The annuitant Black predeceased the testator, he having struck testator on the head with a hammer and then shot himself, dying instantly. Testator never regained consciousness and died the following day.

During the course of administration certain of the heirs at law of testator petitioned the superior court sitting in probate for a distribution of the entire estate to them, whereupon the two charitable institutions named in the will appeared in opposition to said petition and sought distribution of the estate to themselves, each claiming one-half thereof. When the aforesaid petition of the heirs, the objections thereto, and the final account and petition for distribution "to persons entitled thereto" filed by the executors came on for hearing in April, 1939, the superior court made its order and decree that neither of the charitable institutions was entitled to any part of the estate, and directed distribution of the whole estate, with the exception of certain sums set aside for payment of inheritance taxes and other legal obligations, to the heirs at law of testator.

Both charitable institutions appealed from said order and decree which was entered on April 25, 1939. After said appeals had been perfected, the David and Margaret Home for Children, Inc., on August 8, 1939, entered into a compromise and settlement agreement with the heirs, by the terms of which it was agreed that the sum of $4,500 should be paid out of the assets of the estate to this one appellant, and in consideration thereof said appellant assigned to the heirs the balance of the estate and agreed to dismiss its appeal. Thereafter, said appellant David and Margaret Home for Children, Inc., made a motion in this court for a dismissal of its appeal and for an order directing the lower court to enter a judgment for partial distribution in accordance with a stipulation signed by said appellant and the respondent heirs, pursuant to the compromise and settlement agreement of August 8th. Said motion was granted by this court and remittitur therein issued on December 30, 1939. Estate of Lawrence, Cal.App., 97 P.2d 850. As result of that proceeding, the David and Margaret Home for Children, Inc., has been eliminated as a party to this appeal.

Appellant Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles was given an opportunity to participate in the compromise and settlement agreement heretofore referred to, but apparently preferred to rely upon its appeal from the decree of distribution. As the case now stands, it involves the claim of appellant Church Home for Children as against the heirs at law of testator, Philip E. Lawrence.

Said appellant claims that the fourth paragraph of the will provides for a residuary legatee; that the legacy to Black under the terms of the third paragraph of the will constitutes a limited interest, i. e., a life estate in an annuity; and that the death of the legatee of a limited

interest before the testator's death does not defeat the interest of the remainderman who survives the testator (Probate Code, sec. 140); also, that the gift to the charities was not a contingent remainder, but vested upon the death of the testator.

In support of its contentions, appellant cites the case of Estate of Gregory, 12 Cal.App. 309, at page 312, 107 P. 560, at page 568, in which the court held: "In paragraph fifth of the will, as we have seen, the testator gave, devised, and bequeathed all the rest, residue, and remainder of his estate to the trustee in trust for the benefit of his wife, and the residue of that fund, which would be the residue of the estate, he directed to be delivered and paid over [upon the death of his wife] to his two grandchildren in equal shares, and in the same paragraph he directed that all the trust fund and the residue of his estate be paid over and delivered to his said grandchildren. The testator's wife having died before him, she never became entitled to the trust fund. The provision as to her lapsed; but, as there were residuary legatees designated in the will, the property out of which the trust fund was to be constituted must go to them [the grandchildren], and not descend to the heirs."

In the cited case the will clearly provided for a vested remainder in the grandchildren upon the death of the wife, such remainder not being contingent or limited in any manner whatsoever, and while the ruling is definitely based upon the provision in the will which made the two grandchildren the residuary legatees it is strictly in accord with the terms of section 92 of the Probate Code (formerly sections 1310 and 1343 of the Civil Code), for the reason that the bequest being to relatives of the testator, it portrays a situation which falls within the exception provided by said code section, to-wit: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; *except that when any estate is devised or bequeathed to any kindred* of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator." (Italics added.)

In the instant case, the bequest was to a stranger to the blood of testator with a contingent remainder to the charities; therefore, upon the death of said stranger to the blood before the death of the testator, a situation was created which likewise falls within the purview of said section 92 of the Probate Code, above quoted.

In Estate of Kunkler, 163 Cal. 797, 127 P. 43, it was held that legacies to strangers in blood who predeceased the testator became a part of the undisposed residuum of the estate and passed to the heirs at law of testator, and that the legacies to predeceased relatives who died leaving lineal descendants passed to such descendants under section 1310 of the Civil Code, now section 92, supra.

The phraseology of the will clearly indicates that it was testator's intention that the entire residue and remainder of his estate should be used to purchase an annuity for his friend Black, who, therefore, became the residuary legatee of said estate.

According to the holding in Estate of Fritze, 85 Cal.App. 500, at page 505, 259 P. 992, at page 994: "No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the will, that the surplus of the estate, after payment of debts and legacies, shall be taken by a person there designated."

There is nothing in the will which would indicate that testator desired to give to the charities anything more than an unascertained balance of a particular fund, if any remained at the time of the death of the beneficiary thereof. What testator's intent may have been after conditions were changed by the death of the proposed annuitant, we have no means of knowing. In any event, the interest of the charities was limited and uncertain and apparently was not intended by testator to be a complete gift of the residue of his estate, as was provided in the Gregory case, supra.

Estate of Griggs, 98 Cal.App. 119, 276 P. 394, cited by appellant, was decided upon the authority of section 140 of the Probate Code: "The death of a devisee or legatee of a limited interest before

the testator's death does not defeat the interest of persons in remainder who survive the testator." In that case the will provided that Anna Hardman should have the *income* from the sum of $5,000 during the term of her natural life, and upon her death the *principal* sum of $5,000 should go to her son. There is no point of similarity between that case and the case now under consideration.

An analysis of the provisions of paragraphs third and fourth of the said will reveals that testator's main purpose was to provide for the welfare of his friend Black. With such purpose in mind, he directed his executors to take all the residue and remainder of his estate, after all his just debts and funeral expenses were paid, and purchase or contract for an annuity in favor of said Black. Had testator stopped at this point, the question involved herein would not have arisen, because the wording of the will constitutes an absolute bequest of the entire residue of his estate.

The type of annuity which is ordinarily purchased for a person of the age of Black, i. e., thirty-nine years, is one which provides for the payment of the maximum income during the lifetime of the annuitant for the amount of principal invested. However, testator directed his executors to purchase the refund type of annuity: one which would provide for the repayment to them of the principal unused in the payment of annuities in the event of the death of the beneficiary before all of the money used in the purchase thereof should be consumed; thereby reducing the income of the beneficiary under the annuity. He then provided: "In event that refund of principal * * * is made, I give, devise and bequeath all of such money so refunded" to the charities named.

Looking at the will from all four corners, it would appear that the bequest to the charities was made contingent upon the happening of the following events:

1. The purchase by executors of a refund type of annuity.

2. The annuitant's death before all of the money used in the purchase of such annuity had been consumed.

3. The possible refund of such unused principal.

Further, the purchase of the annuity itself, regardless of the type, was contingent upon the death of the testator during the life of the proposed annuitant, and the refund to the charities was contingent, not only upon the annuitant's death, but also upon the condition that such death occur before all of the money used in the purchase of the annuity had been consumed. Testator could not be expected to anticipate that his friend Black, who was approximately forty years younger than he was, would predecease him, and he made no provision for such contingency. For all that appears, the most that testator contemplated when he gave to the charities the sums remaining after the death of annuitant, was that said charities should receive the remaining portion of a particularly designated fund which might remain at the end of Black's life, and only then in the event that the refund type of annuity had been purchased and that a refund of such remaining portion of the principal could be made to his executors.

The lapse of the gift to the residuary legatee Black destroyed any remainder which might have gone to the charities, for the reason that such remainder was so inextricably interwoven with, subordinate to, and dependent upon, the preceding estate that it could not be given effect without destroying the entire testamentary scheme expressed by the will. 69 Cor.Jur., § 2320, pp. 1083, 1084.

For the foregoing reasons, the decree appealed from is affirmed. The appeal from the order denying motion for new trial is dismissed.



ORLOFF v. METROPOLITAN TRUST CO. OF CALIFORNIA et al. *

Civ. 12504.

District Court of Appeal, Second District, Division 2, California.

May 13, 1940.

Hearing Granted July 12, 1940.

1. Conspiracy ⇐18

Where complaint contained nothing more than bare allegations that defendants entered into a conspiracy to defraud plain-

* Subsequent opinion 110 P.2d 396.

tiff and committed certain acts in furtherance thereof, which acts were not wrongful, complaint did not allege a cause of action for civil conspiracy.

2. Conspiracy ⇐1, 18

A conspiracy is not actionable unless the combination results in the perpetration of an unlawful act or some injurious act by unlawful means, and a bare allegation that defendants entered into a conspiracy to defraud plaintiff and that various acts were done for purpose of defrauding plaintiff is not a sufficient averment of fraud unless connected with a showing of facts which, if true, would support the charge that they were wrongful.

3. Contracts ⇐187(1)

A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it. Civ.Code, § 1559.

4. Contracts ⇐332(2)

Where complaint alleged that defendant agreed with codefendants to buy stock of a brewing company, that defendant trust company was appointed escrow holder, that escrow instrument provided that creditors of brewing company, including plaintiff's assignor, were to be paid from money deposited in escrow, that defendant paid sufficient money into escrow to pay creditors, and that original escrow was canceled and a new escrow created which omitted plaintiff from list of creditors, complaint did not state a cause of action for breach of a third party beneficiary contract. Civ.Code, § 1559.

5. Trusts ⇐371(2)

In action for money judgment and declaratory relief as consequence of codefendant being substituted for plaintiff as a creditor in a new escrow after plaintiff's assignor had been named as a creditor in the original escrow, where complaint contained no allegation showing performance of conditions of escrow instructions, which were a prerequisite to disbursement of money received into original escrow, plaintiff did not allege a cause of action upon theory that defendants who had acted as escrow holders had received money in trust for plaintiff as a creditor beneficiary.

6. Pleading ⇐204(3)

If plaintiff is not entitled to recover under a count in a complaint wherein all the facts upon which his demand is based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is based on the set of facts specifically pleaded in the other counts.

7. Action ⇐6

A court may refuse to exercise the power to entertain an action for declaratory relief under statute where its declaration or determination is not necessary or proper at the time. Code Civ.Proc. § 1061.

8. Action ⇐6

Where plaintiff's fifth cause of action, which sought declaratory relief predicated on facts alleged in the first three causes of action, was based on same facts as those alleged in first three counts, and from the facts alleged it was evident that there was no contract or written instrument relative to which it was necessary to have a declaration of plaintiff's rights, no cause for declaratory relief was shown. Code Civ.Proc. §§ 1060, 1061.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Morris Orloff against the Metropolitan Trust Company of California and others, to recover a money judgment and for declaratory relief. From a judgment predicated upon the sustaining of general demurrers to plaintiff's third amended complaint without leave to amend, plaintiff appeals.

Affirmed.

Orloff & Katz, of Los Angeles (Abraham Gorenfeld, of Los Angeles, of counsel), for appellant.

Burr & Smith, of Los Angeles, for respondents Metropolitan Trust Co. of California and P. T. Libby.

Sydney Tannen, of Los Angeles, for respondent Sam Weiss.

Edward Flam, of Los Angeles, in pro. per., for respondent Edward Flam.

McCOMB, Justice.

From a judgment predicated upon the sustaining of general demurrers to plaintiff's third amended complaint without leave to amend in an action to recover a money judgment and for declaratory relief, plaintiff appeals.

The complaint as amended contained five alleged causes of action. The first three alleged causes of action are predicated on the same facts, which are hereinafter stated. The fourth cause of action

is a common count for money had and received predicated on the facts alleged in the first three causes of action, and the fifth cause of action purports to seek declaratory relief predicated on the facts alleged in the first three causes of action. It therefore becomes material for us to consider whether a cause of action is stated in any one of the first three counts of the complaint. These counts being the same in substance, contain the following material allegations:

I. In 1935 defendant Garrison entered into an agreement with defendants Grossfeld, Margulis, and Rio Brewing Company, Inc., to purchase from them all the capital stock of the Rio Brewing Company, Inc.

II. Metropolitan Trust Company of California was appointed escrow holder to receive and disburse the money and instruments required to consummate the transaction.

The aforementioned escrow instructions signed by defendants Garrison, Grossfeld, and Rio Brewing Company, Inc. (it is to be noted that the escrow instructions were not signed by the Metropolitan Trust Company), provided that certain creditors of the Rio Brewing Company were to be paid from the proceeds of money to be deposited in the escrow, one of the creditors thus designated being Leo Schinagel, who was to be paid $2,500. This escrow was numbered D319.

III. Defendant Libby was the escrow officer in charge of escrow No. D319.

IV. In April, 1936, Leo Schinagel transferred and assigned all of his rights to any money due him from the aforementioned escrow to plaintiff. He also gave notice to defendant Metropolitan Trust Company of the assignment and directed it to pay any money due him to plaintiff.

V. Defendant Garrison paid a total of $10,403.75 into the escrow, approximately one-half of which sum was paid into the escrow prior to Mr. Schinagel's assignment to plaintiff and the balance thereafter. This sum was sufficient to pay all creditors in the order of their preference, as set forth in the escrow instructions up to and including the creditors in the class where plaintiff's assignor was listed.

VI. In March of 1937 defendant Garrison gave defendant Grace an option to purchase for $17,000 all of the stock of defendant Rio Brewing Company, Inc., and on the same day defendant Rio Brewing Company, Inc., gave to defendant Grace an option to purchase for $48,000 all of the assets of said corporation. Mr. Grace exercised both of the options March 10, 1937.

VII. March 25, 1937, escrow No. D319 was cancelled on the written instructions of defendants Garrison, Margulis, and Grossfeld, and on the same day a new escrow number 5485G was created with Metropolitan Trust Company of California as escrow holder, the instructions being executed by defendants Garrison, Margulis, and Grossfeld as sellers and defendant Grace as buyer. The purpose of this escrow was to carry into effect the option agreement entered into by the parties March 2, 1937. This new escrow provided for the payment of all creditors listed in the previous escrow No. D319 who had not theretofore been paid, with the exception of plaintiff, who was omitted from the list of creditors to be paid out of escrow No. 5485G. In his place was listed defendant Weiss.

VIII. Defendant Grace paid into the escrow $17,000 which defendant Metropolitan Trust Company of California, after paying the creditors listed in the escrow instructions, distributed as follows:

$8,172 to defendant Grossfeld.
3,923 to defendant Margulis.
1,305 to defendant Weiss.

IX. A portion of the money received by defendants Grossfeld and Margulis and all of the money received by defendant Weiss was paid to defendant Schinagel.

X. The substitution of defendant Weiss for plaintiff as a creditor in escrow No. 5485G was done by defendants Grossfeld, Margulis, Weiss, Flam, defendant Metropolitan Trust Company of California, and defendant Libby through a corrupt agreement to defeat the assignment by defendant Schinagel to plaintiff.

XI. Defendant Flam, with full knowledge of the assignment to plaintiff, aided, assisted, and abetted the consummation of escrow No. 5485G.

To the complaint defendants Metropolitan Trust Company of California, Libby, Weiss, and Flam interposed general demurrers, which were sustained without leave to amend.

This is the sole question presented for our determination:

Were the general demurrers of the defendants just named to the complaint as amended properly sustained on the ground that the pleading did not state facts sufficient to constitute a cause of action.

This question must be answered in the affirmative.

[1, 2] (1) The pleading did not allege a cause of action for civil conspiracy, since the complaint as amended contained nothing more than bare allegations that defendants entered into a conspiracy to defraud plaintiff and committed certain acts in furtherance thereof, which acts were not wrongful. The law is established in California that such allegations are insufficient to state a cause of action for civil conspiracy. The rule is that a conspiracy is not actionable unless the combination results in the perpetration of an unlawful act or some injurious act by unlawful means. The bare allegation that defendants entered into a conspiracy to defraud plaintiff and that various acts were done for the purpose of defrauding the plaintiff is not a sufficient averment of fraud unless connected with a showing of facts which, if true, would support the charge that they were wrongful. Kinney v. Postal Telegraph-Cable Co., 123 Cal.App. 70, 75, 10 P.2d 1043; Rapaport v. Forer, 20 Cal.App. 2d 271, 278, 66 P.2d 1242; Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 683, 200 P. 601; 5 Cal.Jur. [1922], sec. 29, p. 529.

[3] (2) The law in California is that a contract made expressly for the benefit of a third person may be enforced by him at any time *before the parties thereto rescind it.* Sec. 1559, Civ.Code; Ericksen v. Rhee, 181 Cal. 562, 565, 185 P. 847.

[4] In the instant case it appears upon the face of the pleading that the parties to escrow No. D319 had rescinded it prior to the time plaintiff attempted to enforce any rights thereunder. Hence, applying the rule above stated, the complaint does not state a cause of action in favor of plaintiff for breach of a third party beneficiary contract.

[5] (3) There is no allegation in the complaint showing compliance with or performance of the conditions of the escrow instructions, which were a prerequisite to the disbursement of any money received into escrow No. D319. There is thus a failure to allege an essential fact for a cause of action upon the theory that defendant Metropolitan Trust Company and Libby received money in trust for plaintiff as a creditor beneficiary.

[6] From the foregoing it is evident that no one of the first three counts of the complaint stated a cause of action on any theory. This being true, the general demurrer was properly sustained to the fourth count, which was a common count for money had and received. It is the established law of California that if plaintiff is not entitled to recover under a count in a complaint wherein all the facts upon which his demand are based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is, as in the present case, obviously based on the set of facts specifically pleaded in the other counts. Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248.

[7] The general demurrer was likewise properly sustained to the fifth count of the complaint. The law is established in California that a court may refuse to exercise the power to entertain an action for declaratory relief under section 1060 of the Code of Civil Procedure where its declaration or determination is not necessary or proper at the time under all of the circumstances of the case. Sec. 1061, Code Civ.Proc.; Rapaport v. Forer, supra, 20 Cal.App.2d at page 276, 66 P.2d 1242.

[8] Applying the foregoing rule to the facts of the instant case, it is evident that plaintiff's fifth cause of action is based on the same facts as those alleged in counts one to three inclusive of his pleading. From the facts thus alleged it is evident that there is no contract or written instrument relative to which it is necessary to have a declaration of plaintiff's rights. Neither is it necessary to have a declaration of his rights or duties with respect to any of the defendants. Hence the court properly refused to exercise the power conferred upon it by section 1060 of the Code of Civil Procedure.

For the foregoing reasons the judgments are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

ALVEZ et al. v. TOPRAHANIAN.

Civ. 2348.

District Court of Appeal, Fourth District, California.

May 16, 1940.

Rehearing Denied June 5, 1940.

Hearing Denied July 15, 1940.

1. Limitation of actions ⇐127(2)

Generally, where a bona fide attempt is made to state a cause of action which has failed because of some imperfection, the defect may be remedied by amendment so that amended pleading will relate back to date of original pleading and avoid running of statute of limitations in the interim.

2. Limitation of actions ⇐125

Where original complaint, in action on note, was brought in name of guardian of estates of minors, instead of in name of minors, permitting amendment after limitations had elapsed to correctly set forth the real plaintiffs was proper.

3. Guardian and ward ⇐69

Alleged ground of invalidity of guardian's assignment of note to estates of wards arising from statutes providing that a transaction between guardian and ward by which guardian obtained any advantage are presumed entered into without sufficient consideration and under undue influence could not be availed of by maker of note, since statutory presumption is for protection of ward only. Civ.Code, § 2235; Probate Code, § 1400.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Mary Alvez, Marguerite Alvez, and Joaquin Alvez, minors, by F. J. Gianola, guardian of their estates, against T. Toprahanian, on a note. From a judgment for plaintiffs, the defendant appeals.

Affirmed.

Edward B. Patterson, of El Centro, for appellant.

Hickcox & Provence, of El Centro, for respondents.

BARNARD, Presiding Justice.

This is an action on a promissory note. The complaint, as filed, named as plaintiff in the caption "F. J. Gianola, Guardian of the Estates of Mary Alvez, Marguerite Alvez and Joaquin Alvez, Minors". Paragraph I of the complaint alleged that F. J. Gianola was, by an order duly given, made and entered on a certain date, appointed guardian of the estates of these minors, giving their names, and that ever since said date he has been and now is, the duly appointed, qualified and acting guardian of the estates of said minors. Paragraph II set forth a copy of the note in question, which was payable to F. J. Gianola, and alleged its execution. Paragraph III alleged that thereafter and before the note became due the said F. J. Gianola, for a valuable consideration, sold and assigned said note to this plaintiff, who is now the owner and holder thereof. Paragraph IV alleged nonpayment and that the entire amount of the note, principal and interest, is due, owing and unpaid from the defendant to the plaintiff.

A demurrer to this complaint was sustained and an amended complaint was filed naming as the plaintiffs "Mary Alvez, Marguerite Alvez and Joaquin Alvez, Minors, by F. J. Gianola, guardian of their Estates", and making minor corrections in the body of the complaint. A motion to strike this amended complaint on the ground that it changed the party plaintiff from his individual capacity to his official capacity as guardian was denied. A demurrer to the amended complaint was overruled and the defendant answered, setting up as special defenses that there was no consideration for the note and that the cause of action was barred by the statute of limitations. A jury returned a verdict in favor of the plaintiffs. A motion for judgment notwithstanding the verdict and a motion for a new trial were denied. The defendant has appealed from the judgment and from "that certain order herein denying his motion for a new trial, and from all other appealable orders made and entered in said action". The appeal is presented on a clerk's transcript alone.

The appellant's first contention is that the court erred in denying his motion to strike the amended complaint. The claim is that the original complaint was filed by Gianola individually at a time when he had no interest in the subject matter of the action, that the amended complaint substituted an entirely different plaintiff and thereby set up a different cause of action, and that the statute of limitations had run after the filing of the first complaint and before the amended complaint was filed. The appellant relies upon Fox v. Minor, 32 Cal. 111, 91 Am.Dec. 566; Dubbers v. Goux, 51 Cal. 153; Sterrett v. Barker, 119

Cal. 492, 51 P. 695, and Dixon v. Gries, Cardozo, appellant, 106 Cal. 506, 39 P. 857, 858.

In Fox v. Minor, supra, the action was ordered dismissed on similar grounds with suggestions for the guidance of the court in a new action. However, that action was on the strict provisions of a bond, the court strictly applied the provisions of the Practice Act, and there was a dissenting opinion to the effect that instead of dismissing the action the filing of an amended complaint should be permitted. In Dubbers v. Goux, supra, it was held that to permit the substitution of a wife for her husband as plaintiff, when she had at all times been the only party in interest, would be to permit the filing of a new and distinct cause of action. In Sterrett v. Barker, supra, it was held that the complaint did not state a cause of action against a certain estate and that it could not be amended to set up a cause of action against the executor individually as this would be a different suit. In Dixon v. Cardozo, supra, after the plaintiff became insane, a guardian was appointed and an amended complaint filed by this person as guardian of the estate of the insane person. The judgment was reversed because the action should have been prosecuted in the name of the insane person by his guardian, but the court refused to dismiss the action, saying: "Such a result should be avoided, if possible, not only because of the expense and delay, but because it might result in the entire loss of meritorious claims through the operation of the statute of limitations." It will be noted that in that case an attempt had been made to set up a cause of action for the estate of the incompetent, and it was held that an amendment should be allowed.

In Lindsey v. Superior Court, 100 Cal. App. 37, 279 P. 837, 839, the court said: "That the ward rather than the guardian should have been named as plaintiff is well settled (Fox v. Minor, 32 Cal. 111, 91 Am. Dec. 566; Dixon v. [Gries] Cardozo [appellant], 106 Cal. 506, 39 P. 857); but, as held in the case last cited, which is similar in its facts, the order substituting the guardian, though erroneous, was manifestly not intended as a dismissal of the action as to the incompetent plaintiff, and should not be given that effect."

In that case, the court quoted with approval from Nisbet v. Clio Min. Co., 2 Cal.App. 436, 83 P. 1077, as follows: "'"Courts, under the reformed system of procedure, look to the substance of things rather than to form, and to persons and things rather than mere names. This manner of treating things constitutes the life and spirit of the reformed system of procedure." (Anglo etc. Co. v. Turner Casing Co., 34 Kan. 340, 8 P. [403] 404.) That system was designed to enable courts of justice to brush aside technicalities affecting no substantial right, and decide causes upon the merits. In the case at bar the body of the complaint clearly indicated that the intention was to sue the Clio Mining Company and recover upon its debt, and parties appearing in that action could not close their eyes to substantial facts, and rely upon mere technical omissions in the caption or title of the cause. * * *'"

In Cox v. San Joaquin Light etc. Co., 33 Cal.App. 522, 166 P. 578, 579, the action was brought by the widow of the deceased in the wrong capacity. After the statute of limitations had run, an amendment was permitted substituting the widow, in her correct capacity, as plaintiff. It was contended on appeal that a complete change in the cause of action had resulted. The court held against that contention and quoted with approval from Reardon v. Balaklala Consol. Copper Co., C.C., 193 F. 189, the following: "'It should be borne in mind * * * that the substantive cause of action counted on in the amended complaint has not been changed. It remains precisely the same as that stated in the original pleading. No new facts are alleged as a ground of recovery, the only change being in the name of the plaintiff and the capacity in which he sues * * *. This being so, the change effected by the amendment is obviously in no just sense the bringing of a new action. It is one of form rather than of substance, and in the interests of justice is to be treated as such, rather than to adopt a view which would result in an irretrievable bar to all remedy. * * *'"

A somewhat similar holding is to be found in Security T. & S. Bank v. Railroad Co., 214 Cal. 81, 3 P.2d 1015, 1017, where the court said: "The amendment did not substitute a new cause of action, and did not prejudice the rights of defendant. We think that the trial court was clearly justified in permitting the amendment, under the liberal rules prevailing in this state."

[1] In those cases in this state in which it has been held that a pleading may not be

amended by correcting or inserting the name of a party it will usually be found that no attempt was made in the original pleading to state a cause of action with respect to the party brought in by the amendment. See Gates v. Wendling Nathan Co., 27 Cal.App.2d 307, 81 P.2d 173. The general rule is that where a bona fide attempt is made to state a cause of action which has failed because of some imperfection the defect may be remedied by amendment so that the amended pleading will relate back to the date of the original pleading and avoid the running of the statute of limitations in the interim. Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188, 128 P. 330; Rauer's Law etc. Co. v. Leffingwell, 11 Cal.App. 494, 105 P. 427; In Ruiz v. Santa Barbara Gas etc. Co., supra, it is said [164 Cal. 188, 128 P. 333]: "If the amended complaint did not attempt to set up a new and different cause of action from that attempted to be set up in the original complaint, there is nothing in the contention made by respondent based upon the statute of limitations. Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action."

[2] In the instant case, there was but one obligation which was owed by the appellant to the respondents and F. J. Gianola, in his individual capacity, did not claim to own this obligation. He alleged that he had parted with title to the note as far as he himself was concerned, and attempted to allege in the body of the original complaint that he had sold and assigned the note to the estate of the minors, who then owned it, and that the money was owed to these estates, of which he was guardian. While the original complaint was faulty, including the caption, an attempt was made therein to allege a cause of action in favor of the estates of the minors. The amendment made no change in the substance of the action, the only change being to correctly set forth the real plaintiffs for whom the original complaint had attempted to set forth a cause of action. The amended complaint merely cured a technical error and did not set forth a new or different cause of action, but continued the same action upon the same obligation. The amendment permitted was one as to form only and not as to substance and, in our opinion, was properly allowed by the trial court.

[3] The appellant further contends that the amended complaint failed to state a cause of action because it alleged that the note, which had been given to F. J. Gianola individually, was sold and assigned by him "to F. J. Gianola, as Guardian of the Estates of the plaintiffs herein, for the use and benefits of said plaintiffs, and as a part of their estates", and that such a transaction between himself as an individual and himself as a guardian was absolutely void. The execution of the note, the assignment thereof, and the appointment of the guardian were all admitted by the answer to the amended complaint. While the appellant pleaded a lack of consideration, the jury found against him on this issue and he has not seen fit to seek a review of the evidence on this appeal.

The appellant's argument in this connection is more novel than convincing. In arguing that the assignment of this note was absolutely void he relies on Sims v. Petaluma Gas Light Co., 131 Cal. 656, 63 P. 1011, in which it was said that the rule that a trustee may not take part in any transaction in which he has an interest adverse to that of his beneficiary is much older than the codes. From that he argues that section 2235 of the Civil Code has no application here. In a concurring opinion in the case just cited, it was pointed out that the rule that a trustee cannot deal with his beneficiary was too broadly stated in the main opinion in that recognition was not given to established exceptions. Section 1400 of the Probate Code provides that the relation of guardian and ward is subject to the provisions of law relating to trusts. One of these provisions is section 2235 of the Civil Code. In commenting upon the meaning and effect of that section the Supreme Court, in Papineau v. Security-First Nat. Bank, 6 Cal.2d 668, 59 P.2d 131, 132, said: "* * * the presumption declared in the code section is obviously for the protection of the beneficiary against his trustee. It makes the transaction voidable by the beneficiary unless fairness is proved, but it permits the beneficiary to approve and enforce a transaction which is fair and reasonable. Plaintiff's theory that a stranger, antagonistic to both the trustee and beneficiary, can rely upon the presumption and thereby defeat a

transaction which the beneficiary affirms, is entirely contrary to the purpose of the statutory rule, and is not the law. See 1 Perry on Trusts 339, § 198; Bowles v. Bowles, 141 Va. 35, 126 S.E. 49."

While, without doubt, the assignment of this note could have been set aside on behalf of the minors, neither the general rule relied on by the appellant nor any other provision of law of which we are aware will compel the setting aside of that assignment in order to permit a third party debtor to evade an honest debt and thereby deprive the estates of minors of assets which have been paid for from the estates, and which they desire to retain.

The attempted appeal from the order denying the motion for a new trial is dismissed. The judgment and orders appealed from are affirmed.

We concur: MARKS, J.; GRIFFIN, J.



39 Cal.App.2d 144

In re SHAPERO'S ESTATE.

SLOTNIKOW v. SHAPERO.

Civ. 12605-S.

District Court of Appeal, Second District, Division 1, California.

May 17, 1940.

Hearing Denied July 16, 1940.

1. Executors and administrators ⇐185, 189

The right of a widow to a family allowance is a "personal privilege" and she can relinquish it when there are no children, or she may waive it in advance by an antenuptial agreement, or by a separation agreement, but such a waiver must be certain and intended.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Privilege".

2. Executors and administrators ⇐184

Whether widow's right to demand a family allowance has been surrendered is a question of interpretation of the contract or decree set up as a bar to the right, and the right should not be held to have been surrendered, except by clear and explicit language.

3. Executors and administrators ⇐185

An antenuptial contract providing that spouses agreed to waive "all rights of inheriting, administration, homestead or otherwise, whatever," did not "waive" widow's right to a family allowance.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Proceeding in the matter of the estate of Abraham Shapero, deceased, wherein Minnie Shapero, deceased's widow, filed a petition for a family allowance, which was opposed by Jack Slotnikow, executor of the estate of deceased. From an order granting petitioner a family allowance, the executor appeals.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Harry Sherr and James B. Fredericks, both of Los Angeles, for appellant.

Edward Linder, of Los Angeles, for respondent.

YORK, Presiding Justice.

On January 21, 1939, decedent and respondent entered into an antenuptial agreement by the terms of which it was agreed that "as an integral part hereof, and in consideration of all mutual covenants contained herein, that both parties hereby release each other, waive and relinquish all rights, interest or claims against the other for any alimony, attorney's fees or costs in connection with any possible litigation there may be between them and arising out of, or in connection with their domestic relations, or otherwise, which may happen between them at any time during their married life, including also all rights of inheriting, administration, homestead or otherwise, whatever. * * *"

In compliance with certain terms of said agreement, decedent on March 27, 1939, executed his last will in which be bequeathed to respondent wife the sum of $500 to be paid to her in due course of administration of his estate, and also requested that she be permitted to occupy the family home during her natural life

and while she remained his widow, "without rental charges whatever." All the residue and remainder of his estate he devised and bequeathed to his friend, Jack Slotnikow, appellant herein, who was named as executor.

Decedent died on June 2, 1939, his will was duly admitted to probate, and in course of administration respondent petitioned for a widow's allowance of $150 per month alleging to be without means of support or maintenance. Appellant filed his objections to such allowance on the ground that respondent by the antenuptial agreement, hereinbefore referred to, had waived and relinquished all claims in decedent's estate, including the right to a family allowance.

From the order of the trial court granting an allowance to the widow in the sum of $75 per month from the date of decedent's death, this appeal is presented by appellant executor and residuary legatee under the will.

The question to be determined is whether the widow by the terms of the antenuptial agreement waived her right to a family allowance.

[1, 2] "The right of a widow to a family allowance is a personal privilege and she can relinquish it when there are no children (Estate of Yoell, 164 Cal. 540, 129 P. 999; Estate of Noah, 5 Coffey's Prob.Dec. 277, affirmed in 73 Cal. 583, 15 P. 287, 2 Am.St. Rep. 829, and 88 Cal. 468, 26 P. 361) ; * *. * or she may waive and release it in advance by an antenuptial agreement (Estate of Yoell, supra), or by a separation agreement (Estate of Bidigare, 215 Cal. 28, 8 P.2d 122; Wickersham v. Comerford, 96 Cal. 433, 31 P. 358), but such a waiver must be certain and intended (Estate of Bidigare, supra). * * * Whether the right to demand an allowance has been surrendered is a question of interpretation of the contract or decree set up as a bar to the right. In either case the right should not be held to have been surrendered, except by clear and explicit language. (Estate of Bidigare, supra; Estate of Gould, 181 Cal. 11, 183 P. 146; Estate of Whitney, 171 Cal. 750, 154 P. 855; Estate of Myers, 115 Cal.App. 443, 1 P.2d 1013.)" 11a Cal. Jur. 521 et seq.

In Estate of Myers, 115 Cal.App. 443, 444, 1 P.2d 1013, 1014, by an antenuptial agreement the parties thereto agreed to waive "all and every right whatsoever which he or she might have or acquire by law by such marriage in any and all property of every kind and character, real, personal or mixed, now owned or which may hereafter be acquired by the other party; it being understood and agreed that all of the property and property rights which each of these parties now has, or which each may hereafter acquire, shall pass to her or his heirs at law, devisees or legatees in precisely the same manner and with the same effect as though no marriage were ever consummated."

In the Myers case, the parties, as here, lived together until the death of the husband, he supporting her up to that time and under his will granting her a life estate in the home in which they had lived. In upholding the right of the widow to a family allowance, the court in the cited case, quoted from the Estate of Woodburn, 212 Cal. 683, 300 P. 22, as follows: "In that case an antenuptial agreement was executed by the intending spouses in contemplation of their marriage and they undertook 'to make a full and complete settlement of their property rights prior to said marriage,' and both agreed that, 'in consideration of the marriage contract above referred to,' each party 'does hereby expressly waive and relinquish any and all right, title and interest in and to any property either real or personal now owned or that may be hereafter acquired by' said parties which they 'might be entitled to by reason of being the husband' or wife of the other party to the agreement. In connection with the wife's agreement, however, it was provided that the husband should furnish her for 'as long as she may live a good and comfortable home, * * * and it is agreed that said property may be held as a home for' her 'so long as she may live.' * * * In affirming the order granting her petition, our Supreme Court said:

"'Upon the merits of this appeal we are of the opinion that the antenuptial settlement entered into between' deceased 'and the lady who was to become his wife and widow, and who is the respondent herein, while the parties thereto expressly waived and relinquished each on his and her own part all right, title and interest in the property then owned or thereafter to be acquired by the other party, and all right of inheritance therein to which either party might be entitled as the husband or wife of the other, cannot be held to have

accomplished a waiver of those rights to which the widow or minor children, if any, of a decedent are entitled under the provisions of article 1, chapter 5, part 3, title 11 of the Code of Civil Procedure (sections 1464–1470). The provisions of said chapter and article expressly relate to the support of the family of a decedent, and to which the widow and minor children of said decedent become entitled upon his death and the probate of his estate, without regard to any interest which they or any of them may have had in the property of said decedent during his lifetime, and without reference to their heirship or right of inheritance therein. * * * The rights to which this widow became entitled under the foregoing provisions of the Code were in no sense either the rights of inheritance or rights depending upon any previous interest in the property of the decedent owned by him during his lifetime, and which she may or may not have surrendered by virtue of the terms of their antenuptial agreement.'"

[3] In both of these cases the antenuptial agreements were at least as broad as the one presented in the instant case; no children were involved, and in each the husband provided a home for the widow for her lifetime.

In the instant case, the will of the husband gave the wife the sum of $500 to be paid during course of administration and also asked that she be permitted to occupy rent-free the family home for the term of her natural life. In view of the announced desire of the husband that the wife should have a home, as well as the cash bequest, it would appear unjust to deprive her of the right to a family allowance, in the absence of a clear and explicit waiver, or a direct relinquishment thereof in the antenuptial agreement

The order appealed from is therefore affirmed.

I concur: WHITE, J.

DORAN, Justice.

I dissent. The sole question involved is one of construction. It may be conceded that the doctrine relied upon in the prevailing opinion is properly applied to the facts in the decisions cited, but the phraseology of the agreement presented for construction in connection with the appeal herein, clearly contains and contemplates what the agreements in the cited cases lacked. That is to say, the phrase "including also *all* rights of * * * *administration*", is clearly intended by the parties to deny to the widow the right to a family allowance. (Italics added.) Section 680 of the Probate Code provides that the widow is entitled to allowance during the progress of the settlement of the estate; thus the right to such allowance is a right of administration. What else could have been intended by the parties? There is nothing ambiguous, uncertain or doubtful about the meaning of the quoted words, and under elementary rules of construction it is the court's plain duty to give to them full effect. In my judgment they are clear and explicit within the application of the doctrine enunciated in the decisions upon which the prevailing opinion is based.



39 Cal.App.2d 118

STROMERSON et al. v. AVERILL.

Civ. 6282.

District Court of Appeal, Third District, California.

May 15, 1940.

1. Trusts ⇐44(2)

Evidence warranted conclusion that purchaser purchased realty for himself and not in trust for party whose assistance in purchase, financing and farming of the land was prompted by cordial friendship which existed between purchaser and such party and was not done under any claim of ownership.

2. Mortgages ⇐32(3), 299

Where it could be inferred from the evidence that quitclaim deed from purchaser of realty to party who assisted in financing purchase of farm was executed and accepted as security against any liability that might exist against party in the financing of the purchase and in farming operations, deed was a "mortgage" and discharge of obligations for which deed was given as security extinguished mortgage. Civ.Code, § 2924.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

3. Witnesses ⇐271(1)

Where witness testified in response to question from court that he was not sure as to whether he had letters inquired about and that he would have to look through his papers, court's remark that "That is all the time we can give that at this time" was not an improper curtailment of cross-examination.

4. Witnesses ⇐269(1), 329

Cross-examination of a witness should be confined to matters which have been testified to by witness on direct examination, but a wide latitude is permitted for the purpose of testing accuracy or credibility, especially if the witness is himself a party to the action.

5. Witnesses ⇐275(5)

Where there was evidence that purchaser of realty to comply with requirement of lender as a condition to financing of purchase executed an assignment of contract in which name of assignee was not inserted, and contract was deposited with lender as security and party who claimed that purchaser held the title in trust for him and that he had possession of contract at all times since it was received from vendor on direct examination over objection testified as to similar contract in lender's possession in which witness' name had been inserted as assignee and withdrawn, cross-examination of witness with reference to second instrument was not error as going beyond direct examination where testimony concerning second instrument showed purpose for which second contract was deposited with lender.

6. Evidence ⇐269(1)

A declaration is admissible to show the present state of mind or intent of the declarant where such state of mind or intent is material.

7. Appeal and error ⇐1170(7)

Where claimant sought to establish title to realty on ground that purchaser held title in trust for claimant, exclusion of witness' testimony that claimant stated to him that he wanted to purchase land in name of purchaser, on ground that it was hearsay, if error, was not reversible since statement did not exclude possibility that land was purchased for purchaser as contended by him. Code Civ.Proc. § 1850; Const. art. 6, § 4½.

Appeal from Superior Court, Madera County; H. S. Schaffer, Judge.

Action to quiet title by H. C. Stromerson and another against Roger Averill. From an adverse judgment, defendant appeals.

Affirmed.

L. N. Barber and David E. Peckinpah, both of Fresno, and Barcroft & Barcroft, of Madera, for appellant.

Conley, Conley & Conley, of Fresno, for respondents.

Mr. Justice pro tem. LEMMON delivered the opinion of the court.

This action was brought to quiet plaintiffs' title to real property. Defendant answered, denying the material allegations in the complaint. From a judgment adverse to him, defendant appeals.

Plaintiff, H. C. Stromerson, and defendant Roger Averill, had been friends for many years, the friendship beginning in 1915 or 1916 when they both resided in Idaho. In 1933 Averill was engaged in farming in Madera county. He persuaded or encouraged Stromerson to come from Los Angeles, where he then lived, to Madera for the purpose of farming the real property here in dispute. The evidence is in sharp conflict as to whether the property was purchased in the name of Stromerson under circumstances from which the conclusion is to be drawn that title is held by Stromerson in trust for Averill or that Averill's participation in the financing of the purchase and the farming of the property was purely gratuitous and expression of the friendship between the two.

The real property was purchased under a contract dated November 1, 1933, in which Stromerson is the purchaser, and Miller & Lux Incorporated is the seller. According to Stromerson, Averill wanted him to come to Madera, and stated, "he had a piece of land that he could buy for me, that he had all of the land that he wanted and was not in a position to buy this place." The initial or down payment was borrowed by Averill from the San Joaquin Cotton Oil Company, and was charged by that company to Averill. Averill was reported as having stated at the time the contract was being negotiated the land was being bought for a "friend". Upon the contract is endorsed an assignment thereof, the name of the assignee not being filled in. This assignment bears Stromerson's signature. This phase of the transaction is explained as a compliance with the requirement of the lender as a

condition to the financing of the purchase. The contract so assigned was deposited with and kept by that company as security. The same company financed the operations on the farm for that and the succeeding years. Some of the applications for loans were made by Stromerson, and some by Averill, but Averill's guarantee was required in each instance. Early in 1934, the company charged Stromerson's account with all advances previously charged to Averill's account and credited Averill's account with the total of those advances. At the end of that year's season, the proceeds from the year's operations were credited by the company to Stromerson and those proceeds were sufficient to liquidate the Averill account. On November 27, 1933, Stromerson and his wife, Leone, executed a quit claim deed conveying the real property in question to Averill. Stromerson states that Averill "told Leone and I that it was a quit claim deed by us in trust only, he says that he experienced hazards and automobile accidents and one thing and another, and that the only reason that he wanted it was if ever we both got killed or either one of us, that he might have some claim to the land, and he stated at that time that he would never record it." When asked why he took this quit claim deed, Averill stated, "Oh, I don't know of any particular reason I gave for it, except that I wanted it for my record security." This deed, though apparently delivered contemporaneously with its execution and kept thereafter in Averill's possession, was not recorded until August, 1937.

On January 25, 1935, a deed was executed by Miller & Lux Incorporated to Stromerson and his wife in joint tenancy. At the same time plaintiffs executed two deeds of trust, each given to secure a promissory note in the principal sums of $6,300 and $3,600, respectively. These respective amounts were borrowed from the Federal Land Bank and the Land Bank Commissioner and were used partly to pay the balance due Miller & Lux Incorporated under the original contract of purchase. Averill was present when Stromerson applied for the Federal Land Bank loan at which time the former stated to the agent of the bank that his only claim in the transaction was in the sum of $900 due from Stromerson for two pumps installed upon the land and Averill signed and left with the bank a document to that effect. At that time Averill also agreed that, if Stromerson would pay the sum of $1,200 to a Mr. Christiana, which sum was then owing by Averill to Christiana, said sum would pay for four mules and certain farming machinery theretofore owned by Averill, and which had been used in the farming of the land. That amount was paid to Christiana out of the money so borrowed.

In the years of 1936 and 1937 Averill suggested to Stromerson several plans, one, that the two join with other friendly neighbors in deeding their holdings including the real property in question to a corporation to be formed, another, that these lands be placed in a Massachusetts trust and still another which contemplated the deeding of the land to one of the neighbors, a Mr. Lincoln, the purpose of which is obscure in the evidence. To each of these proposals, Stromerson expressed his refusal. Stromerson further stated Averill had never claimed ownership of land until his pleading was filed in this action. Plaintiffs made their home upon and engaged in the farming of the real property during the years following the signing of the contract of purchase.

[1] The record thus reviewed, we think, fairly states the evidence as it appears favorably to the respondent. There is much that could be added which tends to establish appellant's theory which we have not mentioned. What has been set forth, and the inferences which can be reasonably drawn therefrom, we conclude is sufficient to justify the judgment of the trial court. This evidence warrants the deduction that respondent purchased the real property for himself and not in trust for appellant, and that the interest and assistance that appellant exhibited in the purchase, financing and farming of the land was prompted by the cordial friendship which existed between the parties and was not done under any claim of ownership. With the conclusion of the trial court upon conflicting evidence we cannot interfere.

[2] Considerable argument appears in the briefs as to whether the burden of proof shifted to the appellant upon proof of legal title in the plaintiff and as to the quantum of proof if the burden did so shift. Under appellant's theory the execution and delivery of the quit claim deed was equivalent to an assignment of the contract of purchase and the later payment of the balance due under the contract out of the proceeds of the loans procured upon

the security of the land, raised a presumption of trust and cast upon respondents the burden of establishing an intention on the part of appellant to make respondents the absolute owners. We do not need to pass upon the correctness of that theory. Suffice it to remark that the trial court has found the evidence to preponderate against appellant upon this and the finding has justification in the evidence. The conclusion may be reasonably drawn from what has been recited from the record that the quit claim deed was executed and accepted as security against any liability that might exist against appellant in the financing of the purchase and in the farm operations. A deed executed and delivered under such circumstances is to be considered a mortgage. Civ.Code, sec. 2924. The discharge of the obligations for which the deed was given as security extinguished the mortgage.

[3] Stromerson stated on cross-examination that he thought he had some letters from Miller & Lux Incorporated, relating to the Federal Land Bank loan and the deed from Miller & Lux Incorporated. Appellant requested him to produce them. The court overruled an objection to this request and asked the witness if he knew if he had such letters. The witness said he was not sure, and that he would have to look through his papers. Whereupon the court remarked, "That is all the time we can give that at this time." Claim is made that this resulted in an improper curtailment of cross-examination upon an important matter. We find no merit in this. The fair import to be drawn from that remark is that the matter could be later gone into after the witness had had an opportunity to make a search for such letters. Aside from a short discussion between counsel about available letters in which appellant stated he was not interested and which followed the court's statement, the letters were not again referred to by appellant.

Averill had testified on direct examination that the assignment on the back of the contract was executed at his request after the contract was received from Miller & Lux Incorporated, and the document had been in his possession ever since. He was then asked on cross-examination if he did not, after this action was filed, go to the office of the San Joaquin Cotton Oil Company and ask permission to see the contract between Miller & Lux Incorporated and Stromerson. A colloquy between counsel developed that the question referred to a contract other than the one heretofore mentioned, and referred to by the witness in the direct examination. An objection then made to this line of inquiry was overruled. The ensuing examination developed that the contract so mentioned, and which we will for convenience refer to as the second contract, covered the purchase and sale of a tract of land other than that involved in this action; that appellant had obtained the second contract from the San Joaquin Cotton Oil Company, and, while in his possession, had inserted his own name as assignee on the blank space provided for the name of the assignee in a form of assignment thereon which bore Stromerson's signature as assignor; that this had been done without authorization from either the San Joaquin Cotton Oil Company or Stromerson; that as so altered this document was returned to the company by appellant. There appears also upon the second contract and below the assignment these words "I hereby withdraw as assignee of the above instrument, Roger Averill." An official of the company testified that this latter endorsement was not on the document when it was returned to the company. Appellant complains that this cross-examination was permitted over objections to extend beyond proper limits resulting in the reception of evidence highly prejudicial to him.

As above stated, Averill had asserted that the contract here in question had at all times been in his possession since it was received from Miller & Lux Incorporated. Respondents sought unsuccessfully in the cross-examination of Averill to obtain an admission from him that to his knowledge the Cotton Oil Company always required an assignment of an outstanding contract for the purchase of land to secure its advances to the vendee of such land.

[4, 5] Although the cross-examination of a witness should be confined to matters which have been testified to by the witness on direct examination, a wide latitude is permitted for the purpose of testing accuracy or credibility. This is especially true if the witness is himself a party to the action. Neal v. Neal, 58 Cal. 287. The fact that the second contract was to the witness' knowledge deposited with, and kept by the company to secure against advances comes within the reasonable limits of the cross-examination. Elicitation of an

explanation of the endorsements thereon also was proper as throwing light upon the knowledge of the witness as to the purpose for which the second contract was deposited with the company, in the light of that explanation.

[6] Mr. Jensen of the San Joaquin Cotton Oil Company, a witness at the trial, was asked concerning his connection with the purchase of the property in question. He volunteered in his answer the statement that Averill stated to him that he "wanted to purchase this land in the name of Harry Stromerson". A motion to strike the answer was granted upon the ground that it was hearsay. Appellant urges that this was error, and claims this testimony was proper under section 1850 of the Code of Civil Procedure which provides that where a declaration forms a part of a transaction which is itself a fact in dispute, or evidence of that fact, such declaration is evidence, as part of the transaction. He claims that if the fact sought to be established is that certain words were spoken, without reference to their truth or falsity, the statement is original or primary evidence and admissible. There is diversity of authority as to the rule. If the declaration is admitted to show the truth of the statement it is hearsay, but if it is admitted to prove merely that the statement was made it does not come within the general prohibitions of hearsay. The rule which appears to have the weight of judicial support is that a declaration is admissible to show the present state of mind or intent of the declaration, where such state of mind or intent is material. Wigmore on Evidence, 2d Ed., 1729. If a statement is made spontaneously or under such circumstances as to fairly indicate verity, the reason for the exclusion of hearsay is weakened. As Justice Holmes stated in Elmer v. Fessenden, 151 Mass. 359, 24 N.E. 208, 5 L.R.A. 724, "Such declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons."

[7] However, the ruling complained of, if erroneous, is not of such seriousness as to require or justify reversal. The excluded statement is not entirely inconsistent with plaintiff's theory. Averill's purchase of the land in Stromerson's name does not exclude the possibility that it was also purchased for Stromerson. We cannot say that this ruling resulted in a miscarriage of justice. Const., art. VI, sec. 4½.

There are other assignments of alleged error in rulings of the trial court upon the admission of certain evidence. We have reviewed them and they do not justify any extended comment. In one instance the answer obviously would have been wholly immaterial, in another the question objected to sought an answer, the substance of which related to what was undisputed and otherwise established without conflict. The last objection relates to the reception of certain evidence which was properly received.

The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, Acting P. J.



39 Cal.App.2d 96

SCOTT v. SHEEDY et al.

Civ. 11124.

District Court of Appeal, First District, Division 1, California.

May 14, 1940.

Hearing Denied July 12, 1940.

1. Appeal and error ⇐1001(1)

When there is evidence which tends to establish directly or by reasonable inference an implied finding by a jury of a fact necessary to support its verdict, question of sufficiency of evidence is not usually a question of law, and verdict will not be disturbed by an appellate court by substituting a different conclusion.

2. Automobiles ⇐245(6)

Evidence that gateman at barrier opened it sufficiently wide to permit passage of a truck carrying machinery, but that truck driver failed to properly center truck, which struck barrier, injuring gateman, presented jury question as to truck driver's negligence.

3. Negligence ⇐138(4)

An instruction that presumption is that every man takes ordinary care of his own

concerns and that it is presumed that plaintiff exercised ordinary care, and that such presumption was a species of evidence and should prevail until overcome by satisfactory evidence, was proper, where brain injury destroyed plaintiff's memory of accident, testimony of plaintiff's witnesses did not establish plaintiff's contributory negligence as a matter of law, and facts proven were not irreconcilable with presumption.

4. Evidence ⇐53, 597

A "presumption" is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Presumption".

5. Evidence ⇐589, 594

A fact is proved as against a party when it is established by uncontradicted testimony of party or of his witnesses, under circumstances which afford no indication that testimony is product of mistake or inadvertence, and when the facts so proved are irreconcilable with presumption that every man takes ordinary care of his own concerns, such presumption is dispelled.

6. Automobiles ⇐245(72)

In action by gateman at barrier who was injured when truck struck barrier while attempting to pass through opening provided by gateman, evidence that truck driver drove through opening in barrier after gateman had given him a hand signal did not establish that gateman was guilty of contributory negligence as a matter of law, where evidence established that if truck had been properly centered there would have been sufficient clearance.

7. Automobiles ⇐245(72)

A gateman, who was injured when truck, attempting to pass through barrier which gateman had opened, struck it, did not "assume the risk" of injury as a matter of law, where gateman did not know or appreciate possibility that truck would strike barrier.

See Words and Phrases, Permanent Edition, for all other definitions of "Assume the Risk".

8. Trial ⇐50

There is no impropriety in the discussion of merits of an objection to the admission of evidence in presence of jury, unless there is a possibility that minds of jurors may be influenced or prejudiced by statements made by court or counsel during such discussion, or evidence introduced in its course, but it is better practice to discuss all doubtful questions of evidence or procedure out of presence of jury.

9. Appeal and error ⇐1032(2)

Where defendants urged on appeal that prejudicial error resulted in permitting plaintiff's attorneys to testify in presence of jury to alleged surprise in connection with an attempt to impeach their own witnesses, it was incumbent on defendants to point out statements made as evidence introduced resulting in prejudice to defendants' case.

10. Appeal and error ⇐1046(5)

Remarks by trial court, indicating that evidence by which plaintiffs sought to impeach their own witness was not impeaching, was not harmful to defendants.

11. Appeal and error ⇐1060(2)
Trial ⇐133(2)

Statements by plaintiff's attorneys in presence of jury, as to alleged surprise in connection with their attempt to impeach their own witnesses which were stricken out or, if not stricken out, were opinions, did not prejudice defendants.

12. Appeal and error ⇐1053(3)
Evidence ⇐364

In action by plaintiff who was afflicted with several pre-existing diseases, evidence as to loss of wages, based on mortality tables, was admissible but not conclusive, and no prejudicial error appeared where trial court instructed that jury should consider mortality tables only in respect to one who is in average or normal good health, and that presumption of life expectancy based on such tables is one applying to a person of average normal health only.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Horace C. Scott against Joseph Sheedy, James Hagen, sued herein as James Hogan, and James Sheedy Drayage Company, to recover damages for personal injuries. From an adverse judgment, defendants appeal.

Affirmed.

Cooley, Crowley & Supple, of San Francisco, for appellants.

Edwin V. McKenzie and Frank J. Mahoney, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment for personal injuries in favor of plaintiff following a trial by jury.

There is no substantial conflict as to the major facts leading up to the injuries. The accident occurred on the San Francisco bay bridge shortly before its completion. Plaintiff was employed as a gateman and watchman at a temporary fence-like barrier of wood and wire netting erected across the bridge roadway and sidewalks at the westerly end, his duties being to see that no one passed through the barricade except those possessing required credentials. There was an opening or gate in the barrier sufficient to permit the ingress and egress of ordinary automobile passenger cars and trucks. On the day of the accident, defendant Hagan was operating a truck of the open flat bed type, the property of defendant Sheedy, on which was loaded a triangular concrete spreader, its narrow part pointing to and resting on the front end of the truck, fitting in behind the truck's cab, its wide part, between fifteen and eighteen feet in width, overhanging the sides of the truck and extending over the rear of the truck about four feet. When Hagan, driving westerly, reached the barrier, it was found that the traffic opening was not sufficient to permit the spreader to pass through, so one section of the barrier was unbolted and swung around, thereby enlarging the opening to a width of nearly twenty feet. Plaintiff gateman, having taken a position westerly of the barricade, signalled Hagan to proceed. Hagan attempted to center the truck and then drove ahead at two to four miles an hour, during which operation the left side of the load came into contact with the barrier, causing it to move, tilt and spring in such manner that it struck plaintiff, severely injuring him.

[1, 2] Appellants contend that there was no negligence on the part of Hagan, who testified: "* * * I know that they made the place wide enough so I thought I could come through there with perfect safety. * * * Well, I took a diagonal course until I thought I was far enough over, then I straightened out, and by the time I was coming into there, my truck was coming right straight for that opening.

"Q. You were coming right straight through there? A. Right straight through the gate, yes.

"Q. And you could look out on the left side and see whether or not your load was clear of the gate? A. Yes, either side.

"Q. You could look out on either side? A. Yes."

The evidence indicates that Hagan's truck hit the barricade because, upon his immediate approach and in passing through the enlarged gateway, he did not correctly or properly center the truck. The jury must have reached the conclusion that despite a signal from plaintiff there was a failure on the part of Hagan to take necessary precautions. When there is evidence which tends to establish directly or by reasonable inference an implied finding by a jury of a fact necessary to support its verdict, the question of the sufficiency of the evidence is not usually a question of law and the verdict will not be disturbed by an appellate court by substituting a different conclusion. In this case a question that requires greater consideration is the contributory negligence of the plaintiff.

[3, 4] The court instructed the jury as follows: "The presumption is that every man takes ordinary care of his own concerns, and the presumption in this case is that the plaintiff exercised ordinary care and diligence from all the circumstances of the case—his character and habits and natural instinct of self preservation. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence."

Similar instructions have been the pivotal point or crucial factor in the determination of the merits of many appeals, and while the position of appellants finds support in decisions heretofore rendered by this and other appellate courts, the point at issue seems to have been decided by the Supreme Court adversely to appellants' position in the recent case of Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590, 593, and as an intermediate appellate court we are bound by the holding therein.

In the Westberg case, the court instructed: "'The presumption is that every man obeys the law, and the presumption in this case is that the plaintiffs' son, Morris E.

Westberg, was traveling at a lawful rate of speed, and on the proper side of the highway at all times. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence,'" and called attention to the fact that the above instruction was almost identical with an instruction given in Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393. Referring to that case, and later cases cited in the opinion, the Supreme Court in the Westberg case, 14 Cal.2d at page 365, 94 P.2d at page 593, said: "From these decisions, and others of this court which might be cited, the rule is firmly established in this state that a presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence."

In support of their contention that the trial court committed prejudicial error in instructing the jury, appellants in their opening brief cite Varner v. Skov, 20 Cal. App.2d 232, 67 P.2d 123; Campbell v. City of Los Angeles, 28 Cal.App.2d 490, 82 P. 2d 720, and other cases. In the Westberg decision, considering the fact that witnesses on each side testified fully as to the acts and conduct of a deceased at the time of and immediately prior to a collision, the court said, 14 Cal.2d at page 366, 94 P.2d at page 594: "Campbell v. City of Los Angeles, 28 Cal.App.2d 490, 82 P.2d 720, is also cited in support of this last mentioned contention. In that case the statement of facts is quite brief and so far as appears from the opinion the instruction was not qualified as in the instant case. See, Ellison v. Lang Transportation Co., 12 Cal.2d 355, 359, 84 P.2d 510. It cites the recent case of Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, which followed the Mar Shee [Mar Shee v. Maryland Casualty Corp., 190 Cal. 1, 210 P. 269] and Smellie [Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529] cases. In so far as the decision in the Campbell [case] is inconsistent herewith it is disapproved. There is language in the cases of Lindley v. Southern Pac. Co., 18 Cal. App.2d 550, 556, 64 P.2d 490, and Varner v. Skov, 20 Cal.App.2d 232, 67 P.2d 123, cited in the Campbell case, which is perhaps only dicta, but which is apparently in conflict with the rule announced in the Mar Shee case and the decisions of this court following the last named case and which, in so far as it departs from such rule, is not approved." In the Westberg case a distinction is made in a case wherein "both plaintiff and his witnesses testified to all his acts and conduct at the time of his alleged negligence, from a situation where the acts and conduct of a decedent are the issues before the court".

[5] In the instant case the essential difference factually is that the plaintiff did not die as a result of the accident but suffered a brain injury. The following appears in the record: "Now, Mr. Scott, you need not answer it right away, you may consider it a little while, but is it your testimony now that you can't tell us anything about how this truck came to this opening? A. Yes, sir." Under the circumstances, in view of the reason for the rule as stated in the Westberg case, we feel it can make no difference whether the injured party dies or is incapacitated by loss of all memory of the circumstances of the accident, the result of brain injury from the collision. In other words, notwithstanding the evidence from other witnesses, "all possible facts both in favor of and against the alleged negligence of the plaintiff" (Westberg v. Willde, supra) were not before the court. In this case no witness could have testified that plaintiff saw the danger. A witness might place him in a position from which an inference might be drawn that he could see or realize danger, but that would not be sufficient if a reasonable inference otherwise could be drawn. If the acts and conduct of an incapacitated party must be testified to by other witnesses, we conclude that the test given in the Westberg case and in Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269, is proper. In the Mar Shee case, the court, 190 Cal. at page 9, 210 P. at page 273, said: "* * * We deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

[6] Examining the testimony of plaintiff's witnesses on the subject of whether or not plaintiff was guilty of contributory negligence; we find that all witnesses agree that defendant Hagan drove through the opening only after plaintiff had given him a hand signal. This act of hand signalling

as a matter of law would not be sufficient under the facts of this case to find plaintiff guilty of contributory negligence unless it might be assumed that it was a guarantee that the space through which the truck was to pass was of sufficient width, when it may have been proven that as a fact it was not. However, the evidence shows that if the truck had been properly centered, there would have been ample clearance on each side. Wiley v. McNab & Smith, 8 Cal.App. 135, 96 P. 332. The evidence from which a conclusion of contributory negligence on the part of plaintiff might be drawn was produced by witnesses called on his behalf. There was some difference in the testimony as to the number of signals given, and a slight variation as to the position occupied by plaintiff at the time of the accident. Some of the witnesses noted the direction in which plaintiff turned his head. When considered as a whole, we cannot conclude as a matter of law that contributory negligence was or was not established by the uncontradicted testimony of the witnesses, or that the facts proven were wholly irreconcilable with the disputable presumption given in the court's instructions. Mar Shee v. Maryland Assurance Corp., supra; Westberg v. Willde, supra.

Appellants further note that the instruction in the Westberg case is different from the instruction in the instant case in that one deals with lawfulness on two specific subjects,—speed and driving on the proper side of the highway,—whereas the other deals with the use of ordinary care and diligence as applicable to "his own concerns". We find that in addition to authorities cited in the Westberg case dealing with the presumptions: of innocence of wrong (Mar Shee v. Maryland Assurance Corp., supra); nonpayment arising from possession of notes by a payee (Sarraille v. Calmon, 142 Cal. 651, 76 P. 497); that property conveyed to a wife is separate property (Gilmour v. North Pasadena Land etc. Co., 178 Cal. 6, 171 P. 1066; Pabst v. Shearer, 172 Cal. 239, 156 P. 466; Thompson v. Davis, 172 Cal. 491, 157 P. 595); that endorsement was evidence of a valuable consideration for a promissory note (Pacific Portland Cement Co. v. Reinecke, 30 Cal.App. 501, 158 P. 1041); as to a person acting within the scope of employment (Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73), the following cases dealing with the presumption that a person takes due care of his own concerns were also cited: Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Ramsey v. Pasini, 108 Cal. App. 527, 291 P. 884; DeLannoy v. Grammatikos, 126 Cal.App. 79, 14 P.2d 542; Ellison v. Lang Transportation Co., 12 Cal. 2d 355, 84 P.2d 510; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128.

[7] Appellants assert that plaintiff assumed the risk as a matter of law. There was no relation of employer and employee existing between the parties to this action and it cannot be concluded from the facts herein that the risk, if any, was contributory negligence as a matter of law. It does not come within that class of cases holding that upon a contractual obligation, such as the payment of a fee to witness an exhibition (Quinn v. Recreational Park Ass'n, 3 Cal.2d 725, 46 P.2d 144), an injured party may recover; nor within that class holding that where, without contract, one participates in a hazardous undertaking (Grassie v. American La France F. E. Co., 95 Cal.App. 384, 272 P. 1073) and assumes a risk ordinarily incident to the venture, and must by reason of his position exercise a degree of care in accordance with the exigency of the conditions and circumstances of the situation, he may recover. There was nothing to indicate that plaintiff had any knowledge of or that he should have appreciated the possibility that Hagan's truck would strike the barrier. Weaver v. Shell Oil Co. of California, 34 Cal.App.2d 713, 94 P.2d 364; Southern Pacific Co. v. McCready, 9 Cir., 47 F.2d 673.

[8-11] Appellants urge that prejudicial error resulted in permitting plaintiff's attorneys to testify in the presence of the jury to alleged surprise in connection with an attempt to impeach their own witnesses. The force of the objection goes to the fact that the evidence supporting the claim of surprise was presented in the presence of the jury, after objection and a request that the evidence in support thereof "should be heard in the absence of the jury". There is no impropriety in the discussion of the merits of an objection to the admission of evidence in the presence of the jury, unless it appears that there is a possibility that the minds of the jurors may be influenced or prejudiced by the statements made by the court or counsel, pro or con, during such discussion, or evidence introduced in its course, but, as said in 64

Corpus Juris 135, section 156: "The better practice is that all doubtful questions of evidence or procedure should not be proposed or discussed in the presence of the jury." It is incumbent upon appellants to point out statements made as evidence introduced resulting in prejudice to their case. After argument, the court herein finally determined that "surprise" had been sufficiently shown to warrant the production of the alleged impeaching testimony. During the argument the court made the following comment: "Now, let me state in reading this excerpt of the statement, which you say is a copy of the original, I can't see there is any impeachment because on that point the witness testified the same as he testified in the statement." A remark by the court indicating that the evidence was not impeaching could not harm appellants' position. The statements made by counsel, which appellants allege as prejudicial, were stricken out or, if not stricken out, simmer down to opinions which in some instances were expressed in strenuous, forceful language,—a practice not to be approved when an attorney appears as a witness,—but it has not been shown that appellants were prejudiced thereby.

[12] Plaintiff was afflicted with several pre-existing diseases. A computation showing the amount of his wages per week for a period covering the average life expectancy of a person of normal health at plaintiff's age was presented to the jury over objection, the gist of which was that the mortality table was not relevant in the case because of the evidence of pre-existing diseases.

In Morrow v. Mendleson, 15 Cal.App.2d 15, 21, 58 P.2d 1302, 1305, the court said: "Authorities are cited holding that a jury may consider the mortality or American experience tables only in respect to one who is in average or normal good health, and that the presumption of life expectancy based upon such tables is one applying to a person of average normal health only. The point has not been decided by any California case which has been called to our attention, but Norris v. Detroit United Ry., 193 Mich. 578, 160 N.W. 574, and Colbert v. Rhode Island Co. (R.I.) 67 A. 446 [supra], support the appellant and are sound in principle and reasoning. Since the evidence offered by the plaintiff herself showed that she had long suffered from high blood pressure, dizziness and many other physical ailments, and had been under the care of a physician for ten years before the accident, this might have dispelled the presumption of life expectancy (Smellie v. Southern Pacific Co., 212 Cal. 540, 553, 299 P. 529), and the question of life expectancy should therefore have been left to the jury to be determined upon competent evidence based upon the condition of health of the plaintiff prior to the time of the accident."

Though admissible, the evidence in this case was not conclusive and appellants were entitled to an instruction based upon their theory of the evidence. Groat v. Walkup Drayage etc. Co., 14 Cal.App. 2d 350, 58 P.2d 200. No prejudicial error appears when the following instruction, offered by the defendants and given by the court, limiting the effect of such evidence, is read: "You are instructed that the jury may consider the mortality or American experience tables in evidence in this case, only in respect to one who is in average or normal good health, and that the presumption of life expectancy based upon such tables is one applying to a person of average normal health only."

Under all the circumstances and facts of this case, appellants have no substantial ground for complaint.

The judgment is affirmed.

We concur: PETERS, P. J., KNIGHT, J.

Hearing denied; EDMONDS, J., dissenting for the reasons stated by him in Ellison v. Lang Transportation Co., 12 Cal.2d 355, 360, 84 P.2d 510.

15 Cal.2d 507

PEOPLE v. COOK.

Cr. 4273.

Supreme Court of California.

May 20, 1940.

1. Homicide ⇐12, 13

"Malice aforethought" may be express or implied, and it is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature, and it is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart. Pen.Code, § 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice Aforethought".

2. Homicide ⇐145, 147

Where homicide occurs in the course of commission of arson, rape, robbery, burglary or mayhem, intent need not be proved, but where death otherwise results, willfulness, premeditation and deliberation must be established to constitute "murder of the first degree". Pen.Code, §§ 187–189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder of the First Degree".

3. Homicide ⇐232

In murder prosecution, even if there was no evidence apart from defendant's confessions and extrajudicial statements to show that crime was committed in an attempt to perpetrate arson, rape, robbery, burglary or mayhem, jury would have been entitled to infer existence of premeditation in commission of homicide, if it appeared that such a conclusion was warranted from consideration of circumstances connected with assault upon victim. Pen.Code, §§ 187–189.

4. Homicide ⇐269

In prosecution for murder by striking a woman on the head with a piece of two-by-four, the question of presence of premeditation or lack thereof by defendant in committing the crime was for jury's determination from a consideration of type of weapon employed and manner of its use, nature of wounds suffered by deceased, fact that attack was unprovoked and that deceased was unarmed, conduct of defendant in refusing or neglecting to aid deceased, and the fact of defendant's immediate flight from scene of assault. Pen.Code, §§ 187–189.

5. Homicide ⇐16

In determining question of premeditation in fixing degree of homicide, a piece of two-by-four approximately two feet in length may be an "inherently dangerous weapon", if used in a particular manner or if a blow is inflicted on certain portions of victim's body.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Dangerous Weapon".

6. Homicide ⇐268

In prosecution for murder by striking a woman on the head with a piece of two-by-four approximately two feet long, questions of nature of weapon and manner of its use in relation to crime were for jury. Pen. Code, §§ 187–189.

7. Homicide ⇐286(3)

An instruction that a person is presumed to intend natural consequences of his own acts and that if defendant assaulted victim with a dangerous weapon which destroyed victim's life, presumption was that defendant intended death or great bodily harm was not objectionable as telling jury that mere proof of a felonious assault which resulted in death would establish premeditation embraced in first-degree murder, or as failing to advise jury that premeditation embraced in first-degree murder was not to be inferred. Pen.Code, §§ 187–189.

8. Homicide ⇐286(1)

In murder prosecution, defendant could not complain of an instruction that willful use of a deadly weapon without excuse or provocation in such a manner as to imperil life generally indicated a felonious intent, where jury was not instructed that it was jury's province to determine whether weapon employed by defendant constituted a deadly weapon nor instructed that a deadly weapon was one likely to produce death or great bodily harm. Pen.Code, §§ 187–189.

9. Criminal law ⇐1134(2)

In considering claimed errors in the giving of or refusal to give instructions, an appellate court is bound to consider the entire cause, including all evidence, to determine whether a miscarriage of justice has resulted. Pen.Code, § 1239.

10. Homicide ⇐341

In murder prosecution where defendant's extrajudicial statements and confessions indicated that defendant intended to

commit robbery when defendant entered college campus on which victim was assaulted, and consideration of evidence in its entirety showed a violation by defendant of statute providing that where a homicide occurs in the perpetration of or attempt to perpetrate certain crimes, the crime committed is first-degree murder, refusal to instruct that the law did not presume a killing with premeditated design and that premeditation had to be proved beyond reasonable doubt was not prejudicial. Pen.Code, §§ 187–189.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

DeWitt Clinton Cook was convicted of murder in the first degree, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, William B. Neeley, and Ellery E. Cuff, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

PER CURIAM.

The defendant herein was charged with the crime of murder as set forth in the first count of an indictment that had been returned against him. In the same indictment he was charged with the commission of other offenses which consisted of two several counts of assault with a deadly weapon with intent to commit murder, one count of robbery, one of rape and three several counts of burglary,—to each of which charges he pleaded guilty. When the case was called for the taking of evidence by the trial court in the matter of fixing the degree of the crime of murder, defendant refused to testify. Thereupon the trial court of its own motion set aside the plea of guilty to the first count of the indictment and entered a plea of not guilty thereto on behalf of defendant. After trial was had by a jury on the charge of murder, defendant was convicted of the crime of murder in the first degree, without recommendation. Thereafter, a motion for a new trial was made and denied. Following pronouncement of judgment and the imposition of the death penalty, this appeal from the judgment and order denying a new trial was automatically presented to this court. Sec. 1239, Pen. Code.

The facts in this case, which in part were supplied from the confessions and extra-judicial statements voluntarily made by defendant, appear to be substantially as hereinafter related.

At approximately 9 o'clock on the evening of February 24, 1939, at the campus of the Los Angeles City College, defendant, a young man twenty years of age, struck a young woman named Anya Sosoyeva on the head with a piece of two-by-four. A few hours after the assault was committed, she died from the effects of the blow.

In the evening of the day on which the offense was committed, defendant, who was married and living with his wife and mother, left his home at about 7 o'clock, which was the usual time of his departure on occasions when he worked at night as a printer. However, he did not go to work that evening but, instead, he went to the campus grounds of the Los Angeles City College, and looked around the adjoining neighborhood with a view to burglarizing a house. As he did not locate a house suitable for that purpose he thereupon decided to seize a purse instead, and he began to search for some object with which to strike his intended victim. Underneath a bench which was located beside a walk leading to the administration building on the campus grounds, he noticed a piece of two-by-four, which he picked up and carried with him while he resumed his walk around the neighborhood. A short time later he returned to the campus grounds and to the vicinity of the bench. After he had walked back and forth about forty-five minutes he observed a young woman, who was later identified as Miss Sosoyeva, coming toward him along the walk. After she had passed him, proceeding in a direction opposite to that pursued by defendant, he turned and followed her a few feet and then, wielding the piece of two-by-four by the use of both hands, he struck her a blow on the head, which caused her to fall to the ground. Immediately, defendant partly dragged, partly carried her to a tree—a distance of from 8 to 15 feet from the paved walk—for the reason, as asserted by defendant, that had she been left lying where she had fallen she might have been observed if anyone came along the walk. He attempted to stifle outcries which she made by placing his hand over her mouth, but as she was "making lots of noise" he became frightened and fled the scene—without taking her purse, how-

ever—and made his escape through a portion of the campus grounds known as the Shakespearian Gardens.

According to the testimony of a police officer, who, shortly after 9 o'clock p. m., was called to the scene of the attack, Miss Sosoyeva was then seated beside a desk in a room of the administration building. Her head was cradled in her arms which were lying on the desk. He testified that there was blood on her face, that she was moaning, and that her only intelligible words were, "Oh, he hit me." Soon thereafter she was removed to an emergency hospital where she received medical treatment. The doctor and nurse who attended her testified that at the time of her arrival Miss Sosoyeva was in a semi-conscious condition; that she was bleeding from her left ear; that there was blood on her face and head; and that an examination revealed a traumatic injury to the back of her head. She was then transferred to another hospital where, as a result of her injuries, she died at about 1:20 o'clock on the following morning. Before her death she was identified by a young woman with whom she had shared an apartment which was located near the college campus. According to the testimony of her roommate, it appeared that Miss Sosoyeva was about twenty-seven years of age; and that when she was last seen by the witness at their apartment at approximately 6:30 p. m., on the evening of the assault, Miss Sosoyeva was dressing and making preparations for taking part in a theatrical performance which was to be held that night in the administration building of the Los Angeles City College.

The testimony of Police Captain D. R. Patton revealed that about 2:30 o'clock on the morning following the assault on and death of Miss Sosoyeva he visited the portion of the college campus where the attack had occurred, and on the making of an examination of the ground in that vicinity, he found leaning against a tree a section of two-by-four, to one end of which adhered some strands of blonde hair. He also found a comb, a glove for a man's right hand, which glove was stained with blood, and several spots of blood on the walk and on the ground a few feet therefrom. The left glove which was found in the Shakespearian Gardens, through which defendant had fled after the assault, also was marked with blood as well as with lipstick stains. On the taking of evidence it appeared that the blonde hairs found on the piece of two-by-four were of the same color and texture as the hair of the deceased, and that the lipstick marks found on the left glove were of the same color and chemical content as lipstick which had been found in the handbag of the deceased. Furthermore, by his extra-judicial statements and confessions it was established that the gloves had been identified by defendant as being the same gloves that he had secured in a burglary theretofore committed by him and which he admitted having worn on the occasion of the assault in question, in order to avoid leaving fingerprints.

Some months after the assault was committed and on August 28, 1939, defendant was taken into custody for questioning by the police in connection with certain burglary and other charges. While defendant was being taken to the police station in the police car it appeared that a piece of two-by-four, approximately 11 inches long, was found on the rear seat of the automobile where defendant was riding, and that when he observed it he was said to have remarked, "My God, not that!" However, it did not appear that the said section of two-by-four was taken from defendant, nor was either of the accompanying police officers able to account for its presence in the automobile, —although it later was shown that it was not the same piece of two-by-four which defendant had used in committing the assault on Miss Sosoyeva. On the following morning, while he was being questioned specifically with regard to the "campus" crime, defendant made a full and complete confession of his connection therewith. Later he repeated the same confession before the members of the grand jury, which body returned the indictment against defendant.

At the trial of the case, in addition to the confession of defendant, a sound motion picture was presented in evidence which depicted a purported reenactment by defendant of the several incidents which related to the assault. Defendant declined to offer any evidence whatever in his own behalf.

Appellant's principal contention on this appeal is that the jury should have found that his crime amounted only to murder of the second degree. He argues that, independent of his confessions and extra-judicial statements, the evidence established

only the fact that he committed the homicide. He contends that the following circumstances tend to show lack of premeditation: that at the time when the assault was committed appellant did not even know the deceased; that the blow was struck by an immature youth who would not have fully appreciated the consequences which might have resulted from the use of the weapon employed; that one seeking to take life would not have embarked unarmed on such an errand, and then have adopted and used for that purpose an instrument which chance placed in his hand near the scene of the assault; and that a person who had sought to take a human life would not have contented himself with a single blow while his intended victim still lived.

Appellant also argues that, apart from his extra-judicial statements and confessions, the evidence is positive that the homicide was not committed by him in the perpetration of or attempt to perpetrate any of the crimes specifically enumerated in section 189, Penal Code, and, therefore, that in the absence of proof of premeditation on the part of appellant, the homicide amounted to no more than murder of the second degree. He argues that premeditation may not be presumed or inferred, but that it must be proved the same as any other element of the offense; that the degree is an essential element of the corpus delicti of the crime and cannot be established by admissions and confessions of the defendant; and that where the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder, but that in such case the verdict should be murder of the second degree and not murder of the first degree (citing People v. Howard, 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385).

[1, 2] Murder is defined as the unlawful killing of a human being with malice aforethought. Sec. 187, Pen.Code. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature, and it is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart. Sec. 188, Pen.Code. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree. Sec. 189, Pen.Code. Where homicide occurs in the course of the commission of any of the crimes of arson, rape, robbery, burglary, or mayhem (as enumerated in section 189, Penal Code), *intent* need not be proved. But where death otherwise results, wilfulness, premeditation and deliberation must be established in order to constitute the crime of first degree murder.

[3] With regard to the crimes specifically mentioned in section 189, Penal Code, it appears to have been the theory of the prosecution that appellant intended to commit the crime of rape when he made the assault and that (excluding the confessions and admissions of the defendant) the facts and circumstances surrounding the commission of the assault were sufficient to show that he intended to commit such offense. However, aside from the extra-judicial statements and confessions of appellant, from a review of the record herein it does not appear that there was any direct evidence to show either the perpetration of or the attempt to perpetrate the crime of robbery, rape, or any of the other offenses particularly named in the code section,—even though it was apparent that appellant had the opportunity for the commission of such offenses. But even if there was no evidence apart from the confessions and extra-judicial statements of the defendant to show that the crime was committed in an attempt to perpetrate any of the offenses enumerated in the code section, the jury would have been entitled to infer the existence of premeditation in the commission of the homicide, if it appeared that such a conclusion was warranted from a consideration of all the facts and circumstances connected with the assault. People v. Owens, 27 Cal.App. 2d 606, 611, 81 P.2d 429; People v. Wells, 10 Cal.2d 610, 624, 76 P.2d 493; People v. Spinelli, 14 Cal.2d 137, 142, 92 P. 1017; People v. Campos, 10 Cal.App.2d 310, 315, 52 P.2d 251; People v. Johnson, 203 Cal. 153, 164, 263 P. 524.

In the case of People v. Owens, 27 Cal. App.2d 606, 610, 611, 81 P.2d 429, 431, it was said: "'* * * It is settled that "malice may always be inferred from the circumstances in the case—the evidence

presented and considered by the jury." People v. Glover, 141 Cal. 233, 243, 74 P. 745. * * * The circumstances that were shown to have surrounded the homicide, including the character of weapon used, the nature of the wound inflicted, the fact that the deceased displayed no weapon of any character and was unarmed, the acts and conduct of the accused, furnished ample justification for the indulgence by the jury in the inference that appellant entertained a deliberate purpose to kill the deceased. This properly supported inference warranted the return of a verdict convicting appellant of murder in the first degree. People v. Mahatch (148 Cal. 200, 82 P. 779); People v. Bennett (161 Cal. 214, 118 P. 710); People v. Peete, 54 Cal.App. 333, 342, 202 P. 51.'" There it was further said, quoting from the case entitled People v. Fleming, 218 Cal. 300, 23 P.2d 28, "'* * * this court has said on innumerable occasions that in order to prove premeditation in one charged with murder it is not necessary to show that any appreciable space of time elapsed between the intention to kill and the act of killing. * * * Where one assaults another violently with a deadly weapon and takes his life, the presumption is that the assailant intended death or great bodily harm. 13 Cal.Jur., p. 683. And where, as in this case, the assault was made in a manner that was reasonably certain to produce death, and which actually did cause death, the only rational presumption to be drawn therefrom is that the assailant intended to take the life of the person assailed.'"

And in the case of People v. Wells, 10 Cal.2d 610, 624, 76 P.2d 493, 501, it was said: "* * * with respect to the issue of whether the offense was that of murder in the second degree: It was the exclusive province of the jury to determine from the evidence whether the killing was the 'wilful, deliberate and premeditated' act of defendant. In that connection, in the case of People v. Mahatch, 148 Cal. 200, 203, 82 P. 779, 780, in part it was said: 'The jury, having found that the only extenuating circumstance which he interposed had no existence in fact, and no claim of any circumstances of mitigation, justification, or excuse for the killing being advanced, had a right to infer, from the character of the weapon used, the nature of the wound inflicted, and the acts and conduct of the accused, the existence of a *deliberate purpose* on his part to kill the deceased when the fatal blow was struck, and, so inferring, were warranted in returning a verdict therefrom for murder in the first degree. This is the general, it may be said the universal, rule. If a different one prevailed, secret murders could rarely be punished by the infliction of the highest penalty. It is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination.'" (Italics added.)

Also, in the recent case of People v. Spinelli, 14 Cal.2d 137, 142, 92 P.2d 1017, 1019, it was said, quoting from People v. Johnson, 203 Cal. 153, 263 P. 524, that "'* * * section 1105, Penal Code, provides that: "The commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable". The defendant offered no proof to meet the burden which the law casts upon him, and, as there was no claim of justification or excuse offered for the killing of decedent or pretense that the proof tended to show that the crime committed only amounted to manslaughter, the crime was murder of the first degree.'"

As hereinbefore has been indicated, at the close of the case for the prosecution, appellant rested. He produced no evidence on his own behalf, nor any which tended to show mitigation, excuse or justification for the commission of the crime with which he was charged. His confessions and extra-judicial statements were introduced in evidence upon stipulation of counsel and without objection on his part, nor were they or any of them challenged by him as having incorrectly reflected a true recital of the several statements and admissions which were therein attributed to him.

[4-6] From the authorities hereinbefore cited it is apparent, therefore, that in the present case it was for the jury to determine the question of the presence of premeditation or lack thereof on the part of appellant in the commission of the crime, from a consideration of the type of weapon employed and the manner of its use; the nature of the wounds suffered by the deceased; the fact that the attack was un-

provoked and that the deceased was unarmed at the time of the assault; the conduct of her assailant in refusing or neglecting to aid her at a time when by his own statement he had formed the impression she was trying to call for help, and his immediate flight thereafter from the scene of the assault. However, appellant contends that "the very nature of the instrument which in this case did in fact cause death would negative a plan to take life, for it is difficult to believe that one would choose such a weapon to accomplish that intent". The instrument employed by appellant, from the use of which Anya Sosoyeva met her death, was a piece of two-by-four about 2 feet long. She was struck on the back of her head, the blow having been delivered by the use of both hands of her assailant. Although perhaps it may not be said that such an instrument is one which is inherently dangerous or deadly, nevertheless it is obvious that such a weapon may become so if used in a particular manner or if the blow be inflicted on certain portions of the body. People v. Valliere, 123 Cal. 576, 56 P. 433. In the last-cited case, it was ruled (syllabus) that "if the testimony shows that the question whether the instrument used was such as would be likely to produce death depends upon the *manner of its use* and the portion of the body *upon which it was used,* it becomes a mixed question of law and fact whether it was a deadly weapon, which the jury must determine under proper instructions from the court". (Italics added.) Also, in the case of People v. Raleigh, 128 Cal.App. 105, 108, 110, 16 P.2d 752, 753, the court pointed out the distinction between instrumentalities which are "weapons" in the strict sense of the word, such as guns, dirks, etc., and those instrumentalities which are not weapons in that sense, such as canes, hammers or other heavy objects. With reference to the latter classification the court said, "When it appears * * * that [such] an instrumentality * * * is capable of being used in a 'dangerous or deadly' manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion *to use it as a weapon* should the circumstances require, we believe that its character as a 'dangerous or deadly weapon' may be thus established, at least for the purposes of that occasion." And it was held in that case that, if "from all the facts and circumstances the jury is convinced beyond a reasonable doubt that the instrumentality was one which, in the hands of the perpetrator of the robbery, was capable of being used in a 'dangerous or deadly' manner, and that the perpetrator of the robbery *intended to use it as a 'weapon'* should the circumstances require, then the character of the particular instrumentality is established as a 'dangerous or deadly weapon' * * *." (Italics added.) Therefore, under all the facts and circumstances of the instant case the questions of the nature of the weapon and the manner of its use in their relation to the crime committed were for the determination of the jury. People v. Lee, 23 Cal. App.2d 168, 72 P.2d 572; People v. Valliere, 123 Cal. 576, 579, 56 P. 433.

Appellant also contends that prejudicial error was committed by the trial court in its refusal to give to the jury the following instruction: "The law presumes a man to intend what he does, but the law does not presume a killing with premeditated design. It is like every other element of murder in the first degree and must be proved beyond a reasonable doubt before the jury would be entitled to find the defendant guilty."

Appellant asserts that the refusal of the court to give that instruction was rendered particularly injurious to his rights by reason of two instructions which the court gave and which were substantially as follows: "A person is presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all of the natural, probable and usual consequences of his own acts. Therefore, if you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant did assault, on the date mentioned, one Anya Sosoyeva violently with a dangerous weapon, likely to kill, and which did in fact destroy the life of said Anya Sosoyeva the natural presumption is that such assailant intended death or great bodily harm, and in the absence of evidence to the contrary this presumption must prevail."

One of those instructions contained the following additional statement that, "The wilful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent."

[7] With regard to the first portion of the instructions that were given, to which appellant has objected, he argues that the

language therein expressed in effect told the jury that the mere proof of a felonious assault which resulted in death would ipso facto constitute proof of intent to kill and thus establish the premeditation embraced in the definition of first degree murder. Appellant contends that those instructions should have included the further advice that the deliberation and premeditation embraced in the definition of first degree murder were not to be presumed or inferred, but that the existence of those elements had to be proved to the same degree as any other element of the offense. However, from that which has been said hereinbefore, it is apparent that an objection to the two instructions on that ground is without merit. Moreover, in the case of People v. Jones, 160 Cal. 358, 370, 117 P. 176, it expressly is held that the rule contended for by appellant is without application to homicide cases. Other authorities to the same effect need not be cited.

[8] With reference to that part of the instruction which advised the jury that "the wilful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent", it appears that the jury was not specifically instructed that it was the province of the jury to determine whether the weapon employed by appellant herein constituted a "deadly" weapon, nor was it instructed that "a deadly weapon is one likely to produce death or great bodily harm". 26 Cal.Jur., p. 573; see, also, People v. Valliere, 123 Cal. 576, 56 P. 433.

[9, 10] However, in considering claimed errors in the giving of or refusal to give certain instructions, it becomes the duty of an appellate court to consider the entire cause, including all the evidence, for the purpose of determining whether a miscarriage of justice has resulted. People v. Fleming, 166 Cal. 357, 136 P. 291, Ann. Cas.1915B, 88; People v. Hoffman, 195 Cal. 295, 232 P. 974. In the present case, aside from any other evidence, the extrajudicial statements and confessions of appellant indicated that when he went to the campus grounds on the night of the assault he intended to commit the crime of robbery. By that admission it is apparent that a consideration of the evidence in its entirety shows a violation by appellant of that portion of section 189, Penal Code, which provides that where a homicide occurs in the course of the perpetration of or attempt to perpetrate the crime of "arson, rape, robbery, * * *" the crime committed is murder of the first degree.

No prejudicial error appearing in the record herein, it is ordered that the judgment, and the order by which defendant's motion for a new trial was denied, be, and they are, affirmed.



39 Cal.App.2d 188

WALKER et al. v. ETCHEVERRY et al.

Civ. 2538.

District Court of Appeal, Fourth District, California.

May 20, 1940.

Appeal and error ⇐800

Where clerk's transcript was filed in District Court of Appeal before respondents filed notice of motion to dismiss appeal, motion to dismiss appeal would be denied. Code Civ. Proc. § 953a.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Thomas E. Walker and another against Filbert Joe Etcheverry and another for damages. From a judgment for plaintiffs, defendants appeal. On plaintiffs' motion to dismiss appeal.

Motion denied.

Borton, Petrini, Conron & Borton, of Bakersfield, and Farnsworth, Burke & Maddox, of Visalia, for appellants.

Bradley & Bradley, of Visalia, for respondents.

BARNARD, Presiding Justice.

In this action for damages the defendants have appealed from a judgment in favor of the plaintiffs. An order terminating proceedings for the preparation of a transcript was entered on December 26, 1939, which order was affirmed on another appeal. Walker v. Etcheverry, Cal.App. 101 P.2d 709. On January 5, 1940, a clerk's transcript was filed in this court, the clerk's certificate being under date of December 6, 1939.

On February 1, 1940, the respondents filed a notice of motion to dismiss the appeal from the judgment on the grounds that proceedings for the preparation of a transcript under section 953a of the Code of Civil Procedure had been terminated, and that a clerk's transcript had not been filed within the time allowed. So far as appears from the record now before us the order of December 26, 1939, affected only the preparation of a reporter's transcript under section 953a, and had no effect upon the subsequent filing in this court of the clerk's transcript which had been prepared and certified before that order was made.

The fact that the clerk's transcript was on file in this court before the filing of the notice of motion to dismiss this appeal is a sufficient answer to the contention that it was not filed on time. Steiner v. Davis, 21 Cal.App.2d 334, 69 P.2d 184. While it would appear that no reporter's transcript could now be prepared and filed, the appellants are entitled, if they desire, to raise any question which can be presented upon the judgment roll alone.

For the reasons given, the motion to dismiss the appeal is denied.

We concur: MARKS, J.; GRIFFIN, J.



39 Cal.App.2d 133

DURANT v. CITY OF BEVERLY HILLS.

Civ. 11337.

District Court of Appeal, First District, Division 2, California.

May 17, 1940.

Hearing Denied July 15, 1940.

1. Municipal corporations ⇐277

A grant of power to provide and supply water to a city and its inhabitants authorizes a city to carry on a system and supply water to persons outside its limits, whenever it becomes necessary or convenient to do so in order to accomplish main purpose of supplying water to those within.

2. Municipal corporations ⇐277

Whenever necessary for its purposes a municipality may purchase an entire water plant or system furnishing water to persons residing outside city limits, and after operating system and supplying persons entitled to use the water, it may devote surplus to use of inhabitants of the city.

3. Municipal corporations ⇐277

City purchasing water plant, supplying water to persons residing outside city limits, by continuing to furnish such water to such persons, is not selling the surplus or excess waters to the prior users, but rather purchase of system is impressed with a trust and the city holds title as a mere "trustee," bound to apply it to use of those beneficially interested.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

4. Municipal corporations ⇐277

Where city purchases water system, supplying water to inhabitants outside city limits, the continued supplying of water to the outside territory, being incidental to the main purpose, is a "municipal affair."

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

5. Pleading ⇐8(6)

In proceeding for declaratory relief in relation to water rates charged by city to its inhabitants and to persons residing outside city limits, allegation that no warrant for discrimination by city in favor of its inhabitants and against persons residing outside city limits, in the matter of water rates, had been furnished by any rate supervising body was a "conclusion of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

6. Waters and water courses ⇐203(6)

The power of a city to fix water rates to be charged customers residing within its boundaries is incidental to power to establish and operate public utility systems conferred by the Constitution. Const. art. 11, § 19.

7. Waters and water courses ⇐203(6)

The power of a municipality to regulate water rates charged for water furnished by municipally-owned water plant is not controlled by the constitutional provision giving Railroad Commission power to supervise

public utilities and fix rates to be charged. Const. art. 12, § 23.

8. Municipal corporations ⇐277
Waters and water courses ⇐203(6)

The power of a city, owning a municipal water plant, to furnish services to inhabitants outside its boundaries is a part of the constitutional grant wherein city is authorized to establish and operate utilities, and since operation of system in outside territory is but incidental to main purpose of service to inhabitants of city, municipal authorities enjoy the same right to fix charges to be paid by those served in outside territory as it has to fix charges to its own inhabitants. Const. art. 11, § 19.

9. Waters and water courses ⇐183(1)

A city purchasing private water plant, furnishing water to persons residing outside limits of city, assumed a trust to perform the contract and meet obligations of private company, and assumed duty to continue to serve persons outside city limits at a reasonable rate.

10. Waters and water courses ⇐203(3)

Lack of uniformity in water rates charged by a city to its inhabitants and to persons residing outside city limits is not necessarily an unlawful "discrimination" and is not prima facie unreasonable, since discrimination to be objectionable must draw an unfair line or strike an unfair balance between those in like circumstances having equal rights.

See Words and Phrases, Permanent Edition, for all other definitions of "Discrimination".

11. Waters and water courses ⇐203(3)

A charge for water, made by utility to one patron which is different from that made to another, for same service under like circumstances, constitutes an undue "discrimination" and renders charge improper, but fact that a rate is discriminatory by comparison with another rate does not imply that either of them is unreasonable, since a utility may classify its customers on any reasonable basis.

12. Waters and water courses ⇐203(10)

Rates for water furnished by municipally-owned water plant to persons residing outside city limits, which were fixed by the lawful rate-fixing body, must be presumed to be reasonable, fair, and lawful, and city was entitled to rest on that presumption until person residing outside city limits, and claiming an unlawful discrimination in rates charged, made some showing to the contrary.

13. Waters and water courses ⇐203(3)

A person residing outside city limits who received water from water plant, acquired by city from private company, was not entitled to relief against act of city council in fixing a different rate for water to be charged those residing outside city limits than that charged to those residing within city limits, in the absence of a showing that charges were unreasonable, unfair, or fraudulently or arbitrarily established.

14. Constitutional law ⇐70(1)

The court is not a rate-fixing body, and the matter of fixing water rates is not judicial, but is legislative in character, and limit of function and jurisdiction of a court is to find upon a proper showing that rates fixed are unreasonable and unfair, and on a finding that established rates are unreasonable, trial court is not permitted to fix another and different rate.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Fred F. Durant against the City of Beverly Hills, a municipal corporation, for declaratory relief in relation to rates charged plaintiff by defendant for water served for domestic purposes. From an adverse judgment, defendant appeals.

Reversed.

Richard C. Waltz, City Atty., C. Richard Maddox, Asst. City Atty., and Paul E. Schwab, all of Beverly Hills, for appellant.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., Samuel Poorman, Jr., Asst. City Atty., and Robert E. Moore, Jr., Deputy City Atty., all of Los Angeles, amici curiae in support of appellant for water and power.

C. F. Culver, of Los Angeles, for respondent.

William T. Selby, of Ventura, amicus curiae for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for declaratory relief in relation to rates charged him by defendant for water served for domestic purposes. Plaintiff had judgment declaring that he was "entitled to service of water from the defendant at the same rates as fixed for consumers inside the corporate limits of the city of Beverly Hills". On its ap-

peal from this judgment the city's main ground of attack is that the judgment is against law and unsupported by any evidence entitling plaintiff to relief.

The plaintiff and others located in unincorporated territory near the city of Beverly Hills had been served with water by a private utility until the entire plant was purchased by the city. This system the city continued to operate as a part of its municipal plant serving water to its inhabitants. The theory of the plaintiff is that, when the defendant purchased the private water plant serving customers outside the limits of the city, it was obliged to continue to serve such customers at the same rate of service as charged customers within its limits. The position of respondent is that it may discriminate between these two classes of customers if the rates fixed are not unreasonable and unjust and do not work a fraud or confiscation upon the customer.

The cause went to trial upon the amended complaint which alleged that plaintiff was a resident of an unincorporated section known as West Hollywood, that the city of Beverly Hills owned and operated a municipal water system from which it served the residents of the city and also the residents of the West Hollywood area, that the defendant has discriminated against the plaintiff by charging him more than the rates charged the residents of the city. It should be noted that the complaint does not allege that the rates charged plaintiff were unreasonable, arbitrary, or fraudulent. It does not allege what was later conceded that the rates were fixed by the legally constituted rate-fixing body, though it does allege "that no warrant for this discrimination has been furnished by any rate supervising body". It does not allege what is also conceded that the water system supplying the plaintiff and his neighborhood with water was formerly a privately owned utility which was purchased by the city.

On the trial plaintiff testified covering his ownership of the land, the service of water to him by the private system, and the service through the municipally owned system. Through his testimony it appeared that he had been charged by the private utility a rate of twenty-three cents per hundred cubic feet per month; then later was charged twenty cents; that the rate charged by the city of which he complains is seventeen cents per hundred cubic feet per month for the first seventeen hundred cubic feet, then fifteen cents per hundred cubic feet for all over that quantity, whereas customers residing within the city are charged but thirteen cents. The trial court found all the allegations of the amended complaint true, and in addition found the facts relating to the operation and purchase of the private utility above outlined. No other findings were made to support the conclusion that plaintiff was entitled to service of water by the defendant (in an unlimited amount) at the same rate (for an unlimited time) as the rates charged consumers within the city.

[1-4] There are certain legal principles applicable to the controversy which should be stated at this time. "A grant of power to provide and supply water to a city and its inhabitants, authorizes a city to carry on a system and supply water to persons outside its limits, whenever it becomes necessary or convenient to do so in order to accomplish the main purpose of supplying water to those within." South Pasadena v. Pasadena L. & W. Co., 152 Cal. 579, 580, 93 P. 490. When necessary for its purposes a municipality may purchase an entire water plant or system so that "after operating the system and supplying the persons entitled to use the water, it could devote the surplus to the use of the inhabitants of the city". Fellows v. Los Angeles, 151 Cal. 52, 64, 90 P. 137, 141; South Pasadena v. Pasadena L. & W. Co., 152 Cal. 590, 93 P. 490, supra. In these operations the municipality is not selling surplus or excess waters to the prior users. The purchase of the system is impressed with a trust and the city, "with respect to this part of the water, will hold title as a mere trustee, bound to apply it to the use of those beneficially interested". Id., 152 Cal. at page 594, 93 P. at page 496. The continued supplying of water to the outside territory, being incidental to the main purpose, is a municipal affair. Id., 152 Cal. at page 594, 93 P. 490.

[5] At this point arises the essential question of the power of the municipality to fix the rates to be charged all consumers within and beyond its boundaries for services rendered under these circumstances. The parties agree that the rates charged were in fact fixed by the city council, and it is not seriously contended that any other specific body should have exercised the power. It should be noted that the complaint merely alleges that "no warrant for

this discrimination has been furnished by any rate supervising body". If the pleader means "permission", "authority" or "sanction" this is a plain conclusion of law, and an erroneous conclusion at that.

[6-8] The power of the city to fix rates to be charged those customers residing within its boundaries is incidental to the power to "establish and operate" public utility systems conferred by section 19 of article XI of the Constitution. This power to fix the charges for service by the municipality when operating a municipally owned public utility is not controlled by section 23 of article XII of the Constitution. City of Pasadena v. Railroad Comm. 183 Cal. 526, 534, 192 P. 25, 10 A.L.R. 1425; Jochimsen v. Los Angeles, 54 Cal. App. 715, 716, 202 P. 902. The power of the city to furnish services to inhabitants outside its boundaries is a part of the constitutional grant found in section 19 of article XI, wherein the city is authorized to establish and operate the utility; and since the operation of the system in the outside territory is but incidental to the main purpose of service to the inhabitants of the city, it follows as of course that the municipal authorities enjoy the same right to fix the charges to be paid by those served in the outside territory as it has to fix those charged its own inhabitants. And, upon the ruling of the Pasadena case that these extra-territorial operations are the "municipal affair" of the operating city, it follows that the city council must, at least in the first instance, be held to have the power to fix all rates to be charged for its public utility services to those within and without its boundaries. But, in any event, if some superior rate-making body should acquire the right or power to fix the charges under these circumstances, that fact would not be controlling here because the parties agree that the city authorities fixed the rates complained of, and no contention is made that any other body acted or had the power to act in an attempt to fix another rate.

[9-11] In the last analysis respondent's argument is founded upon this theory—that, having shown that the rates were not uniform, he proved that they were discriminatory and hence illegal, and that, if appellant had any excuse for this discrimination, the burden was on appellant to prove it. Fundamentally the respondent's case rests upon the erroneous theory that he has a right to receive the service at the same charge as that made to residents within the city. When the city purchased the private plant it assumed a trust to perform the contract and meet the obligations of the private concern. The obligation of that company to its customers did not require water service at the same rate paid by citizens of Beverly Hills. The obligation which the city assumed through the purchase of the system was an obligation to continue to serve plaintiff water at a reasonable rate. Lack of uniformity in the rate charged is not necessarily unlawful discrimination, and is not prima facie unreasonable. Discrimination to be objectionable must draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges. "The fundamental theory of rate making for public utilities is that there shall be but one rate for a particular service, and a charge made to one patron or consumer different from that made to another, for the same service under like circumstances, constitutes undue discrimination and renders the charge improper. The fact, however, that a rate is discriminatory by comparison with another rate does not necessarily establish or imply that either of them is unreasonable in the sense of being inadequate or exorbitant. * * * It is only unjust or unreasonable discrimination which renders a rate or charge unreasonable; and a utility may, without being guilty of unlawful discrimination, classify its customers or patrons upon any reasonable basis, as according to the purpose for which they receive the utility's service or product, or the quantity or amount received, and, subject to the general requirements of reasonableness, make separate rates for each class or group, even though there be but one customer included therein." 51 C.J. 29, 30.

[12-14] Reverting to the question of the burden of proof, we assume that when a party comes into a court of equity he will come prepared to prove his equities and not rest on the failure of his adversary to disprove them. The rates here complained of, having been fixed by the lawful rate-fixing body, must be presumed to be reasonable, fair and lawful. The appellant was entitled to rest upon that presumption until the respondent made some showing to the contrary. "Mere difference in the rates charged various classes of users is not sufficient to establish an unjustifiable discrimination." Kiefer v. Idaho Falls, 49

Idaho 458, 289 P. 81, 83. There are many reasons of which the court might take judicial notice and which would justify a difference in rates of service to consumers differently situated. These reasons would support the presumption that the action of the city council in fixing the rates was reasonable and fair. But, in the absence of any showing of any character that the charges were unreasonable, unfair or fraudulently or arbitrarily established, the trial court had no case for any relief to respondent. In short, the respondent has sought to substitute the court for the city council and have the court fix the charges which he should pay. The universal rule is that in these circumstances the court is not a rate-fixing body, that the matter of fixing water rates is not judicial, but is legislative in character, and that the limit of its function and jurisdiction is to find, upon a proper showing, that the rates fixed are unreasonable and unfair. Spring Valley Water Works v. Bartlett, 63 Cal. 245; Knoxville v. Knoxville Water Co., 212 U.S. 1, 8, 29 S.Ct. 148, 53 L.Ed. 371. If upon such finding it is adjudged that the established rates shall not be collected, the court is not permitted to fix another and different rate, but this function must be left with the proper rate-fixing body.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



PEOPLE v. SILVER. *

Cr. 397.

District Court of Appeal, Fourth District, California.

May 20, 1940.

Hearing Granted June 19, 1940.

1. Burglary ⇐9(2)

"Mine, or any underground portion thereof," within statute providing that entry upon a "mine, or any underground portion thereof", with intent to commit theft is burglary, does not include all of the open unworked property within exterior boundaries of a mining claim, either under the historical conception of "burglary", or under the rules of statutory construction and the doctrine of "ejusdem generis". Pen.Code, § 459.

See Words and Phrases, Permanent Edition, for all other definitions of "Burglary", "Ejusdem Generis", and "Mine, or any Underground Portion Thereof".

2. Burglary ⇐9(2)

Entry upon unfenced open pit mining claim for purpose of stealing gasoline from uninclosed tank was not an entry upon a "mine, or any underground portion thereof", within statute making entry upon a "mine, or any underground portion thereof", with intent to commit theft, a burglary. Pen.Code, § 459.

3. Homicide ⇐289

In prosecution for murder of one who entered unfenced open pit mining property for purpose of stealing gasoline from uninclosed tank thereon, instruction that the word "mine" in a specific sense means a subterranean cavity or passage, in connection with instruction on statute providing that entry upon a mine or any underground portion thereof with intent to commit theft is a burglary, was harmless, if not broad enough. Pen.Code, § 459.

4. Homicide ⇐289

In prosecution for murder of one who entered unfenced open pit mining property for purpose of stealing gasoline from uninclosed tank, instructions defining a mine as all mineral bearing properties of whatever kind, whether underground, quarry or pit, offered for purpose of justifying the killing on ground that a felony was being committed, were properly refused because too broad. Pen.Code, §§ 197, 459.

5. Homicide ⇐300(8)

Whether instruction on self-defense was properly given depended, not on whether accused was unjustly afraid when he fired fatal shots, but on whether there was any evidence in record, however meager, which might tend to show that accused fired shots under circumstances which a reasonable person might have thought reasonable grounds to apprehend a design to do some great bodily injury. Pen.Code, §§ 197, 198.

6. Homicide ⇐300(8)

In murder prosecution, where it appeared that accused was particularly frightened at time he fired shots in question, particular-

 * Subsequent opinion 108 P.2d 4.

ly when he fired third shot, believing that someone was approaching him in the dark, instruction on self-defense was proper. Pen. Code, §§ 197, 198.

7. Homicide ⇐339

Where jury by its verdict of manslaughter determined that accused did not with malice aforethought intend to take a human life, accused could not complain on appeal that evidence was rejected tending to show, as bearing on his intent, that he acted on the advice, theretofore obtained, of a deputy sheriff respecting his property rights.

8. Criminal law ⇐982

Summary denial of an application for probation is in sound discretion of trial court. Pen.Code, § 1203.

9. Criminal law ⇐982

Where one accused of murder was convicted in a case requiring four days to try and in which trial court was familiar with all the facts, summary refusal to permit accused to file an application for probation after accused stated that he expected to make application was not error. Pen.Code, § 1203.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Gail Bradford Silver was convicted of manslaughter, and he appeals.

Affirmed.

Henry Brouillette, of Los Angeles, and Raymond E. Hodge, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant Gail Bradford Silver was charged in an information with the crime of murder, that on the 25th day of November, 1939, in San Bernardino county, he murdered one Lee Hartman. After a plea of not guilty and a trial by a jury, he was convicted of the included offense of manslaughter. A new trial was denied as was appellant's purported application for probation.

There is little controversy as to the facts. They may be thus summarized: Appellant, aged 22, was a son-in-law of a Mrs. Shook who was the owner of the Temescal Clay Company claim or mining property located near Victorville. The so-called mine consisted of two open cuts in the side of a mountain from which silica was taken. Above the open cuts and adjacent thereto and upon the Temescal Clay Company property was situated, among other things, a gasoline storage tank of 640 gallons capacity, with an unenclosed gasoline pump located out in the open near a road, quite a distance from an enclosed blacksmith shop and oil house. The gasoline stored therein was for use in and about the operation of the claim. Prior to the night of November 24, 1939, gasoline had been stolen from the tank. On the 24th and 25th days of November, 1939, the appellant was employed and stationed as a watchman on that property, having been sent there for that purpose. On the night of November 25, 1939, at about 6 p. m., appellant placed himself at a point near the peak of a hill at an approximate elevation of 84 feet above the point where the gasoline pump was located and a distance of approximately 288 feet in a direct line from the pump. Shortly after dark, in the moonlight, he observed an automobile being driven to and about the property without lights. He picked up a 30-30 Winchester rifle and then saw the outline of the car backed up to the gasoline pump. He testified that after waiting a short time he called out "What do you want?" and received no answer; that he fired a shot to scare away the thieves who were stealing gasoline out of the tank; that he waited a few moments and called again and then he fired two more shots; that after firing the second shot he heard what he thought sounded like rock falling, as though someone was coming up the hill to him, and that he then fired another shot and ran back over the hill approximately a mile and a quarter to a trailer house and endeavored unsuccessfully to have a watchman go back and assist him at the scene where the men were stealing the gasoline; that he then got in his car, went to Victorville, called the office of the deputy sheriff at Barstow, and went to the home of Joseph Simonic, after which a doctor administered him morphine to quiet his nerves. After midnight he was taken to the scene of the shooting by the deputy sheriff and others and it was then that he claimed he first learned that Lee Hartman, the deceased, had been shot and that he, together with his two younger brothers, Walter and Ernest, were the ones who had driven to the mining property for the purpose of stealing gasoline. The evi-

dence indicates that the three brothers had been there on other occasions for the same purpose.

Their testimony, in substance, shows that on the night in question, they arrived on the property in their automobile, turned out the lights, and backed up the hill to the gasoline pump. All three boys got out of the car. Although the pump was locked, by some manipulation they were able to fill the tank of the car. While Lee and Ernest were draining the hose a shot was fired from the hill. Lee was struck by the bullet through the chest, fell backwards and apparently died immediately. The boys all claim that prior to the first shot no words of warning were given by appellant. Ernest then started up the hill toward appellant and shouted "Stop shooting, Mister". He claims that he then heard a voice that said "Get the Hell out of there or I will shoot you" or "I will fill you all full of lead". A second shot followed, while Ernest was trying to put Lee in the back seat of the car. He testified that he again called to appellant and said "Don't shoot any more * * * one of my brothers is shot". After the second shot he discovered that his other brother, Walter, had been shot through the leg. Before they left for their home a third shot was fired over the car. Lee was taken to the mortuary and Walter received medical aid at the hospital. The charge of murder followed.

Appellant now claims (1) that the verdict is contrary to the law and the evidence; (2) that the court misdirected the jury in matters of law; (3) that the court erred in denying appellant's motion for new trial; and (4) that the court erred in denying a hearing on an application of appellant for probation.

[1] It is argued that under the undisputed evidence the Hartmans were in the act of committing theft on mining property and that therefore the entry upon *the mine or any underground portion thereof with the intent to commit grand or petty theft was burglary,* a felony (sec. 459, Pen.Code), quoting section 197 of the Penal Code that "Homicide is * * * justifiable * * 1. When resisting any attempt to murder any person, or to commit a felony * * * 2. When committed in defense of habitation, *property,* or person, against one who manifestly intends or endeavors, by violence or *surprise, to commit a felony* * * *." (Appellant's italics.) It is now claimed that under all the facts as above set forth appellant was justified in the commission of the homicide with which he was accused, and in view of the record as set forth it was necessary to a proper defense of appellant that the jury be properly instructed as to the law based on the evidence adduced. Appellant offered certain instructions bearing on the question which were refused. They are as follows:

"You are instructed that every person who enters any mine, or any underground portion thereof, with intent to commit grand or petit larceny, or any felony, is guilty of burglary, a felony." And

"You are instructed that the California legal definition of a mine includes all mineral-bearing properties of whatever kind or character, whether underground, quarry, pit, well, spring or other source from which any mineral substance may be obtained;

"And you are further instructed that the California legal definition of 'mineral' includes all mineral products both metallic and non-metallic, solid, liquid or gaseous, and mineral waters of whatever kind or character." Sec. 2200, Code of Public Resources, St.1939, p. 1072; Webster's Dictionary; Smith v. Cooley, 65 Cal. 46, 2 P. 880. And

"You are instructed that sluiceboxes, flumes, hose, pipe, railway tracks, cars, blacksmith-shops, mills, and all other machinery or tools used in working or developing a mine are to be deemed affixed to the mine." Citing Civ.Code, sec. 661, now sec. 2601, Public Resources Code, St. 1939, p. 1108.

The trial court read section 197 of the Penal Code on the question of justifiable homicide, and section 195 of the Penal Code on excusable homicide, and instructed the jury in the language of section 459 of the Penal Code defining burglary and then added: "In this connection you are instructed that the word 'mine' in a specific sense means a subterranean cavity or passage, especially a pit or excavation in the earth, from which metallic ores or other mineral substances are taken by digging'."

This was followed by another instruction: "* * * that one charged with homicide cannot avail himself of the defense that the homicide he stands charged with was justifiable because it was committed in defense of property in his charge or care unless it be shown that before the

fatal shot was fired by the defendant it must have appeared to him, as a reasonable person, that the deceased manifestly intended or endeavored by violence or surprise to commit a felony."

It is appellant's claim that it is evident from the wording of section 459 of the Penal Code that the legislature intended a mine to be not only the underground portion thereof, but also that portion of the mine above ground and the equipment thereon used in the operation of the mining plant, and that in reading the given instruction as a whole, and particularly by joining the two distinct instructions or definitions with the words "in this connection", there was but one conclusion that the jury could reach, and "that was that the court instructed them that a mine is a hole in the ground from which mineral is dug, and that a person entering a mine is guilty of burglary, but that it did not apply in the instant case because from all of the testimony the decedent and his two brothers did not enter a hole in the ground with the intent to commit grand or petit larceny". Appellant claims that the legislature did not intend the use of the word "mine", in the definition of burglary, in a specific sense, and that the term "mine" included the whole claim or body of mining property, citing Tredinnick v. Red Cloud, etc., Mining Co., 72 Cal. 78, 81, 13 P. 152; 40 Cor. Jur., pp. 733-735 (par. 3, sub-par. 3); and (par. 8, sub-par. 6).

Respondent in reply maintains that the property in question was a quarry and not a mine, citing Marvel v. Merritt, 116 U.S. 11, 6 S.Ct. 207, 29 L.Ed. 550; J. M. Guffey Petroleum Co. v. Murrel, 127 La. 466, 53 So. 705; Hoysradt v. Delaware, L. & W. R. Co., C.C., 151 F. 321, 331; Board of Commissioners of Greene County v. Lattas Creek Coal Co., 179 Ind. 212, 100 N.E. 561; Id., Ind.App., 96 N.E. 633, 637; and that even if it could be considered a mine within the meaning of the statute, there was no structure whatever on the premises that the Hartman brothers sought or attempted to break into or enter. It is pointed out that the gasoline pump itself was entirely out in the open and was not covered with any roof or sides.

Respondent further points out that section 459 of the Penal Code defining burglary, was amended in 1913 (stats. 1913, p. 228), by adding "mine, or any underground portion thereof" to the structures which were subject to burglary. It is contended that driving upon a naked claim (upon which no structures have been erected, although entitled to be called a mine) with intent to commit theft, could not under any theory of the law be held to be burglary; that the statute, as amended, really contemplates that a person must *enter* a "house * * * mine, or any underground portion thereof" before he could be guilty of burglary. From the evidence it does not appear that the claim here involved was in any manner fenced or marked to designate its boundaries. It appears to comprise several acres of rough and barren land. There is no evidence of underground tunnels existing on the claim, but at most it can only be said that there is a pit or excavation in the earth from which mineral substances are taken by digging. Regardless of the nature of the claim, it is quite apparent that the three brothers did not enter any portion of the pit or excavation nor the underground portion of a mine, nor did they enter any structure or enclosure constituting any part of the mine or attached to it. It seems to us that it is quite obvious that section 459 of the Penal Code does not include under the term "mine, or any underground portion thereof", all of the open, unworked property within the exterior boundaries of the mining claim. This is entirely in accordance not only with the established and historical conception of burglary but also with the elementary rules of statutory construction and according to the doctrine of ejusdem generis. A general and pertinent discussion of this doctrine is to be found in 23 Cal.Juris., page 755, section 130.

[2-4] In People v. Buyle, 22 Cal.App.2d 143, 147, 70 P.2d 955, it was held that a powder magazine dug out of a hill with walls on the sides and a roof of natural earth and a door constituted such a structure as to be a "building" within the meaning of section 459.

In People v. Gibbons, 206 Cal. 112, 273 P. 32, the Supreme Court held that in a prosecution for burglary the crime was not established where the evidence showed that the stolen property was taken from a bin having three sides and a roof. The structure described was not of such a nature as to permit the crime of burglary being committed therein. See, also, People v. Coffee, 52 Cal.App. 118, 198 P. 213; People v. Stickman, 34 Cal. 242; People v. Franco, 79 Cal.App. 682, 250 P. 698.

In the Gibbons case the court said: "We are cited to no case, and know of none, where the element of the definition of burglary which requires a breaking into some kind of structure has been held to be non-essential. The common law, of course, required that the building be a human habitation. This is not necessary under our statutes, but as said in People v. Coffee, supra, the structure need only be one having four sides and a roof."

We are convinced from the undisputed facts in this case that the jury could not have here found the three brothers guilty of burglary under the definition of that offense set forth in section 459 of the Penal Code. While the instruction given defining a mine may not have been broad enough to fully cover the definition of a mine as set forth in that section, we are convinced that the legislature did not intend that the mere driving or going upon a mining claim, as used in a general sense (i. e., the exterior boundaries thereof) with the intent to commit petit theft thereon, constitutes the offense of burglary. We therefore conclude that the giving of the People's instruction complained of was harmless and that the proffered instructions of appellant defining a mine were too broad and not applicable to the undisputed facts. Therefore the failure to give them was not error. People v. Davis, 135 Cal. 162, 67 P. 59. The stealing of the gasoline as here related did not constitute an entry of "any * * * mine, or any underground portion thereof" within the meaning of section 459 of the Penal Code.

[5, 6] Appellant next objects to the court giving an instruction to the jury in reference to self-defense. The appellant asserts that there was no evidence whatsoever in the record with reference to shooting in self defense and claims that it was therefore error to give such an instruction, citing People v. Savinovich, 59 Cal.App. 240, 210 P. 526, and People v. Maybelle Roe, 189 Cal. 548, 209 P. 560. It appears from the transcript that the appellant was particularly frightened at the time he fired the shots, at least when he fired the third shot. The appellant himself testified that "as I remember it was between the second and third shots I heard a scraping of, I don't know what it was, but it sounded like rock, as though somebody was coming up the hill to me, and I was frightened and I got up and fired and ran back over the hill". It is quite obvious from the appellant's testimony that he believed at the time that he was in imminent danger and in order to protect himself he fired the shot. We are not here concerned with whether or not from all the facts and circumstances it appears to us that the appellant was unjustly afraid. We are concerned only with whether or not there is any evidence in the record, however meager, which might tend to show that the appellant fired the shot under circumstances which a reasonable person might have thought reasonable grounds to apprehend a design to do some great bodily injury, under the law of self-defense, as set forth in sections 197 and 198 of the Penal Code. The instruction was proper and pertinent. The cases cited by the appellant are not therefore in point.

[7] Appellant next objects to the refusal of the trial court to permit the appellant to introduce into evidence a conversation he had with a deputy sheriff before going up on the hill to guard the property. The appellant made an offer of proof which was to the effect that on the morning of November 25, 1939, he sought the advice of a deputy sheriff as to what his rights were as a watchman on the property of the mine, as bearing on the intent of the appellant. He cites in support of his contention the case of People v. Fong Sing, 38 Cal.App. 253, 258, 175 P. 911, regarding res gestae. Whether or not appellant acted upon the advice as given by the deputy sheriff and whether or not such advice was proper is entirely beside the point. We are not here concerned, at this stage of the proceeding, with the question of whether or not the appellant actually intended to take a human life. The jury, by its verdict of manslaughter, determined that the appellant did not with malice aforethought intend to take a human life. Appellant should not now complain.

[8, 9] Appellant finally contends that the trial court erred in refusing to permit him to file an application for probation, and relies upon the case of People v. Lovelace, 97 Cal.App. 228, 275 P. 489. In the Lovelace case the defendant had entered a plea of guilty to involuntary manslaughter. In the instant case the appellant had been tried before a jury in a case that required four days to try and in which the trial court was familiar with all the facts. It is entirely true that at the time counsel for the appellant stated to the court that he

expected "to make an application for probation", the court stated that among other things, section 1203 of the Penal Code provided that probation should not be granted to a defendant who at the time of the perpetration of a crime was armed with a deadly weapon. Without any citation of authorities, and without offering in any way to file an application for probation or to apply, orally or in writing, to file an application for probation, counsel for appellant stated, "we submit the matter to the court". The court thereupon stated that the application for probation would be denied. The court did not err in summarily denying probation. It is within the sound discretion of the trial court, under the provisions of section 1203 of the Penal Code, to summarily deny an application for probation. Because the trial court cited a portion of the statute and stated that "among other things the statute provides", it does not necessarily follow that that was the sole reason for denying the application for probation. This court stated in People v. Blankenship, 16 Cal.App.2d 606, 609, 61 P.2d 352, 353, as follows: "It must, in the first place, be conceded that the granting or withholding of probation is a matter that rests entirely in the sound discretion of the trial court. Section 1203, Pen.Code; People v. Judson, 128 Cal.App. 768, 774, 18 P.2d 379. * * * The only right which an applicant for probation possesses is that his petition shall receive consideration by the court. He may not demand clemency as a matter of right." Citing cases.

In People v. Henry, 23 Cal.App.2d 155, 167, 72 P.2d 915, 922, this court previously decided a similar case adversely to appellant's contention as follows: "The defendant's final complaint on this appeal is that the trial court arbitrarily refused to entertain an application for probation. The record does not sustain the objection. * * * From the foregoing it is apparent, first, that there was no request by defendant's counsel for permission to file a formal application for probation and hence no denial of such a request and, second, that the statement of defendant's counsel to the effect 'that he would like to make application for probation for the defendant' was considered by the court to be an application for probation which the court summarily denied, giving his reasons for the denial at some length. There was then no arbitrary refusal of permission to present an application for probation, but on the contrary a denial of an oral application by the judge who had presided during the trial of the action and was familiar with all the facts, including the defendant's character and his reputation for the various traits involved in the offense of which he was convicted, which was very fully developed by the testimony of a large number of witnesses. Section 1203 of the Penal Code (as amended by St.1935, p. 1706) expressly authorizes the summary disposition of an application for probation and it is impossible to find anything in the record which indicates that the trial court abused the very wide discretion which it possessed in passing upon the application." Citing cases.

This phase of the case is entirely disposed of by the case of People v. Henry, supra.

The judgment and orders from which this appeal has been perfected are affirmed.

We concur: BARNARD, P. J; MARKS, J.



39 Cal.App.2d 198

CLARK et al. v. JANSS.

Civ. 2474.

District Court of Appeal, Fourth District, California.

May 21, 1940.

1. Appeal and error ⇐613(1)

If documents constituted an attempt to present a record of objections and rulings made in connection with settlement of bill of exceptions, they could not be considered on appeal where there was no certificate by trial judge.

2. Appeal and error ⇐672

A duly authenticated clerk's transcript which contained judgment roll was a sufficient record to require appellate court to consider the appeal on its merits since an appeal may be taken with the judgment roll as the only record on appeal.

3. Appeal and error ⇐655(2)

The trial court's certification of bill of exceptions is conclusive of motion to dismiss appeal for failure to serve and file proposed bill of exceptions within statutory time; such certification being equivalent of relief from such default and within court's sound discretion. Code Civ.Proc. § 473, as amended by St.1933, p. 1851, § 34; § 650.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Marjorie Clark and another against Elmer R. Janss. From a judgment, defendant appeals, and plaintiffs move to strike out the record on appeal and to dismiss the appeal.

Motions denied.

McFadden & Coomber, of Anaheim, for appellant.

Wm. J. M. Heinz, of Anaheim, for respondents.

MARKS, Justice.

These are motions to strike out the record on appeal and to dismiss the appeal.

The record on appeal consists of a clerk's typewritten transcript and a printed bill of exceptions. No question is raised of the propriety of using the two records. We will assume, without holding, that such records may be filed on one appeal.

[1] Attached to the notice of motion to dismiss the appeal is an affidavit of counsel for respondents and copies of certain documents on file in the office of the county clerk which relate to the proceedings leading up to and taken on the settlement of the bill of exceptions. It also contains a copy of a notice of the denial of the motion for new trial which has on it a receipt of service by counsel for appellant showing service of the notice on November 4, 1939. Attached to these documents is the certificate of the county clerk to the effect that certain of them are true copies of the originals on file in his office. There is no certificate by the trial judge.

If this is an attempt to present a record of objections and rulings made in connection with the settlement of the bill of exceptions, it cannot be considered here because of the lack of any proper certification. Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748; Clark v. McCain, 107 Cal.App. 668, 290 P. 901; Guyot v. Cassab, 118 Cal.App. 742, 5 P.2d 912; Salinas v. Riverside Finance Co., 126 Cal.App. 675, 14 P.2d 1025; Mason v. Coalinga U. H. S. Dist., 31 Cal.App.2d 317, 87 P.2d 921.

[2] It is clear that the motion to dismiss the appeal must be denied. There is a duly authenticated clerk's transcript before us which contains the judgment roll. This is a sufficient record to require us to consider the appeal on its merits as an appeal may be taken with the judgment roll as the only record on appeal.

[3] The motion to strike is directed at the bill of exceptions and is made on the ground that the proposed bill was not served within the time provided in section 650 of the Code of Civil Procedure.

The bill of exceptions was settled and filed on December 12, 1939. The order denying the motion for new trial was made on October 4, 1939. Notice of the order was waived in open court on that date. The record on appeal fails to disclose when the proposed bill of exceptions was first served and filed. The trial judge's certificate to it contains the following: "* * * the foregoing bill of exceptions was duly prepared, and served and * * amendments were made thereto in conformity with the requirements of the court * * *".

A similar question was before the Supreme Court in Colburn Biological Institute v. DeBold, 6 Cal.2d 631, 59 P.2d 108, 109, and was disposed of as follows:

"The certification by the trial court is conclusive of this motion. It is well settled that certification of the record by the trial judge is the equivalent of relief from default under section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851, § 34) and within the exercise of the sound discretion of the trial court. Keys v. Mother Lode Extension Mines, 212 Cal. 612, 299 P. 524; Stenzel v. Kronick, 201 Cal. 26, 255 P. 199; Town of Mill Valley v. Massachusetts, etc., Co., 189 Cal. 52, 207 P. 253; Atowich v. Zimmer, 129 Cal.App. 193, 18 P.2d 370; Rubin v. Platt Music Co., 79 Cal.App. 756, 251 P. 243. * * *

"Relying upon Rossi v. Scott, Magner & Miller, 41 Cal.App. 646, 183 P. 263, the respondents urge that where the bill of exceptions is settled although it has not

been presented within the time provided and respondent has made timely objection to its settlement, the burden is upon the appellant to incorporate in the record affirmative matter in excuse of his delay and that in the absence of such a showing the bill of exceptions, although settled by the trial court, cannot be considered upon appeal. In answer to this contention it may be pointed out, first, that it does not appear upon the face of the bill of exceptions in the case now before us that respondents were not served within the time allowed with the proposed bill of exceptions, and, second, that this rule is no longer rigidly enforced, the matter of excuse for delay being considered to be more properly a subject for investigation by the trial court."

The motions are denied.

We concur: BARNARD, P. J.; GRIFFIN, J.



39 Cal.App.2d 168

PEOPLE v. ENRIQUEZ.

Cr. 3320.

District Court of Appeal, Second District, Division 2, California.

May 20, 1940.

1. Robbery ⇐24(1)

The possession of stolen property is not of itself sufficient evidence of the guilt of the party in whose possession it is found.

2. Burglary ⇐46(7)
Robbery ⇐27(1)

In prosecution for robbery and burglary, refusal to give instruction that possession of stolen property is not of itself sufficient evidence of guilt of party in whose possession it is found and that if jury found no evidence of guilt of defendant other than possession of stolen property, it was duty of jury to render verdict of not guilty was prejudicial error.

3. Criminal law ⇐790

The court is under duty to instruct jury regarding principles of law pertaining to facts and circumstances presented in evidence.

4. Robbery ⇐26

In a proper case the court may decide whether there is any competent evidence in addition to proof of possession of stolen property but the question ordinarily is for the determination of the jury whose province it is to weigh the evidence and draw reasonable inference therefrom.

5. Burglary ⇐42(1)
Robbery ⇐24(1)

The fact that defendant, charged with robbery and burglary, could not inform officers concerning the person who had left stolen property in defendant's room could not be relied upon by the prosecution to supply testimony necessary to sustain the conviction.

6. Robbery ⇐24(1)

Evidence that defendant received goods obtained in robbery with knowledge of how it had been obtained would not, standing alone, be sufficient to justify a conviction of robbery.

7. Burglary ⇐46(7)
Robbery ⇐27(1)

Where it was not shown that defendant, charged with robbery and burglary, gave a false account of presence of stolen goods in his room, instruction that where goods have been feloniously taken by means of a burglary and they are immediately or soon thereafter found in possession of a person who gives a false account or refuses to give any account of the manner in which he came into their possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods but that he made use of the means by which access to them was obtained should not have been given.

8. Burglary ⇐29
Robbery ⇐22

In prosecution for robbery and burglary, where evidence disclosed that shortly after offense was committed, officers found stolen goods in defendant's room but defendant stated that he did not know how goods got into his room, no presumption of guilt arose from possession of the stolen property or failure of defendant to account for his possession, but question of defendant's guilt was required to be left to the determination of jury from all facts shown in evidence.

9. Criminal law ⇐1172(8)

In prosecution for robbery and burglary, the fact that defendant was acquitted of

burglary did not cure vice of an instruction which naturally tended to confuse the jury in considering the two charges of robbery and burglary growing out of the same set of facts.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Rudolph Enriquez was convicted of robbery, and he appeals.

Reversed and new trial ordered.

Stanley Visel, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WOOD, Justice.

An information was filed against appellant Rudolph Enriquez and Julius Roberts and William Marsh, charging that on August 17, 1939, they committed the crime of robbery by forcibly taking the sum of $16 and a quantity of cigarets and liquor from the possession of J. R. Picklum. In a second count in the information it is charged that the same defendants are guilty of burglary in that on the same date they entered the establishment of J. R. Picklum at 4801 South Main street in the city of Los Angeles with intent to commit theft. The prosecution relied upon the same set of facts and circumstances to sustain both charges. A jury found appellant guilty of the crime of robbery and not guilty of the crime of burglary. He now appeals from the judgment of conviction and from his order denying his motion for a new trial, basing his appeal upon the contention that the evidence is insufficient to justify his conviction and upon errors of the trial court in instructing the jury.

The witness Picklum testified that "about between 12:15 and 12:30 o'clock on the morning of August 17", he was at his cafe at 4801 South Main street when a man whom he identified as defendant Marsh entered and, drawing a gun from his pocket, compelled the witness to "get in the back room"; that he heard somebody else coming in and looked and saw two men who were strangers to him. These two men took part in the robbery. The witness identified defendant Roberts as one of the two men but failed to identify appellant. The record discloses the following testimony by the witness on this point: "Yes, I saw them to a certain extent. I took a good look at them to see whether they were people I knew or not.

"Q. Do you see either of the other two persons that were coming into your place of business? Do you see them in the courtroom? A. The second man from the end I recognize.

"Q. That is referring to the man to the right of Mr. Marsh? A. Yes.

"Q. And to the right of Mr. Enriquez? A. Yes. Mr. Leavy: May the record show he is referring to the defendant Roberts?

"The Court: It may so show.

"Mr. Leavy: May I have the defendant Enriquez stand up?

"The Court: You may stand up.

"Q. Mr. Leavy: Directing your attention to Mr. Enriquez, standing at this time, are you able to describe as to build, the other man who was coming in with the man you have already identified as Mr. Roberts? Are you able to describe the build with reference to the defendant Enriquez and the man whom you saw coming in with Roberts on the occasion you have told us about? A. He was the general build of Enriquez."

Referring to the identification of defendant Roberts, the witness stated that he based the identity "on the dress and manner of walk and the stooped shoulders and he had his head rather down. * * * I noticed that his nose was quite prominent * * * he gave an impression of having a little wider nose than ordinary". Concerning appellant the witness further testified:

"Q. You don't intend to say, do you, by your testimony that Enriquez here, the man sitting at the end of the table, is one of those two men that came in? A. I couldn't identify him myself."

At 2:25 a. m. on August 17 police officers went to a lodging house at 836 Crocker street, where appellant occupied room 315. In this room the officers found bottles of liquor and cartons of cigarets which had been stolen earlier from Picklum's cafe. Part of the goods was in a dresser drawer and part in a suitcase. Appellant returned to his room at about 8 o'clock a. m., and upon being questioned by the officers, stated that he did not know how the goods got into his room, that somebody else must have put them there.

Appellant was sworn as a witness and testified that he had occupied room 315

for about two weeks before the robbery; that the suitcase was the property of one Frank Herman, who had loaned it to appellant; that he had permitted Herman, who had a girl friend, to use his room on several occasions and that on three occasions when he had returned to his room he had found Herman there; that a man named Frank Salas who formerly occupied room 314, across the hall, had had a key to room 315; that on the evening of August 16, 1939, upon his return to his room he had found a note reading "see me tonight, important, Frank H". Appellant "figured" the note was from Herman and went to cafes in the vicinity of Fifth and Main streets in search of him. He did not find Herman during the evening, and at about 12 o'clock went to one of the all-night picture shows on Main street near Fifth street where he remained until about 5 o'clock a. m. From the picture show he went to a Mexican broadcast at a theater at Eighth and Main streets, where he remained until he returned to his room. Appellant stated that he was not acquainted with defendant Roberts but that he had known defendant Marsh and had been at his place on two occasions.

Audrey Thompson appeared as an alibi witness for appellant. She testified that she attended the picture show, concerning which appellant had testified, on the night in question; that she arrived there a little before midnight and remained until the end of the show at about 5 o'clock a. m. She saw appellant, whom she had previously known, at the show and noticed that appellant was accompanied by one or two men but defendants Marsh and Roberts were not with him. At that time appellant asked the witness if she "would like to stick with him", but she declined as she was with someone else. The witness testified that appellant took his seat a short distance from her. The witness further testified: "At different times I glanced over there and noticed they were still there, but my attention was directed mostly to the screen. I couldn't say he was there the full time.

"Q. After you were seated in the theater and you saw Enriquez seated in the theater, starting around quarter of twelve, did you notice him at any time between that time and say a quarter past twelve? A. I think so, yes.

"Q. Was he still in the theater during some portion of that period of time? A. Yes.

"Q. Do you remember having glanced over that way and having seen him there? A. Yes. * * *. I saw him occasionally in the show up until I should say about five o'clock."

The witness also testified that the wife of defendant Marsh had told her that a day or two after the robbery Marsh and appellant were both in jail and that appellant had told her (Mrs. Marsh) that the witness could recall seeing him in the theater on the night in question.

[1-4] Appellant now complains of the refusal of the court to give to the jury the following instruction: "The possession of stolen property is not of itself sufficient evidence of the guilt of the party in whose possession it is found and if you find no evidence of the guilt of the defendant other than the possession of the stolen property, it is your duty to render a verdict of not guilty." This instruction correctly sets forth a principle of law which has been approved in many decisions and the court committed prejudicial error in refusing to give it to the jury. 4 Cal. Jur. 741 and cases there cited. It was the duty of the court to instruct the jury as to the principles of law pertaining to the facts and circumstances presented in the evidence. People v. Chesney, 72 Cal. App. 570, 237 P. 793. Although the court may in a proper case decide whether there is any competent evidence in addition to proof of possession of stolen property, the question ordinarily is for the determination of the jury whose province it is to weigh the evidence and draw reasonable inferences therefrom.

Respondent argues that the identification of appellant by the witness Picklum was sufficient to supply the additional evidence required by law. The evidence on this point, however, is at the most very slight; indeed it may be well argued that the identification evidence is more favorable to appellant than respondent. Mr. Picklum not only failed to identify appellant notwithstanding he took a "good look" at him at the time of the robbery but he did identify the other two participants in the robbery, particularly pointing out the features of defendant Roberts which enabled the witness to recognize him. The very fact that the witness could identify only two of the three robbers in this manner forms ground for the contention that appellant was not one of the three. The most that can be gleaned from his testimony by the prosecution is that the witness stated

that appellant, who was singled out and ordered to stand in the court room, was of "the general build" of the robber. Unquestionably there are many thousands of men in the city of Los Angeles of the same "general build".

[5, 6] Respondent points to the alibi testimony of the witness Audrey Thompson and argues that here also can be found evidence in addition to that concerning the possession of the stolen property. We find nothing in the record bearing out this contention. The fact that Mrs. Marsh had been requested by appellant to seek the witness for the purpose of verifying his statement that he was in the theater presents but a natural situation. Nor do we find anything incriminatory in the circumstance that appellant had been acquainted with defendant Marsh. The fact that appellant could not inform the officers concerning the person who had left the stolen property in his room cannot be relied upon by the prosecution to supply testimony necessary to sustain the conviction. As pointed out in People v. Hurley, 60 Cal. 74, 78, 44 Am.Rep. 55: "if he did not know that they were there, he could not explain how they came to be there". The prosecution did not prove that any of the statements made by appellant concerning the presence of the stolen property in his room were in fact false. Conceding, without deciding, that the record shows sufficient evidence to sustain a verdict of guilty, the appellant undoubtedly had the right to have the issues presented to the jury under proper instructions informing them of the principles of law applicable. In this regard it should be borne in mind that evidence that appellant received the goods obtained in the robbery with knowledge of how it had been obtained would not, standing alone, be sufficient to justify a conviction of the crime of robbery. People v. Shephardson, 48 Cal. 189. Appellant was not here charged with the crime of receiving stolen property.

[7-9] The prejudicial effect of the error of the trial court in refusing to give the instruction above quoted was emphasized when the court gave to the jury the following instruction: "Where goods have been feloniously taken by means of a burglary and they are immediately or soon thereafter found in the possession of a person who gives a false account or refuses to give any account of the manner in which he came in their possession, proof of such possession and guilty conduct is presumptive evidence, not only that he stole the goods, but that he made use of means by which access to them was obtained." As above pointed out, it was not shown that appellant gave a false account of the presence of the stolen goods, and he could not be expected to explain what he did not know. The court premised its instruction upon the supposition that defendant had given a false account or had refused to give any account of the manner in which he came into possession of the property and added that "proof of such possession and guilty conduct is presumptive evidence" of guilt. The court should not have told the jury that such facts were presumptive evidence of the guilt of appellant. Respondent refers to People v. Lang, 142 Cal. 482, 76 P. 232, wherein certain language appears which apparently would justify the instruction but in that case the court did not approve of an instruction to the jury that proof of possession of stolen property under the circumstances indicated is presumptive evidence of guilt. The language in the opinion in the Lang case which is relied upon by respondent was not necessary to the decision. The author of the opinion cites People v. Smith, 86 Cal. 238, 24 P. 988, as authority, but the ruling in the Smith case was merely that the evidence there under review was "sufficient to warrant the jury in their verdict". No presumption of guilt arises from possession of stolen property or the failure of defendant to account for his possession of it, but the question of defendant's guilt must be left to the determination of the jury from all the facts and circumstances shown in evidence. The fact that appellant was acquitted of the crime of burglary does not cure the vice of the instruction, which naturally tended to confuse the jury in considering the two charges of robbery and burglary growing out of the same set of facts.

The judgment and the order denying the motion for a new trial are reversed and a new trial is ordered.

We concur: MOORE, P. J.; McCOMB, J.

39 Cal.App.2d 211

PEOPLE v. WONG FUN.

Cr. 452.

District Court of Appeal, Fourth District. California.

May 21, 1940.

1. Poisons ⇐9

In prosecution for possession of narcotics, evidence in support of conviction established that bottles containing opium solution were under dominion and control of accused.

2. Criminal law ⇐822(1)

The whole of allegedly erroneous instruction was to be taken together and viewed in the light of the evidence to which it applied.

3. Criminal law ⇐822(6)

In prosecution for possession of narcotics, instructions which, when considered as a whole, informed jury that possession of the narcotics must have been exclusive in accused were not erroneous.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Wong Fun was convicted on a charge of possession of narcotics, and he appeals.

Affirmed.

Horace Appel, of Los Angeles, and A. C. Finney, of El Centro, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant has appealed from a judgment of conviction on a charge of possession of narcotics. He was arrested by two state narcotic inspectors at a residence in Brawley on October 31, 1939, at about 11 o'clock p. m. He was alone at the time and had just been cooking something on the stove in the kitchen of the residence. The residence also had a living room and bedroom in which were some five cots, only one of which had the appearance of being in regular use. This was identified by the defendant as his own bed. There were some card tables and a safe in the living room, a number of boxes filled with canned goods and dishes, and other articles in the kitchen. Many of these articles had an accumulation of dust on them. The inspectors found six bottles, filled with a solution of wine and opium which contained morphine and codeine, in the kitchen, three being on a sort of table near the stove and the others being near a refrigerator and partly under a table. None of these bottles had any dust on them. When confronted with the bottles in question the defendant stated that he did not know what they were and knew nothing about them. He later told the officers that he did not know who owned them but that he knew there was nothing in them except wine. He stated that no one else was staying at the house and that he had occupied it for thirteen months and paid the rent. He also stated that he had formerly used opium but had used none for some years. There was evidence that he showed no physical signs of the recent use of opium.

The defendant was charged in count I with the possession of narcotics; in count II with a violation of the Deadly Weapons Act; and in count III with a prior conviction for a violation of the State Poison Act. He admitted the charge of prior conviction and pleaded not guilty to the other two counts. A jury returned a verdict finding him guilty on count I and not guilty on count II. A motion for a new trial was denied and this appeal followed.

[1] It is first contended that the evidence is not sufficient to support the judgment in that it fails to show any possession in the appellant which was exclusive or immediate, or that the bottles containing the opium solution were under his dominion and control. The appellant relies on such cases as People v. Herbert, 59 Cal.App. 158, 210 P. 276, wherein it has been held that the burden of proving possession of narcotics rests on the prosecution and that such possession must have been immediate and exclusive and one under the dominion and control of the defendant. In this connection the appellant called as a witness in his behalf one Tom Wing Foo. This witness testified that he stayed at this residence during April and May of 1939; that he brought these particular bottles of opium solution to the house at that time; that he was then using opium in that form although he quit using it when he left; that when he left some of these bottles were by the stove in the kitchen and the others were under the table; and that the

appellant did not see him bring the bottles there and did not know that he had them. This witness left Imperial county in May, 1939, and returned in November of that year.

Not only was the appellant in the control and possession of the house where the opium was found, having paid the rent for more than a year, but he himself stated that he was living there alone and that others who had formerly stayed there with him "had all gone away". He was a professional cook and stated that when others were there he did the cooking for them. The opium was found in conspicuous places in the kitchen where he did his work and where it could not have been easily overlooked. It is significant that the bottles containing the opium were free from dust, which condition did not prevail with respect to many other bottles and articles in the same room. The appellant's contradictory statements with respect to what the bottles contained are not without significance. Moreover, on his way to jail the appellant said to one of the officers: "If you charge me with one complaint I will pay $50 fine." The evidence, with the inferences reasonably to be drawn therefrom, is sufficient to support the judgment in the respect here in question.

[2, 3] The only other point raised is that the court failed to properly instruct the jury as to what constitutes possession. The instruction complained of is as follows:

"You are instructed that possession may be either actual or Constructive. Actual Possession is when the article or thing is in the immediate hands or possession of the defendant, and Constructive Possession exists when the defendant has the immediate and exclusive right to control the article. In this case, it is not necessary in order to find the defendant guilty that you be convinced beyond a reasonable doubt and to a moral certainty that the defendant had the morphine and codeine in his hands or on his person. If he had knowledge of its presence and if he had the right to the immediate possession of the same and they were found in the house where he lived and in his room, even though he was in a different part of the house at the time of the arrest, still, if you believe the foregoing facts, beyond a reasonable doubt and to a moral certainty, then the defendant would be in possession.

"Two or more persons may be in the joint possession of articles if each of such persons has the immediate right to the possession and has control of such articles."

It is argued that the first paragraph of this instruction is erroneous in that it fails to instruct the jury that the possession here in question must have been exclusive in the defendant. It is then argued that the second paragraph, with respect to joint possession, had no place in this case and could only have been misleading and confusing to the minds of the jury.

Apparently the second paragraph of the instruction was given in view of the testimony of appellant's witness Tom Wing Foo, to the effect that he had brought the articles in question to the house and left them there. This element was injected into the case by the appellant, by way of a defense. The court further instructed the jury, in that connection, that if they believed that these bottles "were brought into the house at 945 G. Street in Brawley, by Tom Wing Foo, and left there by him, without the knowledge and consent of the defendant, and that the defendant has never handled them or had them in his possession or under his control, then you should find the defendant not guilty on Count No. I the information".

In the first part of the instruction complained of the court told the jury that constructive possession exists when the defendant has the immediate and exclusive right to control the article. While this was not repeated in the later portion of the instruction which related to his knowledge of the presence of the narcotics and his right to the immediate possession thereof, the whole instruction should be taken together, especially in the light of the evidence to which it applied. The evidence disclosed not only knowledge on the part of the appellant, with a right to immediate possession, but that the bottles had recently been used or handled which must have been done by him. The only other person shown by the evidence to have had any right to possession was Tom Wing Foo. He had been gone for five months and had had no immediate possession, and the issues raised by his evidence were covered in other instructions. When the instructions are considered as a whole, it cannot reasonably be said that the jury may or could have been confused or misled with reference to the necessity of an exclusive dominion or control over the arti-

cles on the part of the appellant. While the instructions may not have been perfect in form they were sufficient to inform the jury as to the sort of possession which it was incumbent upon the prosecution to establish. Moreover, a reading of the entire record discloses no miscarriage of justice.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



BUTLER BROS. v. McCOLGAN, Franchise Tax Com'r. *

Civ. 6464.

District Court of Appeal, Third District, California.

May 18, 1940.

As Modified on Denial of Rehearing June 17, 1940.

Hearing Granted July 15, 1940.

1. Taxation ⇐543(7)

Where formula method is adopted by taxing power in assessing corporate franchise tax, the burden of proof is upon the taxpayer, in an action to recover tax paid, to show that such method has been applied unreasonably and arbitrarily. Gen.Laws 1937, Act 8488, § 10.

2. Taxation ⇐20

Jurisdiction to tax is dependent upon jurisdiction of person or transaction sought to be taxed.

3. Constitutional law ⇐230(1), 287
Taxation ⇐37

The imposition of state tax on transactions beyond jurisdiction of state is denial of "due process" and of "equal protection" U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process" and "Equal Protection".

4. Taxation ⇐347

Where property located in two or more states derives a value from its unity of use, allocation of the composite value on a fair and reasonable basis will be sustained.

5. Taxation ⇐376(4)

The fact that a corporation does business in more than one state does not necessarily justify the application of a formula to ascertain corporate franchise tax. Gen. Laws 1937, Act 8488, § 10.

6. Taxation ⇐376(4)

Where a business is "unitary" in character, that is, where its separate parts cannot be fairly considered by themselves, and where the whole business in the several states derives a value from the unity of use, allocation of income, in determining franchise tax, upon a reasonable formula may be sustained.

See Words and Phrases, Permanent Edition, for all other definitions of "Unitary Business".

7. Constitutional law ⇐230(1), 287
Taxation ⇐397

Where it appeared that taxpayer was foreign corporation engaged in wholesale business, that it operated seven distinct wholesale houses, one located in California, that taxpayer maintained a central buying division, that no charges were made against any house for benefit of taxpayer by reason of such centralized purchases, that addition or subtraction of purchases in the volume made by the California house would have no effect on prices obtainable for remaining houses, and that during the year 1935 the California house sustained a loss but that during the same year operations of all houses produced a profit, in fixing franchise tax, the use of a formula for allocation to California of a portion of taxpayer's income from all sources was improper and resulted in a denial of "equal protection" and "due process". Gen.Laws 1937, Act 8488, § 10; U.S.C.A.Const. Amend. 14.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Butler Brothers, a corporation, against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, in the place and stead of Charles G. Johnson, State Treasurer of the State of California, to recover taxes and interest paid under protest. Judgment for defendant, and plaintiff appeals.

Judgment reversed, with directions.

Brobeck, Phleger & Harrison, of San Francisco, for appellant.

Earl Warren, Atty. Gen. (H. H. Linney and Valentine Brookes, Deputy Attys. Gen.,

* Subsequent opinion 111 P.2d 334.

and Frank M. Keesling, of Los Angeles, of counsel), for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to recover the sum of $4,143.10, being the amount of taxes and interest thereon paid to respondent under protest. Judgment was entered in favor of respondent, and plaintiff appealed therefrom.

The cause was submitted upon an agreed statement of facts which may be summarized as follows:

Plaintiff and appellant, Butler Brothers (herein called "the Company"), is an Illinois corporation, having its principal corporate office at Chicago. It is engaged in the wholesale dry goods and general merchandise business, purchasing from manufacturers and others, and selling to retailers only. It operates seven distinct wholesale houses at Chicago, Jersey City, Baltimore, Minneapolis, St. Louis, Dallas and San Francisco. Each of these houses serves a separate trade territory. At each house stocks of goods are maintained, from which sales are made in its territory. Each house handles its own sales, and all solicitation, credit and collection arrangements in connection therewith, and keeps books of account showing the operations of the house. All sales in California were made from the San Francisco house and all receipts credited thereto.

The greater part of the operating expense of the houses is directly and exclusively incurred at the respective houses, including such items as labor, rentals, etc. There are, however, some common expenses such as executive salaries and corporate overhead and the expense of operating a central buying division and a central advertising division. These expenses are apportioned to the respective houses on bases which, it is agreed, are in accord with recognized accounting practice, and the accuracy and propriety of such bases of apportionment are here conceded. The aggregate of such common expenses so charged to the San Francisco house for the year 1935 was $100,091, of which, it is agreed, approximately 75 per cent would have been incurred whether or not the San Francisco house were operated. Except for such common expenses, each house is operated independently of each other house.

Through a central buying agency goods required for resale in the various houses are ordered, but such goods are shipped directly from the manufacturer to the houses, where the cost thereof, with transportation charges thereon, is entered on the books of the house. No charges are made against any house for the benefit of the company, or any other house by reason of such centralized purchases, but the actual cost of operating the central buying division is allocated to the houses as stated in the preceding paragraph. By reason of the volume of purchases so made, more favorable prices are obtained than would be obtainable in respect to purchases for the account of any individual house, but addition or subtraction of purchases in the volume made for the San Francisco house would have no effect on the prices obtainable for the remaining houses.

The accounts of the San Francisco house, computed by deducting from the gross receipts from all sales made therefrom (which includes all sales made and business done in California) the actual cost of merchandise and other direct expenses, and the apportioned share of common expenses previously described, showed for the year 1935 a loss of $82,851. Within the time allowed by law a report showing this loss was made and the minimum tax of $25 was paid for the year 1936. During the year 1935 the operations of all houses of the company produced a profit of $1,149,677. The commissioner subsequently assessed an additional tax of $3,798.43, which, with interest amounting to $344.67, was paid under protest on September 16, 1938. The additional assessment was predicated on the allocation to California of 8.1372 per cent of the company's total income derived from all sources. This percentage was a mathematical average of the percentages which the value of the tangible property, payroll and gross sales attributable to California bore to the corresponding items of all houses of the company. If an allocation is proper, use of the particular percentage here used is not questioned.

The tax in question was levied under the provisions of section 10 of the Bank and Corporation Franchise Tax Act (General Laws, Act 8488, vol. 2, p. 3851.) That section provides: "If the entire business of the bank or corporation is done within this State, the tax shall be ac-

cording to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation. * * *"

It is contended by appellant that the method by which the tax was fixed and computed was unauthorized and unlawful, and that such method had the effect of taxing plaintiff on, and in respect to income derived from sources beyond the jurisdiction of the state. This resulted, it is contended, in a denial of due process of law, and of the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

On the other hand, respondent contends that the tax was levied upon income from business derived from within this state; that such business was unitary in character; and that the state was therefore justified in applying the formula method in arriving at the net income of appellant.

[1] The sole question presented is whether the franchise commissioner should have adopted the separate accounting method in computing the franchise tax, or whether it was proper and legal for him to have used the formula system. If the first method is used, only the minimum tax of $25 would be due. Under the second method, which was actually applied here, the tax amounted to $3,798.43. The first method shows a loss in the California operations of appellant amounting to $82,851. Under the second, respondent showed that appellant enjoyed and received a net income from the business done in California amounting to $95,000. *In respect to net income, the two methods are some $177,851 apart.* Both methods are described in the stipulated facts above. The first is obviously based upon strict and accurate accounting procedure, while the second is the application of a set formula which has been approved in many jurisdictions in those cases where interstate operations are carried on, and where, from the nature of such operations, income cannot be properly allocated by separate accounting methods. Plain instances which justify the application of the formula method would be telegraph, telephone, railroad and express companies. If there is any evidence to sustain a finding that the operations of appellant in California, during the year 1935, contributed to the net income derived from its entire operations in the United States, it would seem as though the method used was a proper one. Such income would be within the purview of the statute quoted above—"The portion of net income derived from business done within this State". Where the formula method is adopted by the taxing power, the burden of proof is upon the taxpayer to show that such method has been applied unreasonably and arbitrarily. Hans Rees' Sons v. State of North Carolina, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879.

Appellant earnestly contends that the evidence is insufficient to justify the imposition of the formula. It points out that there is nothing in the stipulated facts which would justify a finding that it was doing a unitary business, and even if there were such evidence, the method used operated arbitrarily and unreasonably in respect to appellant's business. It is agreed by all parties that the formula of allocation to California of a portion of appellant's income from all sources, is proper, if the facts of the case justify the application of a formula. The question is not whether the formula used is fair and proper, but whether, under the facts here, there should be any allocation at all.

The factual structure of the case is relatively simple. Appellant is engaged in buying merchandise from manufacturers and others, and selling to retailers only. It does no manufacturing. It maintains a central buying division, but goods are shipped directly from the manufacturer to the houses in the several states, where the cost thereof and transportation charges are entered upon the books of the house. Further facts appear in the summary given above.

[2-4] It is fundamental that jurisdiction to tax is dependent upon jurisdiction of the person or transaction sought to be taxed and that for a state to tax property or transactions beyond its jurisdiction is a denial of due process of law and of the equal protection of the laws. Frick v. Pennsylvania, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316. Where, however, property located in two or more states derives a value from its unity of use, allocation of the composite value on a fair and reasonable basis will be sustained. The familiar illustration of this principle is in the assessment of railroad property. State Railroad Tax Cases, 92 U.S. 575, 23 L.Ed. 663. Referring to a unitary business, "That term is simply descriptive, and primarily means that the concern to which it is applied is carrying on one kind of business—a business, the component parts of which are too closely connected and necessary to each other to justify division or separate consideration, as independent units." Maxwell v. Kent-Coffey Mfg. Co., 204 N.C. 365, 168 S.E. 397, 399, 90 A.L.R. 476. It has further been held that unity of *use* is something more than mere unity of *ownership*. Adams Express Co. v. Ohio, 165 U.S. 194-222, 17 S.Ct. 305, 41 L.Ed. 683. The allocation may be made by the application of a formula, which is based upon certain factors. The following excerpt from the stipulated facts describes the formula used and the manner of its application: "In the year 1935, the operations of all houses of the Company produced a profit of $1,149,677. The additional tax assessed by the Franchise Tax Commissioner was predicated on the allocation to California of 8.1372% of the total income of the Company derived from all sources, such percentage having been determined by mathematical average of the percentages which (a) value of real and tangible personal property, (b) wages, salaries, commissions and other compensation of employees, and (c) gross sales, less returns and allowances, attributable to the San Francisco house bore to the corresponding items of all houses of the Company."

[5] The fact that a corporation does business in more than one state does not necessarily justify the application of a formula to ascertain the tax. In Hans Rees' Sons v. State of North Carolina, supra, the court held [283 U.S. 123, 51 S.Ct. 389, 75 L.Ed. 879]: "But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state."

[6] Where, however, a business is unitary in character, that is, where its separate parts cannot be fairly considered by themselves, and where the whole business in the several states derives a value from the unity of use, allocation of income upon a reasonable formula has been sustained. Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165. Aside from the question as to the propriety of applying a formula here, and paramount over all other considerations, is the question whether or not it reasonably appears that a portion of the total net income of appellant was "derived from business done within this State". Sec. 10 of Act 8488—fully quoted above.

The only factor called to our attention by respondent which might point to a unitary business is the central buying power exercised by the headquarters of appellant in Illinois. The state argues that even though the California house lost money during the year 1935, the operations conducted during that year actually brought a profit to the corporation. They contend that the disposal of some $5,000,000 worth of merchandise during the time mentioned, increased the purchasing power of appellant, and thus permitted it to buy for its other houses, through volume purchases, at a price lower than it otherwise would have secured. It appears, however, that the parties have stipulated otherwise. We quote from the agreed facts: "A reduction in the volume of purchases in an amount equal to the purchases made for the San Francisco house would result in no less favorable prices being obtainable in respect of the purchases which would be made for the remaining houses of the Company."

Most of the cases cited by respondent, with one exception, involve corporations

which are engaged in *manufacturing*. In those instances a manufacturing profit was made by the corporation before the merchandise was shipped to another state. This is true of the Underwood case, supra. Here, none of the merchandise was manufactured by appellant. It was engaged solely in buying and selling. There are cases where a corporation engaged in buying and selling has been held subject to the payment of income taxes in one of the states where it has been doing business. In International Elevator Co. v. Thoresen, 58 N.D. 776, 228 N.W. 192, a company which bought and sold grain was held liable for the payment of an income tax in the state of North Dakota. It bought grain in that state and shipped it for resale in other states. The corporation filed a return showing only income derived from sales in North Dakota. It failed to account for sales outside the state, and contended that only transactions within the state should be considered in fixing its income. It showed that it had lost some $85,000 on transactions *within the state*. Its net profit from all its operations in several states amounted to $249,515.11. A tax of $2,937.98, computed by a formula, was upheld. The case was clearly one where a separate accounting system did not disclose the income received from shipment and sale of grain outside the state. The return by the elevator company included only income received from sales at North Dakota elevators. The case of Montgomery Ward & Co. v. Kansas Tax Commission, 151 Kan. 159, 98 P.2d 143, throws little light upon the question. No attempt was there made by the state to base a tax upon the net income of the corporation outside the state of Kansas. The only question was whether or not the corporation was entitled to charge against its Kansas income a proportionate share of certain expenses incurred outside the state. The court held in the affirmative.

Appellant relies strongly upon the case of Standard Oil Co. v. Wisconsin Tax Commission, 197 Wis. 630, 223 N.W. 85, 88. Wisconsin taxes corporations on a basis very similar to our Bank and Corporation Franchise Tax Act and provides for allocation of income in a manner very like section 10. A company engaged in the production, refining and sale of petroleum products but engaged only in selling within Wisconsin was taxed on the basis of a statutory allocation of income from the entire operation. In that case it was shown that accurate accounting of the operations of the various branches existed. The court there held: "In the enactment of the statute relating to the allocation of income of persons doing business within and without the state, the declared legislative purpose is to make a reasonable and equitable distribution of the taxpayer's income to the end that that part of the income justly assessable in the state of Wisconsin may be ascertained. The statute does not enjoin upon the commission the use of that method which will produce the largest amount of taxable income but rather that method which will most justly apportion the income properly taxable in Wisconsin. Here it appears conclusively that it is possible to ascertain the income derived from business transactions in Wisconsin by the application of proper accounting methods. * * * There are some operations which from their very nature produce an income which cannot be properly allocated by separate accounting methods, instances of which are the telegraph, telephone, and express companies. They stand ready to serve whoever may apply for service and the entire operation constitutes a unit of service. *That is not the case with the manufacturing and sales business, particularly so where the accounts are so kept as to be readily separable.*"

We regard the foregoing case as very persuasive authority to the effect that a separate accounting method should be applied in the instant case.

[7] We therefore conclude that the stipulated facts show that the company actually incurred a loss in California; that its California earnings could have been accurately ascertained without the necessity of recourse to any arbitrary formula, and that the use of such formula results in the imposition of a tax on income not earned in California, and therefore not subject to its taxing power.

The facts found do not support the judgment, and it is ordered that the judgment be reversed, with directions to the trial court to enter judgment in favor of appellant.

We concur: PULLEN, P. J.; THOMPSON, J.

39 Cal.App.2d 235

ASSOCIATED BREWERS DISTRIBUTING CO. v. RILEY, State Controller, et al.

Civ. 11290.

District Court of Appeal, First District, Division 1, California.

May 23, 1940.

Hearing Denied July 22, 1940.

1. Taxation ⇐5

The states under no circumstances may constitutionally impose taxes against United States while it is engaged in a governmental function.

2. Intoxicating liquors ⇐90(1)

The enforcement of customs laws and regulations of United States through duly constituted agencies is exercise of a "governmental function", and intoxicating liquors in possession of United States in exercise of such function are not taxable under state Beverage Tax Act on theory that government is "first in possession * * * after completion of act of importation", within statute. St.1933, pp. 626, 628, §§ 1(c, d), 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Function" and "First in Possession After Importation".

3. Constitutional law ⇐48

The court must presume that Legislature, in using the terms "manufacturer" and "first in possession" in statute levying excise tax on intoxicating beverages sold by a manufacturer, and defining a "manufacturer", in case of beverages manufactured outside state, as being first in possession thereof within state after completion of act of importation, intended to lay the tax on a taxable person, not on federal government, since in latter case the statute would be invalid. St.1933, p. 626, § 1(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Manufacturer" and "First in Possession".

4. Statutes ⇐233

Unless special words are used in statute indicating contrary intent, it must be presumed that state statute was not designed to operate against federal government.

5. Intoxicating liquors ⇐90(1)

Where alcoholic liquors manufactured in foreign country and imported into United States and into state were seized and sold to plaintiff at public auction under federal statutes by federal government for failure to pay customs duties, plaintiff, and not the unknown importer who abandoned the liquor, was "first in possession after importation" within beverage tax statute, and plaintiff was liable for the tax; the statute contemplating a physical possession within state by taxable person, not a theoretical or constructive possession based on fiction of law. St.1933, p. 626, § 1(c).

6. Intoxicating liquors ⇐90(1)

Even if importation of intoxicating liquors from foreign country was complete the moment the goods arrived at port of entry instead of after discharge of liquors by federal government on sale thereof for nonpayment of customs duties, purchaser from federal government could not escape responsibility for payment of alcoholic beverage tax, because under either interpretation it was the "first in possession after importation" within taxing statute; the federal government not being subject to the tax. St.1933, pp. 626, 628, §§ 1(c, d), 5.

Appeal from Supreme Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Associated Brewers Distributing Company against Harry B. Riley, State Controller of the State of California, and others, to recover excise beverage taxes levied by the State Board of Equalization on an importation of alcoholic beverages paid by plaintiff under protest. Defendants' demurrer to the complaint on the grounds that it failed to state facts sufficient to constitute a cause of action or to entitle plaintiff to relief sought was overruled. Thereafter judgment on the pleadings was entered on plaintiff's motion, and defendants appeal.

Reversed with directions.

Earl Warren, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for appellants.

Laurence W. Beilenson, of Los Angeles, for respondent.

KNIGHT, Justice.

Plaintiff brought this action against the State of California, its controller and its

treasurer, to recover excise beverage taxes amounting to $1,085.50, levied by the state board of equalization on an importation of alcoholic liquors pursuant to the provisions of the state Beverage Tax Act of 1933 (Stats.1933, p. 625), and paid by plaintiff under protest. Defendants demurred to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action or to entitle plaintiff to the relief sought, and the demurrer was overruled. Thereupon defendants filed an answer, and on plaintiff's motion judgment on the pleadings was entered in plaintiff's favor. From said judgment defendants prosecute this appeal.

The beverage upon which the tax was imposed consisted of 49,341 gallons of beer and ale. It was manufactured in a foreign country, and imported into the United States and into the state of California during the four months immediately preceding February, 1934, by parties unknown to respondent. Thereupon it was abandoned to and seized by the United States government for failure to pay the customs duties thereon, following which the government sold the liquor at public auction, in Los Angeles, in conformity with the requirements of federal statutes. Respondent was the purchaser at the sale, but did not report the purchase to the state board of equalization as required by the provisions of the Beverage Tax Act; and two years or more later said board assessed the excise tax on said liquor, which respondent paid under protest.

The pertinent provisions of the act of 1933 are the following: Sec. 5. "An excise tax is hereby imposed on all beverages [specified in the act, including beer and ale] sold by a manufacturer at the rate of sixty-two cents for every barrel containing not more than thirty-one gallons * * *." Sec. 1. "(c) 'Manufacturer' means every person who, within the State of California, produces, brews, ferments or manufactures a beverage as herein defined, or who, in the case of a beverage produced, brewed, fermented or manufactured outside of the State of California, is the first in possession thereof within the State after completion of the act of importation. (d) 'Sale' means and includes any sale, exchange, barter or other act whereby the title to a beverage is transferred for a consideration, from a manufacturer, 'on sale' licensee or 'off sale' licensee as herein defined, to any other person and the words 'sell' or 'sold' mean and include the act of making any such 'sale.'" Sec. 5. "* * * It shall be presumed, for the purposes of this act, that all beverage produced, brewed, fermented or manufactured outside of this State and imported into this State by any manufacturer or delivered to such manufacturer here, has been sold by such manufacturer unless he shall establish to the satisfaction of the board that such beverage is still in the ownership and possession of such manufacturer, or, prior to the termination of such ownership or possession, has been lost through evaporation, leakage, spillage or destruction by the elements. * * *"

[1-3] The present controversy arises over the question of whether under the facts stated respondent was "the first in possession * * * within the State after completion of the act of importation", within the meaning of said act. According to the allegations of the complaint the action was brought upon the theory that because the United States government seized and sold the liquor for unpaid customs duties, it was the first in possession; and evidently such was the position taken by respondent before the trial court; but on this appeal its major contention is that the unknown importer was first in possession. With respect to respondent's primary contention, it is well settled that under no circumstances may a state constitutionally impose taxes against the United States while it is engaged in a governmental function; and beyond question the enforcement of the customs laws and regulations through duly constituted agencies is the exercise of a purely governmental function. Those fundamental doctrines have long since been firmly established by the Supreme Court of the United States, and it must be presumed that the legislature had them in mind when it framed the law imposing an excise tax on imported liquors, and that by employing the terms "manufacturer" and "first in possession" it intended to lay the tax on a taxable person. Before it could be held that it was the legislative intent to include the federal government within those terms, it would be necessary to assume that the legislature enacted a tax measure which obviously, to a large extent, would be not only fruitless in its results and unenforceable in its op-

eration, but also violative of the constitutional inhibitions; and of course we have no right to indulge in such assumption.

[4] Respondent points out that tax laws must be strictly construed against the taxing power, and it is argued therefore that since the clause of the act under consideration contains no exceptions, it must be held to include the federal government, regardless of the inability of the state to collect the tax imposed thereby from the government. The established rule is, however, that a sovereign power, in this case the federal government, shall not be deemed to be included within the general language of a statute—that unless special words are used indicating a contrary intent, it must be presumed that the statute was not designed to operate against the government. Dollar Savings Bank v. United States, 19 Wall. 227, 86 U.S. 227, 239, 22 L.Ed. 80.

[5] Respondent's alternative contention that the unknown importer was first in possession is based upon the theory that although admittedly the liquor was in the lawful physical possession of the government from the moment it arrived at the port of entry of the United States until it was actually delivered to respondent following the government sale, the legal title thereto remained in the unknown importer up to the time of its abandonment to the government for nonliquidation of the customs duties, and that, therefore, by virtue of such ownership it must be deemed that the unknown importer "had possession" of the liquor within the meaning of the act up to the time of such abandonment. We are unable to sustain this theory. In its final analysis it amounts to this: That inasmuch as the unknown importer, as the owner of a property right in the liquor up to the time of the abandonment, would have been *entitled to the possession* thereof at any time up to the abandonment *if* he had liquidated the customs duties, he must be deemed to be the "first *in* possession" within the state within the meaning of the clause of the act under consideration. There is a vast difference, however, between being first entitled to possession, and being "first *in* possession"; and therefore, since in framing the law the legislature saw fit to employ the term "first *in* possession", we are in full accord with appellants' view that it thereby contemplated a physical possession within the state by a taxable person, and not a theoretical or constructive possession based on a fiction of law. As suggested by appellants, if the lawmakers had intended that the tax on imported liquors should in all cases be assessed against the importer, they could have easily so worded the act; and it is plain to be seen that one of the main reasons it was worded so as to fasten liability for its payment on the "first in possession * * * after completion of the act of importation", rather than upon the importer, was because not until imported goods are released from the government's possession is the state in a position to impose the excise tax or to exercise the power of seizure and sale necessary to enforce its payment.

In support of its alternative position respondent relies upon the early case of Conard v. Pacific Insurance Co., 6 Pet. 262, 31 U.S. 262, 281, 8 L.Ed. 392, wherein the government sought to compel a transferee of certain imported goods then in the possession of the government awaiting payment of customs duties, to pay not only the duties on the particular goods transferred, but also certain sums of money claimed by the government to be due from the transferor on the importation of other goods. In deciding against the government's demand, and by way of clarification of an earlier decision, the court went on to say in effect that if the importer "has the general right and property in the goods, that right draws after it a constructive possession"; and that the possession taken by the government upon the arrival of the goods at the port of entry for the purpose of maintaining its lien for unliquidated customs duties, may be properly deemed not so much an exclusive possession as a concurrent or mixed possession, for the joint benefit of the importer and of the United States, which does not affect the importer's right to immediate possession upon the discharge of the lien. In other words, the court held merely that possession by the government of imported goods while awaiting liquidation of customs duties does not destroy the owner's property right in the imported goods; and that upon such liquidation he *is entitled* to possession. Here, however, as already pointed out, the language of the statute is: "first in possession * * * within the State after completion of the act of importation", which, when considered in the light of the other provisions of the act and its manifest intent

and purpose, clearly implies a physical possession after release by the government, and excludes any theory of a possession based upon a fiction of law while the goods are in actual possession of the government.

[6] In a supplementary brief respondent cites several federal decisions interpreting the word "importation" as used in the United States customs laws to mean that the act of importation is complete the moment the foreign goods arrive at the port of entry in the United States. But even though such interpretation were to be accepted here, rather than the one contended for by appellants, namely, that under our statutes the act of importation is not complete until the discharge of the goods by the federal government, respondent could not escape the responsibility for the payment of the tax because under either interpretation it was "first in possession * * * [other than the federal government, which is not taxable] after completion of the act of importation".

For the reasons stated, we conclude that the complaint in its present form fails to state a cause of action; and since no suggestion is made that additional facts are available which if pleaded would alter the situation, it is ordered that the judgment be and the same is hereby reversed with directions to sustain appellants' demurrer to the complaint without leave to amend, and thereupon to enter judgment in favor of appellants.

We concur: PETERS, P. J.; WARD, J.



39 Cal.App.2d 201

DUEHREN et al. v. STEWART.

Civ. 2351.

District Court of Appeal, Fourth District, California.

May 21, 1940.

1. Death ⇐58(1), 104(2)

The statutory presumption that decedent was in exercise of due care for his own safety arose, in absence of evidence on such subject, and an instruction by trial court was proper manner of calling such presumption to attention of jury. Code Civ.Proc. § 1963, subd. 4.

2. Evidence ⇐53, 89

Disputable presumptions are "evidence" in a case, and such presumptions may be controverted by other evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

3. Trial ⇐139(1)

It is a question for jury to determine whether a disputable presumption has been overcome by evidence offered in contradiction thereof.

4. Automobiles ⇐242(8)

In action for death of pedestrian struck at intersection by a motorist, plaintiffs were entitled to benefit of statutory presumption that pedestrian was in exercise of due care for his own safety and protection, where plaintiffs' own evidence was reconcilable with it, and such presumption remained as evidence until overcome by evidence offered in contradiction thereof. Code Civ.Proc. § 1963, subd. 4.

5. Evidence ⇐20(1)

It is common knowledge that the American experience table of mortality is used in fixing insurance rates and premiums and the probable average future life in years of persons.

6. Appeal and error ⇐1064(1)

In action for death of pedestrian struck at intersection by a motorist, an instruction with reference to life expectancy of pedestrian, which stated that life expectancy was established by tables of probable expectancy, "what they call the mortality tables of insurance cases", although unhappily worded, could not be construed as a statement to jury that motorist was insured against liability, and hence error, if any was harmless.

7. Trial ⇐186

In action for death of pedestrian struck at intersection by a motorist, trial court's comment on certain phases of evidence with reference to a conflict about the claimed odor of alcohol on pedestrian's breath did not constitute error, where court told jury that it was only commenting thereon and that jury was entitled to disregard its views.

8. Trial ⇐232(3)

Trial court commits error in instructing jury with reference to bringing in a verdict

only when by the instruction the jury is coerced to an agreement.

9. Trial ⇐232(3)

An instruction that "when you get all through considering this, you will bring in a verdict one way or the other", did not constitute error on ground that it "coerced" jury into an agreement, although no instruction as to course to be pursued by jury in event of disagreement was given, where such instruction was not requested by either party.

See Words and Phrases, Permanent Edition, for all other definitions of "Coerced".

10. Trial ⇐244(4)

In action for death of pedestrian struck at intersection by a motorist, an instruction, that a person lawfully crossing a highway in a crosswalk was entitled to rely on presumption that motorist would obey the law, was not erroneous on ground that it in effect repeated trial court's former instructions and thereby overaccentuated the conditions under which a pedestrian could not be regarded as negligent.

11. Trial ⇐260(8)

Although defendant's requested instruction that there was no such thing in California as degrees of negligence or comparative negligence was a correct statement of law as applied to case, refusal to give requested instruction was not error, where trial court's instruction on question of contributory negligence substantially covered principles embodied in requested instruction.

12. Trial ⇐252(8)

Refusal of defendant's requested instruction that the law presumes that all persons obey the law and exercise ordinary care, and that the presumption should be considered as evidence on behalf of defendant as well as for plaintiffs, was not error, in view of evidence offered by defendant which in and of itself established negligence on part of defendant.

13. Trial ⇐260(8)

In action for death of pedestrian struck at intersection by the motorist, refusal to instruct that use of the public highway was a privilege to be equally enjoyed by all citizens, and that pedestrian had no greater right to use highway than motorist was not error, where trial court instructed jury relative to rights of a pedestrian in a marked crosswalk and of a vehicle being driven upon the highway.

14. Trial ⇐260(8)

Refusal to give defendant's requested instruction on contributory negligence was not error, where a proper instruction was given on such subject.

15. Automobiles ⇐246(50)

In action for death of pedestrian struck at intersection by a motorist, trial court properly refused to read to jury provision of Vehicle Code in reference to brakes and stopping distances as requested by motorist, where there was no attempt to dispute motorist's testimony that his brakes were in satisfactory condition, and motorist by his own evidence admitted that he did not see pedestrian until it was too late to avoid striking him. Vehicle Code, § 670, St.1935, p. 222.

16. Automobiles ⇐245(72)

Evidence presented question for jury as to whether pedestrian, who was struck by a motorist at an intersection, was guilty of contributory negligence.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Georgie Duehren and Joseph Duehren and William Duehren, by their guardian ad litem, Georgie Duehren, against Harry Day Stewart for death of E. T. Duehren as result of being struck by defendant's automobile. From a judgment for plaintiffs, the defendant appeals.

Affirmed.

Joseph A. Spray, of Los Angeles, and Hervey & Holt, of San Diego (W. H. Abrams, of Los Angeles, of counsel), for appellant.

Rorick & Cottingham, of Oceanside, and Wright, Monroe, Harden & Thomas, of San Diego, for respondents.

GRIFFIN, Justice.

This appeal was taken from a judgment rendered in favor of the plaintiffs for damages because of the death of E. T. Duehren, occasioned by defendant's claimed negligence. Georgie Duehren is the widow of E. T. Duehren, deceased, and Joseph and William Duehren are his two minor sons, aged 19 and 17 years respectively. E. T. Duehren was killed as the result of having been struck by an automobile operated by the appellant. At the time, Mr. Duehren was crossing Hill street in the city of Oceanside, at the

intersection of Sixth street. He was walking easterly in a marked pedestrian crosswalk running east and west on the south side of the intersection. The accident occurred at about 8 o'clock p.m. on August 18, 1939. Hill street and Sixth street are public streets in the city of Oceanside. Both streets are 50 feet in width. Hill street is also known as Highway No. 101. These streets cross at right angles. Hill street runs north and south. Sixth street runs east and west. On the southerly side of the intersection of Sixth and Hill streets the marked pedestrian zone is 7 feet in width. There was one street light attached to a pole and extending slightly into the southeast corner of the intersection. There are two electric signs on opposite corners of this intersection. The deceased was struck by the left front fender of appellant's car, just west of the center line of the highway. The appellant's car was at all times on the westerly side of the center line of Hill street. After the impact the car was brought to a stop approximately within its length. There was an automobile being driven in a southerly direction at that time and place and between the car of the appellant and the westerly curb. The lights of both cars were burning. That other car was owned and operated by R. T. Watt, and riding with him was his wife, Edwina Watt. Mrs. Watt was called to testify on behalf of respondents. Mr. Watt was called by the appellant.

Mrs. Watt testified that they were driving in a southerly direction at a speed of between 25 and 30 miles per hour on the right-hand side of Hill street; that she first observed Mr. Duehren crossing in the southerly crosswalk as they were about to enter the intersection from the north. She testified that the speed of the Watt car was not varied at all; that it proceeded at the same rate and that Mr. Duehren had ample time to and did cross safely out of its line of travel; that as they entered the intersection the car driven by appellant passed to the left of their car from behind; that it proceeded through the intersection and struck Mr. Duehren at the time he had reached within a foot of the center of the highway. She further testified that she did not see Mr. Duehren at all until he was at a point directly in front of the center of their car; that at that time he was already engaged in crossing the street and the Watt car was then north of the northern crosswalk. In other words, when first seen by the witness, the deceased was engaged in crossing the street and was already 12 or 15 feet out into the intersection. She observed him, therefore, only during a portion of his walk crossing the street. On cross-examination Mrs. Watt stated that during the period when she observed him, he walked straight ahead and didn't turn his head or look in the direction from which they were approaching.

A motorcycle officer made certain measurements at the scene of the accident and testified that he noticed 57 feet of tire marks on the street extending northerly from the rear tires of appellant's car. It was stipulated that the basic speed at that intersection was 25 miles per hour.

The only other eye-witness to the accident (Mr. Choate), called in behalf of respondent, testified that he saw Mr. Duehren just at the instant before he was struck, and that he was walking "pretty fast".

Mr. Watt, testifying on behalf of appellant, stated that he was driving about 20 to 25 miles per hour; that when he was in the intersection a car passed him to the left going south at approximately 30 to 35 miles per hour; that he saw deceased as he stepped "off the curb" to cross the street; that during all the time he was crossing the street he (Duehren) was looking straight ahead and toward the east; that just after appellant's car passed him he heard the squeaking of brakes; that appellant's car was sufficiently ahead of him to prevent him from seeing the contact between the car and the deceased.

Appellant testified that he was traveling between 25 and 30 miles per hour and had no recollection of passing the Watt car at all; that the first time he saw Mr. Duehren was when "he was seemingly right in front of me; I judge about 25 feet"; that he put on his brakes, but was unable to stop until about a car's length after striking Mr. Duehren. The deceased was struck by the left front fender. Appellant testified that he had no opportunity to observe in which direction Mr. Duehren was looking; that the brakes on his car were in satisfactory shape and had recently been checked up;

that the lights on his car were good, average lights. Deceased was dressed in a light khaki shirt, dark trousers, no coat, and wore a grey felt hat.

After submission of the case, the jury returned a verdict in favor of respondents for $18,000. There is no contention made that the judgment is excessive.

Appellant complains that it was error for the trial court to give certain instructions and to refuse to give certain requested instructions and that the trial court committed error in refusing to hold that the actions of the deceased at the time of the accident amounted to contributory negligence as a matter of law.

The record indicates that the trial judge refused to give any of the instructions asked by both plaintiffs and defendant, but instead resorted to instructions of his own. The following are the instructions given by the court which appellant claims caused a miscarriage of justice and constituted reversible error:

(a) "In passing upon the conduct of the deceased, the law indulges in a presumption for his benefit that he exercised due care for his own safety and protection. This presumption applies in a case of this nature to the actions and conduct of a person who has met his death and constitutes evidence in the case, and is to be weighed by you as against any evidence offered in contradiction thereof. Based upon this presumption, it is presumed that the deceased used proper care; that he made reasonable look-out for his own safety and protection, and that at the time he proceeded across the intersection conditions were such that it was safe to do so."

(b) "Considering further the question of the conduct of the deceased, it is the law that a person about to cross a highway is required, in the exercise of reasonable care, to look and ascertain the approach of traffic which might cause his injury or damage. With reference to the conduct of a deceased person, it is presumed that he made such observation, which presumption remains as evidence until overcome by evidence to the contrary. It is not required, however, that the pedestrian so crossing the highway at an intersection shall keep a constant watch for approaching traffic or that he shall keep a constant lookout in one particular direction, but it is required only that he keep such lookout as is reasonable, or such lookout as an ordinary, reasonable person would keep under the same or similar circumstances."

These instructions are not challenged as being an improper statement of the law but appellant argues that under the evidence as produced in the instant case, "the presumption based on section 1963, subdivision 4 of the Code of Civil Procedure has no place in the record when the evidence clearly demonstrates the action of the injured or deceased party", citing Lindley v. So. Pac. Co., 18 Cal.App. 2d 550, 556, 64 P.2d 490; Varner v. Skov, 20 Cal.App.2d 232, 67 P.2d 123; Rogers v. Interstate Transit Co., 212 Cal. 36, 38, 297 P. 884; Young v. Pac. Elec. Ry. Co., 208 Cal. 568, 283 P. 61; and Paulsen v. McDuffie, 4 Cal.2d 111, 119, 47 P.2d 709.

[1] It is contended that there is no conflict in the evidence as to the actions of the deceased from the time he was first observed on the sidewalk until he was struck; that he stepped down into the street and walked across the same at a moderate gait and at no time turned his head to look in the direction from which oncoming traffic might endanger his safety; that the appellate courts have ruled "that to look and fail to see" what is perfectly obvious and apparent is negligence; that Mr. Watt testified that he saw the deceased on the sidewalk before he stepped into the street; that he saw him step into the street and that he was looking straight ahead at all times and walking at a moderate gait; that where all the facts and circumstances were proven, the court was not authorized to cast a presumption into the scales in favor of the plaintiff, citing Ryan v. Union Pac. R. Co., 46 Utah 530, 151 P. 71, 74; Larrabee v. Western Pac. Ry. Co., 173 Cal. 743, 161 P. 750, 751; and Ross v. San Francisco-Oakland Terminal Rys. Co., 47 Cal.App. 753, 191 P. 703. Appellant does not argue that the evidence did not establish appellant's negligence. The law gave to the deceased the right of way in a marked crosswalk. The deceased undertook to cross in a marked crosswalk. The appellant not only drove at an excessive rate of speed, but passed another car at the intersection under circumstances where he could not have seen whether there were pedestrians in the crosswalk or not. That he was not keeping an accurate or sufficient lookout is

conclusively demonstrated by his own statement. No witness testifying on behalf of the respondents saw Mr. Duehren at all as he approached Hill street, nor did any of respondents' witnesses observe him until he was first seen by Mrs. Watt some 10 or 15 feet out into the crosswalk. The presumption, therefore, arose in the absence of evidence on the subject. There is therefore nothing to call that presumption to the attention of the jury unless the court did instruct them relative to its existence. The leading cases in this state upon the question of presumptions and their evidentiary force are Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; and Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059. In the Mar Shee case it is said [190 Cal. 1, 210 P. 273]: "From the foregoing we deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

To the same effect are the cases of Smellie v. Southern Pacific Co., supra, and Engstrom v. Auburn Automobile Sales Corp., supra. See, also, Lam Ong v. Pacific Motor Trucking Corp., 16 Cal.App. 2d 274, 60 P.2d 480.

[2-4] It has been repeatedly held that disputable presumptions are evidence in a case (Pabst v. Shearer, 172 Cal. 239, 156 P. 466), and such presumptions may be controverted by other evidence. Reynolds v. Dryer, 112 Cal.App. 712, 297 P. 563. It has also been repeatedly held that it is a question for the jury to determine whether the presumption has been overcome by evidence offered in contradiction thereof. People v. Milner, 122 Cal. 171, 54 P. 833; Pabst v. Shearer, supra. Respondents produced no evidence to determine what observations Mr. Duehren made just before he attempted to cross the street. Appellant offered no evidence as to whether the deceased looked *prior to the time he stepped off the curb.* Respondents were therefore entitled to the benefit of the presumption above mentioned, as their own evidence was reconcilable with it, and such presumption remained as evidence in the case until dispelled or overcome by evidence offered in contradiction thereof.

[5, 6] The next instruction complained of is one wherein the court, after explaining the reasonable expectancy of Mr. Duehren's life as being 17.4 years, said: "Those (years) are established by the tables of probable expectancy, what they call the mortality tables of *insurance cases,* and, while we do not know how long anyone will live, those are taken as evidence in a case such as this." (Italics ours.) It is argued that by the use of the words *of insurance cases* the attention of the jury was directly invited to the fact that the instant case was an insurance case and that insurance was involved, citing Withrow v. Becker, 6 Cal. App.2d 723, 729, 45 P.2d 235. The purpose of the American experience table of mortality is no doubt a matter of common knowledge and is used in fixing insurance rates and premiums and the probable average future life in years of persons. The instruction, although unhappily worded, could not be construed as a statement to the jury that the defendant was insured against liability and that he would not individually have to pay the judgment but that it would be paid by an insurance company. No such conclusion is justified. It was apparently the thought of the court to inform the jury that such tables were employed by life insurance companies in determining average future life expectancy. The claimed error, if any, was harmless.

[7] The trial court proceeded to comment on certain phases of the evidence in reference to a conflict about the claimed odor of alcohol on Mr. Duehren's breath. The court properly told the jury that he was only commenting thereon and that it was "entitled to disregard my views on that if you want to * * *." Therefore we perceive no error in this respect.

[8, 9] The next instruction contained these words: "When you get all through considering this, you will bring in a verdict one way or the other." Appellant argues that it was equivalent to telling the jury that it must bring in a verdict for either the plaintiffs or the defendant, and that it took from the jury the right to disagree, citing Cook v. Los Angeles

Ry. Corp., 13 Cal.2d 591, 91 P.2d 118. This argument is more novel than sound. The jury deliberated about 20 minutes. The court commits error only when by instruction or conduct the jury is coerced into an agreement. 64 C.J., p. 1046 et seq.; 64 C.J., p. 590. No such criticism can be made of the court's instruction. It might be that if a proper instruction as to the course to be pursued by the jury in case they disagreed had been requested, it would have been given, but no such request was made by either party.

[10] The court then instructed the jury, in another instruction, to the effect that "A person lawfully crossing a highway in a cross-walk * * *", is entitled to rely upon certain presumptions, to-wit, that the driver of an automobile "will obey the law", etc. Appellant argues that the court in effect repeated its former instructions and thereby over-accentuated the conditions under which a pedestrian cannot be regarded as negligent. We see little merit to this argument.

[11] Appellant insists that he was entitled to have instruction No. 9 given to the jury. It emphasized the fact that there was no such thing in this state as degrees of negligence or comparative negligence. While this is a correct statement of the law as applied to this case, the court properly instructed the jury on the question of contributory negligence. That instruction substantially covers the principles embodied in the requested instruction. It was not error to refuse to amplify the given instruction.

[12] The court refused appellant's instruction to the effect that the law presumes that all persons obey the law and exercise ordinary care. Appellant argues that the presumption should be considered as evidence on behalf of the appellant as well as for the respondents. In view of the evidence offered by appellant which in and of itself establishes negligence on the part of appellant, which fact is not argued on this appeal, and the interpretation given the cases cited by respondents bearing on the subject, we see no error in refusing the proffered instruction.

[13] Appellant offered the following: "You are instructed that the use of a public highway is a privilege to be equally enjoyed by all citizens and the deceased E. T. Duehren had no greater right or privilege to use the highway than the defendant." The court instructed the jury relative to the rights of a pedestrian in a marked crosswalk and of a vehicle being driven upon the highway. Failure to give this instruction was not error. Broun v. Blair, 26 Cal.App.2d 613, 80 P.2d 95.

[14] The next complaint is directed to the failure to give an instruction offered by appellant on the defense of contributory negligence. A proper instruction was given on this subject and we see no need for repetition.

[15] Appellant complains at length of a failure to read to the jury section 670 of the Vehicle Code, St.1935, p. 222, in reference to brakes and stopping distances. Appellant contends that he wished to show thereby that he could have and did stop his car within the distance required by law. The sufficiency of the brakes on appellant's car was not in question. He testified that his brakes were in satisfactory condition. There was no attempt to dispute his statement in this regard. By his own evidence he admitted that he did not see the deceased until it was too late to avoid striking him. Appellant offered no evidence to show the exact distance within which his automobile would stop at any given speed. Section 670 of the Vehicle Code provides that unless a car can be stopped within the maximum distances set forth in the code its braking equipment must be held to be insufficient, and it is a misdemeanor to operate it on the highways. Under the evidence the trial court was justified in refusing the proffered instruction.

[16] Lastly, it is argued that it was error for the trial court to refuse to hold that the actions of the deceased at the time of the accident amounted to contributory negligence as a matter of law, citing 2 Cal.Jur. Ten Year Supp. p. 329, and cases cited. We believe that under the evidence the question was a matter of fact to be determined by the jury. Clohan v. Kelso, 42 Cal.App. 67, 183 P. 349; Potter v. Driver, 97 Cal.App. 311, 275 P. 526; Clark v. Bowers, 116 Cal.App. 88, 2 P.2d 486.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

O'HARA et ux. v. LOS ANGELES COUNTY FLOOD CONTROL DIST. *

Civ. 12535.

District Court of Appeal, Second District, Division 2, California.

May 20, 1940.

Rehearing Denied June 12, 1940.

Hearing Granted July 18, 1940.

1. Levees and flood control ⇐2

The act of the state in taking jurisdiction over the matter of flood control constituted a valid exercise of police power.

2. Levees and flood control ⇐10

A flood control district is not liable for consequential damages caused by the proper exercise of its police power.

3. Levees and flood control ⇐36

Where complaint of landowners, seeking to recover for damages allegedly suffered when their land was overflowed, disclosed that acts of defendant flood control district were performed for purpose of flood control, that no property of landowners was taken, that the district properly exercised its police power, and that damages suffered were consequential only, and did not disclose that district did any act in negligent or improper manner, court properly sustained demurrer to the complaint.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Jamie O'Hara and wife against the Los Angeles County Flood Control District to recover for damages alleged to have been suffered when their property was overflowed by water. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Joseph K. Coady, of Los Angeles, for appellants.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and Arthur Loveland, Deputy Co. Counsel, all of Los Angeles, for respondent.

WOOD, Justice.

By this action plaintiffs seek to recover for damages alleged to have been suffered when their property was overflowed by water from the Los Angeles river. A demurrer to the complaint was sustained and, plaintiffs declining to amend, judgment was entered in favor of defendant. From this judgment plaintiffs have appealed.

From the allegations of the complaint it appears that plaintiffs are the owners of real property "in close proximity to the Los Angeles river". During the greater part of the year the Los Angeles river has a normal flow of slow moving water which during the rainy season is greatly augmented. In its natural state the river consists of a narrow channel that carries the normal flow. Before the erection of certain works of which complaint is made the bed of the river "consisted of a narrow channel that carried the normal flow of the river, and a border overflow area extended along both sides of the aforementioned channel". During the rainy season the narrow channel was incapable of carrying the augmented volume, which would overflow into the border overflow area. Prior to the construction of the works of which complaint is made defendant installed permeable dikes of piling and wire mesh along the edge of the narrow channel, which installation allowed the augmented flow of water usual in the rainy season to flow to the border overflow area, thus reducing the velocity of the augmented flow of water. Prior to 1938 defendant built certain constructions in the bed and along the banks of the river in the vicinity of plaintiffs' property, intended to change, and which did change the natural flow of the river. Defendant removed the permeable dikes and wire mesh and built and maintained a new channel for the river in such manner as to make its water flow at a high velocity. The constructions of which complaint is made were authorized by defendant "for a public use and purpose, to-wit flood control". On or about March 2, 1938, a storm occurred, and the water burst through the banks of the river and carried debris upon the property of plaintiffs, causing them heavy damage.

In a second cause of action set forth in the complaint plaintiffs re-allege most of the matters set forth in the first cause of action and further allege that prior to the storm of March 2, 1938, defendant had built a levee and concrete banks which obstructed the natural flow of water of the river and caused it to overflow and injure plaintiffs' property. Plaintiffs again allege

* Subsequent opinion 119 P.2d 23.

that the acts of defendant were performed for a public use and purpose.

[1] Plaintiffs assert that the facts set forth in their complaint constitute the taking and damaging of plaintiffs' property for a public use without first making compensation. It will be noted that the complaint contains no allegation that any of the property of plaintiffs was "taken". The nearest approach to such an allegation is found in the statement that plaintiffs' property was in close proximity to the river. On the contrary, it appears affirmatively from the complaint that plaintiffs' property was damaged as a consequence of the proper exercise of the police power of the Los Angeles County Flood Control District. In each cause of action plaintiffs set forth that the acts of defendant were performed for the purpose of "flood control". Nowhere does it appear in the complaint that the defendant did any act in a negligent or improper manner. No claim is made that the "new channel" was defectively made or that any bank or levee was improperly constructed. It cannot be doubted that the act of the state in taking jurisdiction over the matter of flood control constituted a valid exercise of the police power. Western Assur. Co. v. Drainage Dist., 72 Cal.App. 68, 73, 237 P. 59. From the complaint it appears that defendant district is vested with full power and duty "to do all acts and things necessary or useful for the control of flood and storm water of said district". Plaintiffs do not allege that the structures built by defendant did not constitute a reasonable improvement for the benefit and protection of the flood control district.

[2, 3] It is thoroughly established in California, as indeed in other jurisdictions, that a district such as defendant is not liable for consequential damages caused by the proper exercise of its police power. Since it appears from the complaint that defendant properly exercised its police power, that no property of plaintiffs was taken, and that the damages suffered were consequential only, it must be held that the court properly sustained the demurrer. Green v. Swift, 47 Cal. 536; Lamb v. Reclamation District, 73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775; Gray v. Reclamation District, 174 Cal. 622, 163 P. 1024; San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200; Cubbins v. Mississippi River Comm., 241 U.S. 351, 36 S.Ct. 671, 60 L.Ed. 1041.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.



ARCHER et al. v. CITY OF LOS ANGELES et al.*
ALLISON v. SAME.

Civ. 11894, 11895.

District Court of Appeal, Second District, Division 1, California.

May 22, 1940.

Hearing Granted July 18, 1940.

1. Appeal and error ⇐1097(1)

Opinion of District Court of Appeal determining that complaint in action to recover damages from overflow of storm waters due to construction of series of drainage systems was good as against general demurrer was not the "law of the case" on subsequent appeal in same action from judgment of nonsuit.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Waters and water courses ⇐171(1)

An improvement for purposes of drainage and protection of upper riparian lands does not give lower riparian owner a cause of action because such improvement increases volume of water in stream and thereby increases burden of lower riparian owner to protect land, irrespective of whether increased volume exceeds capacity of the channel of the stream.

3. Waters and water courses ⇐171(2)

A city accelerating natural drainage of surface waters into stream by the construction of drainage systems was not liable for damages to realty of lower riparian owners caused by overflow of storm waters at outlet of stream.

4. Waters and water courses ⇐171(2)

That flood waters during periodic storms spread over wider area in some parts of

* Subsequent opinion 119 P.2d 1.

channel of stream than in others gave rise to no cause of action by landowners affected thereby, against city which accelerated natural flow of surface waters into stream by construction of drainage systems.

5. Waters and water courses ⇐171(3)

A city allegedly permitting third parties to construct in a stream, bridges, pipe lines, pilings and an oil derrick, was not liable for flood damages caused by such obstructions to landowners affected thereby, since obstructions were not "hazardous per se".

See Words and Phrases, Permanent Edition, for all other definitions of "Hazardous Per Se".

6. Appeal and error ⇐927(3), 989

All presumptions are in favor of the plaintiffs on an appeal from a judgment of nonsuit, and fact that evidence is conflicting must be disregarded.

7. Municipal corporations ⇐845(5)

In action against city and others to recover damages resulting from overflow of storm waters allegedly caused by construction of a series of drainage systems by defendants, wherein question of liability as a matter of law by stipulation of counsel was submitted for trial court's consideration, trial court did not commit error in granting motion for nonsuit on ground that there was no liability on part of defendants.

8. Trial ⇐165

Rules applicable to motions for nonsuits do not require courts to put themselves in incongruous positions to hold case in court, and courts will not give a strained construction to language or conduct or distort orderly laws of sequences to force an unnatural result.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Agatha Archer and others against the City of Los Angeles, etc., and others, and by James L. Allison against the City of Los Angeles, etc., and others to recover damages resulting from overflow of storm waters. From adverse judgments, plaintiffs appeal.

Affirmed.

Dempster & Dempster, J. H. Creighton, and Jerrell Babb, all of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick von Schrader, and Leon T. David, Asst. City Attys., and Howard E. Crandall, Deputy City Atty., all of Los Angeles, for respondent City of Los Angeles.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, all of Los Angeles, for respondent County of Los Angeles.

Hibbard & Kleindienst, of Los Angeles, amici curiæ in support of appellants.

DORAN, Justice.

This is an action for damages resulting from the overflow of storm waters upon the plaintiffs' property located in Venice, California, a suburb or part of the city of Los Angeles, due to the construction of a series of drainage systems built and maintained by the defendants.

The action involves the history of the entire drainage area of what is known as La Ballona creek, an area in the westerly part of Los Angeles county approximately 12 miles square, containing 134 square miles, bounded on the north by the Hollywood hills, on the south by the Baldwin hills, on the east by Vermont avenue, in the city of Los Angeles, and on the west by Sepulveda canyon and the Pacific Ocean. Within the area above mentioned is included the towns of Culver City, Beverly Hills, Palms, a portion of the defendant city of Los Angeles and a portion of the defendant county of Los Angeles. The defendant Los Angeles County Flood Control District includes the entire described area.

A report of the board of engineers of the flood control, to the board of supervisors of Los Angeles county, on July 27, 1915, and in evidence as plaintiffs' exhibit No. 55, contains the following description of the area in question:

"* * * The drainage of this basin is vague and ill-defined, the valley of Ballona Creek itself being the only clearly marked drainage system in it. It is fed from the canyons of the Santa Monica and Cahuenga Mountains and from the run-off of the City of Los Angeles. The run-off from the canyons is torrential in character, carrying a considerable amount of detritus with it and has built up the debris cones or bench land of Hollywood and the region westerly thereof.

"After leaving the canyons, these washes have no refined channels, but wander at will except as controlled by street improvements or other obstructions, later

spreading over the flat area south of Sherman and Colegrove and finally finding their way into the Cienegas at the head of Ballona Creek, east of Ivy Station. The run-off from the four canyons spreading over the flat lands about Sawtelle, finally finds its way into the lower part of Ballona Creek, south of Palms. The run-off from the canyons west of Sepulveda Canyon passes southward through Santa Monica directly into the ocean, and is, therefore, not a part of the Ballona Creek drainage.

"Centinela Creek, which has a drainage area of 7606 acres of 11.9 square miles, empties into Ballona Lagoon from the east near the mouth of Ballona Creek.

"While the Santa Monica Mountains are chiefly sedimentary in origin, consisting of sandstones, shales and conglomerates, the hills back of Hollywood are largely of disintegrated granite. They are, therefore, more absorbent than the higher mountains elsewhere in the county. For this reason, and because of their lower elevation, the gravel cones at their base have a less extent than elsewhere and are of finer material.

"Because of the high percentage of shale in the mountains, the uplands formed by the material washed therefrom in the westerly part of the basin contain a large proportion of clay. It is, however, to be noted that the southern slope of the mountains is longer than the northern, and facing the ocean has a greater precipitation than the northern slope of the mountains, toward the San Fernando Valley. The soil close to the foot of the hills while loose and porous with much granite sand, yet has a large percentage of clay from the disintegrated shales of the mountains and grades southward to a dense black soil of adobe.

"The soil of the valley of Ballona Creek, including the marshes extending northward from its mouth is of dark loam with a considerable percentage of humus. This is due to the fact that these soils are or have been moist lands covered with a dense natural growth, whose decay has resulted in its present condition. Because of the preponderance of shales in the Santa Monica Mountains, the soil resulting from its decomposition has more clay than that in the Coastal Plain eastward. The downward percolation from the surface flow is, therefore, materially less than elsewhere.

"There is, moreover, a considerable underflow of the Los Angeles River westward, bringing the water plane near the surface at the Cienegas. All of this tends to decrease the percolation and increase the run-off.

"The basin received no water from the high mountains, except such as enters it from the Los Angeles River through underflow. With this exception, therefore, it is dependent on local rainfall and the run-off from the southerly slope of the Santa Monica Mountains."

A layman probably would characterize the above-described area as a valley about ten miles wide lying between the Baldwin hills on the south and the Santa Monica mountains on the north, and extending inland from the Pacific Ocean on the west about twelve miles, the floor of which valley consists of low rolling hills that drain into what is known as La Ballona creek, a watercourse that skirts the foot of the Baldwin hills and empties into the Pacific Ocean. In its natural state, water from the rains flowed down the canyons of the Santa Monica mountains and spread over the deep detrital cones at the mouth of the canyons, which constituted absorptive areas. The water that was not absorbed by these areas spread out over a series of cienegas, and during periods of heavier rainfall eventually found its way into La Ballona creek. Manifestly, during this early period, the progress of water flowing through and across the area toward its lowest point was comparatively slow. In its undisturbed state, at and for some distance back from where it empties into the Pacific Ocean, La Ballona creek was a marsh, subject to periodic inundation by extremely high tides. It is in this last-mentioned area that plaintiff's properties are located.

About the year 1905, the land now owned by a majority of the plaintiffs was reclaimed. Canals were dug and a community known as Venice was created. This was a private enterprise. Lands owned by the other plaintiffs are in the same area and are approximately at the same level.

Thereafter, over a period of years, the city of Los Angeles gradually extended westward. The land was subdivided, streets and boulevards were established, graded and paved throughout almost the entire area, and the valley above described became more or less thickly populated. As the development progressed, the natural

drainage channels were retained and the runoff from the streets, highways and boulevards drained into the natural watercourses that always had existed in the valley. During heavy rains, by reason of the varied and extensive building construction that prevented the natural absorption of waters, and by reason of the many streets, highways and boulevards that afforded a rapid delivery of water, the various channels that emptied into La Ballona creek were taxed to capacity. In order to accommodate these channels to the rapid runoff of storm waters they were converted into wnat are known as storm drains, that is to say, concrete conduits were built in the channels to facilitate the runoff of storm waters. In all, some sixteen storm drains were constructed. As the result of these improvements, the flow of the storm waters was rapid, and as a consequence greater volumes of water in a much shorter period of time flowed into La Ballona channel than the channel, under natural conditions, had received.

In 1933 a storm, unprecedented by comparison with rainfall records of previous years, flooded the channel and caused the damage about which plaintiffs complain.

Plaintiffs' cause of action is based on the contention, as the complaint in the action alleges, that as a result of the drainage system constructed by defendants, the surface waters, falling and collecting upon the above-described area, "have been and now are diverted from their natural flow and collected into said large underground conduits and the said underground laterals to said conduits, which are and were emptied into said ditch, and said waters are no longer permitted to spread out over said strip of land commonly known as La Ballona Creek as it heretofore did do, and said surface waters are no longer permitted to find their way slowly to the Pacific Ocean as they theretofore did before said drainage system was built and constructed, but said surface waters were and now are confined to said large underground conduits and their underground laterals and said artificial ditch, hereinabove described. That as a result of said artificial drainage system the said surface waters upon said drainage area are diverted, concentrated and accelerated to such an extent that when they arrive at a point near Venice, the La Ballona Lagoon, hereinabove mentioned and described, is not of sufficient size to properly carry said waters, so diverted, concentrated and accelerated, into the Pacific Ocean, and as a result of said inadequacy in size of the ditch, hereinabove described, and said La Ballona Lagoon and the obstructions therein, as hereinabove described, the storm waters rise to a tremendous height and overflow Venice to such an extent that the waters during heavy rain storms stand from six to eight feet in and about Venice."

The "obstructions" above referred to, as further alleged, are bridges, pipe lines, pilings and an oil derrick which it is alleged, were "permitted * * * to be placed in and about said ditch and lagoon" by the defendants.

It is further alleged, in additional causes of action, in substance, that the above-described drainage system which caused the damage was built by defendants for a public use and purpose and that plaintiffs received no compensation for the damage suffered, as contemplated by article I, section 14 of the Constitution of the state of California; that the drainage system was built without due regard for the rights of plaintiffs pursuant to a plan that was inherently wrong and defective, in that the storm waters exceeded the capacity of the La Ballona channel into which it flowed; that the defendants intentionally diverted surface waters by artificial means in increasing quantities and collective force, "which diversion of said storm waters caused plaintiffs' property to be overflowed"; that the defendants permitted "obstructions" in the channel without taking the necessary precautions for the escape of storm waters flowing therein.

At the commencement of the trial it was stipulated that the issue of liability should be determined first. At the conclusion of plaintiffs' showing on this issue the trial judge granted defendants' motion for a nonsuit, from which order and the judgments entered thereon, plaintiffs appeal.

[1] It is urged by appellants that the opinion in the matter of Archer v. City of Los Angeles et al., 15 Cal.App.2d 520, 59 P.2d 605, one of the consolidated actions herein, is the law of the case. The contention is without merit. The appeal in that action was from a judgment entered after the demurrer of the defendants was sustained without leave to amend. The opinion merely determined that the complaint in the action was good as against a general demurrer.

The decision by the trial judge in the instant case upon the motion for a nonsuit was based upon the authority of San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554, 557, 9 A. L.R. 1200, which was an action for the recovery of damages for injury alleged to have been done to plaintiff's land by the construction of certain storm drains by the defendant county, and to enjoin the further use of such drains. The contentions there were substantially the same as appellants' contentions here, with regard to which the opinion recites:

"The plaintiff's position is, and must necessarily be, that the owner of land through which a watercourse passes has the right to have the stream flow by exactly as it would naturally flow and may complain of any increase of volume, no matter how caused, providing only it be caused by artificial means. But this position is directly opposed to the decisions of this court that a riparian owner may construct embankments or levees along the bank of the stream to prevent the overflow and erosion of his land. [Citing cases.] * * * But the purpose is a lawful one, and the decisions mentioned determine that no cause of action arises merely because of what is a necessary incident of the accomplishment of this purpose. * * *

"The present case is not wholly analogous to those just mentioned, but the reason for it is much the same and is indeed stronger. Not to permit an upper land owner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy. Such a rule would seriously interfere with the development of the country. Because of this and because of the necessity of permitting the utilization for drainage of the means afforded by nature for the purpose, a very great preponderance of the decisions in other states go further than it is necessary to go in this case and hold that a riparian owner has no right to complain because the volume of water in the stream is increased by artificially draining surface waters into it above, provided only the stream is the natural drainage channel for the lands so drained. Furthermore, this rule is adopted regardless of whether the so-called common-law rule concerning surface waters prevails in the particular jurisdiction or, as here, the civil law rule, which forbids the gathering together of surface waters and discharging them as a stream upon adjoining lands. If the surface waters are gathered and discharged into the stream which is their natural means of drainage, so that they come to the land below only as a part of the stream, it is held that no action lies because of their being added. [Citing cases.] Mr. Freeman in his note in 85 Am.St.Rep. 727, reviews very thoroughly the authorities dealing with the right to accelerate or diminish the flow of water, and upon the particular point under discussion says (page 733): 'We have just noticed the difference between merely draining onto another's land, and draining into a natural channel or water course, which flows across such land. So far as streams or natural water courses are concerned, there can be no doubt that one can drain into them, and thereby increase their volume without subjecting himself to liability for any damage suffered by a lower owner.'

"If a riparian owner cannot complain if surface waters be actually added by artificial drainage above to the volume of the stream, it must certainly be that he cannot complain of a drainage improvement which adds no water to the stream, but merely protects the adjoining lands against the water already in it. The cases in which this exact question is presented are not many, but so far as we have been cited to them they all, with one possible exception, so hold. [Citing cases.] * * *

"Our conclusion is that an improvement for the purposes of drainage of lands above does not give a lower riparian owner on the stream a cause of action merely because the improvement increases the volume of water coming to his land in the stream with the incidents necessarily accompanying such increase of volume, but without affecting the stream in any other manner. Such is the present case.

"There remains, however, one point which should be discussed. It is frequently stated, and some decisions perhaps hold, that the rule that no action lies simply because of an increase in the volume of a stream caused by improvements for drainage above is subject to the limitation that thereby the natural capacity of the channel be not exceeded; that is, that the lands below be not flooded. It does not appear from the findings in the present case whether the plaintiff's land was flooded or not. What does appear is that a considerable

portion of it was washed away. This may well have happened without the land being actually overflowed. But, however this may be, we are of the opinion that no such limitation should be adopted. On the one hand, the authority for it consists largely of dicta and casual statements, and, on the other hand, it is wholly impracticable and in many cases destructive of the rule on which it is supposed to be only a limitation. This is very clearly pointed out and the limitation rejected in Mizell v. McGowan, 129 N.C. 93, 39 S.E. 729, 85 Am. St.Rep. 705."

[2] After quoting from the Mizell case, supra, the opinion continues: "The reasons so stated may be multiplied many fold. To them also may be added the query: Why should there be any difference between injury done by flooding and injury done in any other manner by an increase in the volume of the stream. * * * Summing up the discussion, our conclusion, as we have stated, is that an improvement for the purposes of the drainage and protection of lands above does not give a lower riparian owner on the stream a cause of action merely because such improvement increases the volume of water in the stream as it comes to his land, even though the burden he is necessarily under of protecting his land against the stream is thereby increased and his land is injured because of his failure to meet such increased burden, and further that the rule is not subject to the limitation that the increased volume must not be such as to make the stream exceed the capacity of its channel." San Gabriel V. C. Club v. County of Los Angeles, supra.

[3] Appellants undertake to distinguish the facts in the San Gabriel Club case, supra, from the facts in the case at bar. It may be conceded that the facts are not identical but nevertheless a resemblance is presented, sufficient in degree to warrant the conclusion that the law applicable to one is likewise applicable to the other. As to each, the cause and effect are the same. Hence the law established by the San Gabriel Club case is controlling as to the issues involved in the within appeal.

In giving consideration to the arguments advanced by appellants it should be emphasized that evidence of any diversion of water from its natural channel anywhere in the area involved is entirely lacking. It should be noted also that there is no evidence of negligence on the part of defendants in connection with the manner or form in which the storm drains were constructed. In addition to the foregoing it is also important to note that the so-called "obstructions" hereinbefore referred to were not installed or erected by defendants or either of them but, to the contrary, were installed or built by individuals or corporations not parties to the within action.

Appellants' contentions are incorporated in the following argument quoted from the briefs:

"The evidence also discloses that such storm waters in their natural manner of want to flow lodged in many low flat places, which formed a series of lakes, one right after the other from the beginning of the marsh lands to the ocean, and that the greater portion of the storm waters never reached the ocean at all, but remained in lakes to be evaporated by the sun and absorbed by the ground, and that the portion of the water that did find its way to the ocean traveled very slowly, where the outlet in those days at the ocean was adequate to discharge the storm waters that came to it, without flooding Venice.

"By December 31, 1933, and January 1, 1934, the natural drainage system had been changed by the hand of man (the Defendants) from the natural state above described to that of a very fine, high speed drainage system designed to carry the storm waters from the watershed of La Ballona Creek drainage area to the ocean in a very small space of time, which resulted in the collection and concentration of the storm waters of such drainage area into a swamp and marsh area just south of Venice much faster than the old natural outlets to the ocean could possibly carry, and in addition thereto the defendants greatly impaired the principal natural outlet into La Ballona Lagoon for the carrying of storm waters by the Vista Del Mar bridge and as to the other outlet into La Ballona Lagoon, there being only two outlets into said lagoon, the defendants permitted another bridge to be built across the lagoon, bulk head to be built out into the channel of said Lagoon, and another bulk head to be erected in the channel of said lagoon

to protect an oil well that had been drilled in the bed of the natural channel, all of which greatly impaired and obstructed the natural channel and impeded the flow of storm waters on their way to the ocean.

"* * * that said artificial drainage system has diverted the surface waters and has accelerated, impounded and concentrated said storm waters to such an extent and in such great quantities that when they arrived at a point near Venice, the La Ballona Lagoon was not of sufficient size to properly carry such waters into the Pacific Ocean. * * *

"In the instant case, all of the channel regulation was done in the upper reaches of the Ballona Basin while there was nothing done to take care of the augmented flow from the upper reaches at the outlet into the ocean."

[4] In other words, appellants argue, in effect, that the outlet was inadequate. The fallacy of the argument is at once apparent. An argument that selects one part of the channel, namely, the outlet, and attempts to give to it a fancied or fictitious importance and significance, will not stand the test of logic. One cross-section of the channel is as much a part thereof as any other, by whatever name it may be known, whether it be at the extreme end and known as the outlet or at some other point along the course of the channel and known as the narrows. By either name or at any point, its function is the same as part of the whole. Hence, the contention that the outlet was inadequate means nothing more than the contention that the channel was inadequate. But the evidence in the case fails to establish the inadequacy of the channel in question. What the proof does show, however, is the fact that La Ballona creek is a watercourse or channel that varies in width, and that plaintiffs are owners of land within its course, which, during high water periods and as a consequence of its location and elevation, is subject to inundation. Proof of such conditions does not establish the inadequacy of the channel but merely confirms the natural fact that heavy rainfalls increase the depth of the water in the channel. In the circumstances such conditions are burdens incident to the location of such lands, and the fact that floodwaters during periodic storms therefore spread over a wider area in some parts of the channel than in others gives rise to no cause of action by landowners affected thereby. San Gabriel V. C. Club v. County of L. A., supra.

[5-8] Whether the so-called "obstructions" above referred to contributed to any material extent to the damage complained of, is doubtful. From a review of the record it is evident that such was the conclusion of the trial judge, although evidence on the issue was conflicting. In any event, as heretofore noted, such so-called "obstructions" were not installed by the defendants or either of them. Assuming for the sake of argument that defendants or either of them in the ordinary routine of governmental affairs issued permits for the installation of the objects now claimed by appellants to amount to "obtructions", appellants point to no authority supporting the contention that because the obstructions were so permitted by defendants, or either of them, liability attached. Manifestly such objects and structures are not hazardous per se. With regard to the duty of the trial judge in connection with motions for nonsuits, it must be conceded that all presumptions are in favor of the plaintiffs upon an appeal from a judgment of nonsuit, and the fact that evidence is conflicting must be disregarded. But in the case at bar it is important to bear in mind that the question of liability as a matter of law, by stipulation of counsel, was submitted for the court's consideration and was the question and issue in connection with which the motion for a nonsuit was made and granted. The trial court concluded and accordingly adjudged that there was no liability on the part of the defendants. In Anchester v. Keck, 214 Cal. 207, 4 P.2d 934, 937, appears the following: "The rules applicable to motions for nonsuits do not require courts to put themselves in incongruous positions in order to hold a case in court. Courts will not give a strained or unnatural construction to language or conduct, or distort the orderly laws of sequences or the logic of a given situation to force an unnatural result. Looking at the case as presented, and giving the effect to the evidence which in reason it should receive, we are in accord with the conclusions reached by the District Court of Appeal. The evidence as a matter of law is insufficient to support a judgment for appellants."

In the circumstances, the same doctrine is applicable to the case at bar.

In the light of the foregoing, it is unnecessary to give consideration to plaintiffs' other contentions above mentioned.

For the foregoing reasons the judgments entered in the above-entitled consolidated cases, are affirmed.

We concur: YORK, P. J.; WHITE, J.



39 Cal.App.2d 241

BUSING v. PIERSON et al.
Civ. 11336.

District Court of Appeal, First District, Division 2, California.

May 23, 1940.

Rehearing Denied June 22, 1940.

1. Appeal and error ⇐676

An order denying a motion for substitution of plaintiffs was not reversible where record contained no copy of judgment roll and it did not appear from bill of exceptions that affidavits set out therein were attached to notice of motion or offered in trial court in support of motion, or that such affidavits constituted all of evidence presented on hearing of motion. Code Civ.Proc. § 950.

2. Appeal and error ⇐901

An appellant is not entitled to a reversal unless an adequate record is presented showing affirmatively the existence of error.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by H. B. Busing, as administrator of the estate of Louie S. Dexter, deceased, against George M. Pierson and others. From an order denying a motion to substitute W. P. Nichols as plaintiff, he appealed, and Catherine A. McKenna was substituted as appellant.

Affirmed.

Catherine A. McKenna, of Los Angeles, in pro. per.

Edwin J. Miller, of Los Angeles, for respondent.

SPENCE, Justice.

This is an appeal from an order denying a motion to substitute W. P. Nichols as plaintiff in the above entitled action in the place and stead of H. B. Busing, as administrator of the estate of Louie S. Dexter, deceased.

There have been two prior appeals in this case. Dexter v. Pierson, 214 Cal. 247, 4 P.2d 932; Busing v. Pierson, 1 Cal.2d 495, 36 P.2d 116. The motion to substitute involved on this appeal was not made until August, 1936, being almost two years after the judgment had become final. During the pendency of this appeal, Catherine A. McKenna, one of the defendants in the action, was substituted as appellant in the place and stead of W. P. Nichols.

While an order denying a motion to substitute is not ordinarily an appealable order (Grant v. Los Angeles, Etc., Ry. Co., 116 Cal. 71, 47 P. 872; Welch v. Allen, 54 Cal. 211), the order under attack is claimed to be appealable on the theory that it is in effect a final judgment. Walsh v. Superior Court, 92 Cal.App. 454, 268 P. 442. We may assume, without deciding, that the order made in the instant case was in effect a final judgment and appealable, but we are nevertheless of the opinion that appellant has presented no adequate record to show error on the part of the trial court in denying the motion.

[1, 2] The record contains no copy of the judgment roll (Code Civ.Proc., sec. 950) and the bill of exceptions is wholly inadequate. Said bill of exceptions contains a copy of the notice of motion followed by copies of certain affidavits. It does not appear therefrom that said affidavits were attached to the notice of motion or that said affidavits were offered in the trial court in support of the motion. If we may so assume, there is nevertheless no showing that said affidavits constituted all of the evidence presented for the consideration of the trial court on the hearing of the motion. An appellant is not entitled to a reversal unless an adequate record is presented showing affirmatively the existence of error. Olson v. Ranker, 93 Cal.App. 124, 269 P. 175; Shepard v. Yale, 94 Cal.App. 104, 270 P. 742; Eddie v. Schumacher Wall Board Co., 79 Cal.App. 318, 249 P. 235; Foster v. Young, 172 Cal. 317, 156 P. 476; 2 Cal. Jur. 697. No such record has been pre-

sented here, and it is therefore unnecessary to discuss the other points urged by respondent in support of the order.

The order is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



39 Cal.App.2d 215

PEOPLE v. BURNETTE.

Cr. 2091.

District Court of Appeal, First District, Division 1, California.

May 22, 1940.

Hearing Denied June 20, 1940.

1. Rape ⇐57(1)

In rape prosecution, whether it was impossible for man weighing more than 200 pounds to have sat on top of 97-pound prosecutrix in automobile and to have punched her to extent to which she testified without inflicting injuries far more serious than those found by physicians following attack was jury question.

2. Rape ⇐14

It is not required that prosecutrix resist rape as long as strength endures or consciousness continues, but resistance required depends on circumstances, such as relative strength of parties, uselessness of resistance, degree of force manifested, and other factors.

3. Rape ⇐14

The resistance of prosecutrix in rape case need only be such as to make nonconsent and actual resistance reasonably manifest.

4. Rape ⇐51(4)

Prosecutrix' testimony, corroborated by her physical condition and finding of her heel in place where it could not possibly have been had defendant's story been true, showed resistance to rape, as against contention that it was beyond comprehension how defendant could have kept up the act for half an hour if there had been the slightest resistance.

5. Criminal law ⇐1159(1)

The implied finding of jury, who visited scene, as to whether any outcry or scuffle by prosecutrix in rape case must inevitably have been heard could not be disturbed on appeal.

6. Criminal law ⇐742(1)

The credibility of testimony of prosecutrix in rape case that she had suit which she wore cleaned, and had carelessly destroyed stockings, as respects her failure to introduce such clothing in evidence, was for jury.

7. Rape ⇐51(4)

Evidence, including fact that prosecutrix was beaten and bruised, her clothes were disheveled and torn, and her heel was found where she stated she had lost it when trying to escape, supported conviction of rape, as against contention that act of intercourse was voluntary.

8. Witnesses ⇐268(1)

While great liberality should be allowed in rape case as to scope of cross-examination of prosecutrix, such cross-examination is not unlimited.

9. Witnesses ⇐267, 268(1)

As respects scope of cross-examination of prosecutrix in rape case, when evidence does not tend to show prior intercourse, a rule of reason must be adopted, and matter must rest largely within sound discretion of trier of facts.

10. Witnesses ⇐269(1)

Cross-examination is limited generally to scope of direct examination. Code Civ.Proc. § 2048.

11. Witnesses ⇐269(2)

Where witness' general past life is not examined into on direct examination, although trial judge should give wide interpretation as to scope of the direct, he is not required or permitted to allow inquiry into entire past life of witness on cross-examination.

12. Rape ⇐40(1)

In prosecution for rape with force and violence, prosecutrix' past life is not an issue, as long as it does not involve intercourse with other men.

13. Witnesses ⇐338

Limiting cross-examination of prosecutrix in rape case as to her past life to period relatively recent was not improper.

14. Witnesses ⇐269(2)

Excluding cross-examination of prosecutrix in rape case as to whether she owned and could drive automobile was proper, as

against contention that facts were relevant as to credibility of her story that she was seeking a taxicab at 3 o'clock in the morning.

15. Criminal law ⇐1170(2)

In rape prosecution, exclusion of cross-examination to show that prosecutrix had filed robbery complaint against defendants was not injurious to appealing defendant, where jury had before it all of the facts in reference to such robbery complaint.

16. Rape ⇐43(1)

Evidence that defendant in rape prosecution was not afflicted with syphilis, as prosecutrix had testified that codefendant had stated to her, was properly rejected as not tending to prove or disprove any issue in case.

17. Criminal law ⇐1186(4)

The remarks of trial judge in ruling on evidence in rape case, particularly during cross-examination of prosecutrix and during examination of defendant, were not so prejudicial as to require reversal, under circumstances. Const. art. 6, § 4½.

18. Criminal law ⇐719(1)

The statements in deputy district attorney's argument in rape prosecution, that in one month 16 men convicted of rape would come before prison board to have their sentences fixed, and that during attorney's 14 years' experience in district attorney's office there probably had been hundreds of convictions on rape cases, were improper because relating to matters outside record.

19. Criminal law ⇐720(7)

The deputy district attorney's argument in rape prosecution, in describing how fortunate prosecutrix was to have secured opportunity to escape, that it was doubtful whether prosecutrix would ever have been seen alive again, was warranted as fair inference from testimony.

20. Criminal law ⇐724(1)

The deputy district attorney's statement in argument in rape prosecution, in which she referred to defendants as "yellow rats" and made plea to free San Francisco from men of their ilk, was improper.

21. Criminal law ⇐700

Prosecutors should remember that accused is entitled to a fair trial, and that they are duty-bound not to take advantage of their official position so as to deprive him of such right.

22. Criminal law ⇐1171(1)

The deputy district attorney's misconduct in argument in rape prosecution was not of such flagrant character as to require reversal, in view of evidence.

23. Criminal law ⇐829(18)

The refusal of instruction on reasonable doubt was not error, in view of instruction that all the elements of offense had to be proved by state to a moral certainty and beyond a reasonable doubt, and of instruction almost in identical words of Penal Code on presumption of innocence and as to effect and definition of reasonable doubt. Pen. Code, §§ 1096, 1096a.

24. Rape ⇐59(3)

In rape prosecution, instruction warning jury of danger of conviction on uncorroborated testimony of prosecutrix alone was properly refused, where act was admitted, and only issue was whether force and violence had been used.

25. Criminal law ⇐829(11)

Refusal of instruction dealing with oral admissions was not error in view of instruction that testimony of accomplice ought to be viewed with distrust, and evidence of oral admissions of a party with caution. Code Civ.Proc. § 2061, subd. 4.

26. Criminal law ⇐780(1), 1185(4)

Instruction that testimony of accomplice ought to be viewed with distrust should not have been given where the two defendants were both charged with the same offenses, and neither was called as a witness for or against other, but testified solely on his own behalf, but instruction was not prejudicial. Code Civ.Proc. § 2061, subd. 4; Const. art. 6, § 4½.

27. Criminal law ⇐1186(4)

Where conviction of rape was supported by overwhelming weight of evidence, story told by prosecutrix was corroborated by surrounding circumstances and by every physical fact capable of corroboration, and defendant's story was highly improbable and corroborated only by codefendant's testimony, any error that might have crept into record during long and hotly contested trial was not prejudicial so as to require reversal. Const. art. 6, § 4½.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Huston Burnette was convicted of rape by force and violence, and he appeals.

Affirmed.

William F. Herron, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for respondent.

Hearing denied; CARTER, J., dissenting.

PETERS, Presiding Justice.

Defendant appeals from a judgment of conviction of rape by force and violence and from the order denying his motion for a new trial. This court has already passed upon two preliminary proceedings related to this appeal. In People v. Burnette, 34 Cal.App.2d 663, 94 P.2d 399, upon petition of appellant, a writ of supersedeas pending the appeal was granted on the ground that an examination of the reporter's transcript demonstrated that the appeal was not frivolous. Thereafter, in Ex parte Burnette, 35 Cal.App.2d 358, 95 P.2d 684, a writ of habeas corpus based on a claim of excessive bail pending appeal was denied.

Appellant and Remus Godfrey were charged by indictment with kidnaping, rape by force and violence, and with conspiracy to commit rape and conspiracy to kidnap. All the charges were based on the same transactions. Godfrey was acquitted of all charges. Appellant was acquitted of the kidnaping and conspiracy charges, but found guilty by the jury after a lengthy trial on the rape charge. On this appeal it is urged by appellant that:

(1) The evidence of the prosecutrix is inherently improbable and insufficient as a matter of law;

(2) The trial court improperly restricted the cross-examination of the prosecutrix;

(3) The trial court was guilty of misconduct prejudicial to appellant;

(4) The district attorney was guilty of misconduct prejudicial to appellant; and

(5) There was error in the giving of, or refusing to give, instructions.

It is appellant's main theory, confidently, vehemently and exhaustively advanced by him, that the evidence given by the prosecutrix and the other witnesses for the prosecution, was so inherently improbable, and so contrary to the laws of nature, that this court must hold it insufficient as a matter of law; or, if this contention be not sound, that even if such evidence was technically sufficient to convict, it was of so dubious a character that any substantial error or misconduct must have worked a miscarriage of justice. We agree with neither of these contentions. After reading the entire record we are convinced that the overwhelming weight of the evidence supports the judgment.

We do not believe that in this type of case it serves any useful purpose to set forth in the opinion all of the sordid details contained in the record. It will be sufficient to outline the evidence upon which the respondent relies to sustain the conviction.

The rape with which appellant stands convicted was committed in the early morning hours of May 6, 1939. The prosecutrix, Agnes Mae Chattin, testified that she was thirty-one years of age, married, and that she lived with her husband at 450 Duboce street in San Francisco. She testified that her husband operated an all night cafe at 34 Mason street, and that his business required him to be present at the cafe during the early morning hours; that she kept house and occasionally assisted her husband; that on the evening of May 5, 1939, she had dinner with her sister; that at about 1 A. M., May 6th, the sister, her husband, a Mr. and Mrs. Church and a friend of her brother-in-law called at her apartment; that drinks were served; that she had two or three whisky highballs; that her guests remained until about 3 A. M.; that the sister's husband was a seaman and was sailing for China the next day; that after the departure of her guests she cleaned up the apartment and then decided to visit her husband at his place of business; that she left home with the object of walking a short distance to a taxi stand to get a cab; that she had proceeded but a short distance when, between 14th and 15th on Market street, Burnette accosted her, and, in spite of her screams, forced her into the back seat of an automobile driven by defendant Godfrey; that Burnette, who was a big man weighing over two hundred pounds, held her by the throat (the prosecutrix weighed under one hundred pounds); that she was forced to lie on the floor boards of the rear seat, Burnette sitting on top of her; that when she offered resistance Burnette hit her on the abdomen or head; that they drove some distance to a hilltop quarry; that there Burnette, after requesting Godfrey to get some gasoline, dragged her from the car, and, after Godfrey had driven away, had intercourse with her against her will;

that any resistance on her part met with repeated punches from appellant; that the act continued for a "long half hour"; that when Godfrey returned he taunted her with the statement that Burnette was full of syphilis; that when Burnette got up she tried to run away and might have escaped had she not lost the heel on one of her high-heeled shoes half way down the hill; that Burnette caught her, dragged her back and forced her into the automobile; that Burnette then abused her in a disgusting manner, the details of which were recounted by her; that they were at the quarry for about two hours; that at about 6 A. M. they left with Godfrey still driving; that instead of returning to San Francisco where all the parties resided, Godfrey turned south towards South San Francisco; that she begged Burnette to release her; that Burnette replied: "You are not going to get out of this car while you are conscious, you don't think we are that dumb, do you?"; that she was afraid for her life; that on reaching a certain intersection in South San Francisco the traffic light was against them; that two policemen were in the vicinity; that Burnette ordered Godfrey not to stop and Godfrey stated he would make a right-hand turn through the stop light; that in doing so the car slowed down; that as it did so she jumped out and started screaming; that the two officers came over to the car; that she told the officers she had been attacked by appellant; that appellant told the officers she was drunk and that he would take care of her; that the officers took the entire party to the police station, where she told her story.

Dr. M. R. Oliva, a doctor connected with the South San Francisco Hospital, testified that he examined the prosecutrix a little after 8 A. M. on May 6th; that she was then "in a semi-hysterical condition, her clothes torn * * * The first thing I noticed was a large hematoma on the left side of her forehead"; that a hematoma is a collection of blood under the skin, and follows a severe bruise and rupture of a blood vessel under the skin; that the bruise "was the size of an egg"; that "There was a smaller hematoma * * * on the right forehead above the eyebrow and over the face of the nose"; that there was "an abrasion * * * over the right mastoid process, behind the right ear. There was a black and blue spot and a crushed area in the skin at about the mid-portion of the large muscle in the neck on the right side. There was a large abraided area of the skin over the top of the breast bone." He also testified there were fairly fresh scratches or abrasions in and about the genitals, and that he found a few dead spermatozoa. He also gave it as his opinion that the hematoma that he observed were under five hours old, but that it was within the realm of possibility that they were seven hours old.

Dr. Phyllis Bourne, a doctor connected with the Board of Health of San Francisco, whose official duty it is to physically examine girls who have been assaulted, testified that she examined the prosecutrix at about 2 P. M. of May 6th; that at that time "her general condition was only fair. She had bruises on her forehead, nose, arm, left elbow and both legs; and scratch marks chest, throat, both arms and hands, abdomen and the inner side of thigh. * * * Her clothes, especially blouse, grass stained and torn"; that she tested for spermatozoa but found no evidence of their presence; that such test was not a positive test as to whether intercourse had taken place some hours before; that among other things an acid condition would destroy any such evidence in one-half to two hours. This doctor also stated that there was physical evidence to corroborate the story of the prosecutrix as to the abuse she received from Burnette.

The municipal judge who had issued the warrant for the arrest of the two defendants testified that when the prosecutrix appeared before him it was apparent that her face had been bruised.

Nello Lazzari, one of the policemen who was present when the prosecutrix jumped from the automobile in South San Francisco, corroborated the prosecutrix in reference to her physical condition and as to the facts surrounding her escape. He testified he was standing on the corner when he observed the automobile make a right-hand turn through the stop light; that the car was then going about fifteen or twenty miles per hour; that he heard a woman screaming; that he turned around and observed Mrs. Chattin running across the street; that Godfrey got out of the car and told him that he thought she was a prostitute; that Mrs. Chattin was hysterical, the left arm of her coat was torn and her blouse was torn; that

she had big welts on the left and right sides of her head and on the nose; that she immediately charged that she had been attacked; that appellant told the officers: "Don't pay any attention to her, she is drunk". The officer stated that the prosecutrix, in his opinion, was not drunk and that he could not smell liquor on her breath; that "If there was anybody drunk, it was Huston Burnette. He was a little intoxicated"; that he then took the entire party to the police station and called the chief of police. This officer also testified that when his superior officer arrived he was ordered to take Mrs. Chattin to the scene of the alleged offense; that he took Mrs. Chattin to the quarry and there found the heel of her shoe about half way up the slope.

Both the chief of police and Officer Lazzari testified that Burnette admitted to them that he had had intercourse with the prosecutrix. The police chief testified that Mrs. Chattin was not drunk, and testified as to her appearance; that Burnette told him that he had "attacked" the girl. On cross-examination he stated that Burnette used the word "attacked".

After their arrest the two defendants were taken to the San Francisco jail. There they both signed statements. Burnette then, and at the trial, admitted he had had intercourse with the prosecutrix, but then contended, and on the trial contended, that Mrs. Chattin consented thereto.

The appellant and defendant Godfrey took the stand in their own defense. In many details the stories they told the police at the time of their arrest were inconsistent with each other and are inconsistent with the stories they later told on the witness stand. It would serve no useful purpose to recount these inconsistencies. Burnette testified that on the evening of May 5th he had attended a meeting with Godfrey where he had a few glasses of beer; that thereafter he and Godfrey visited various places in his automobile and purchased a half pint of whisky; that they had a few drinks; that some time after 2 A. M. they parked in the vicinity of Fillmore and Ellis streets, some distance from where the prosecutrix testified she was seized; that he got out of the car and observed Mrs. Chattin coming towards him; that she smiled and he accosted her and offered her a drink; that she got in the car and had a drink; that she then consented to take a ride. Both Burnette and Godfrey testified that she then had a bruised forehead, but they did not testify as to other bruises or lacerations, or that her clothing was disheveled or torn. They stated she obviously had been drinking when they first met her. Burnette testified that they took a ride down the Bayshore highway, and drove up to the quarry for a drink; that he then took her for a walk and she consented to the act of intercourse; that thereafter they returned to the car, and later, while walking around the quarry, she lost her heel, which they could not find; that they then decided to go get a bottle of beer; that they started towards South San Francisco; that on this ride Godfrey, who also testified as to the same fact, with a perverted sense of humor, told the prosecutrix that Burnette had syphilis; that Burnette denied it but that she became angry; that they drove up befor a cafe in South San Francisco and stopped; that Mrs. Chattin, without warning, jumped out screaming.

Appellant makes much of the fact that neither Mrs. Chattin's husband, nor the visitors at her home, were called as witnesses by the prosecution to corroborate portions of her story, although all were apparently subpoenaed by the prosecution. Why they were not produced does not appear. This was a matter that could properly be, and undoubtedly was, argued to the jury—it is entitled to but little consideration on appeal. It might be added that appellant could have subpoenaed the husband, as well as the other witnesses, had he desired. The names of the visitors were disclosed on the first day of an eight-day trial. Appellant had ample time to interview and subpoena such witnesses had he been so inclined.

[1] Appellant argues that it would be impossible for a man weighing more than two hundreds pounds to have sat on top of the ninety-seven pound prosecutrix while riding to the quarry, and to have punched her to the extent to which she testified without inflicting physical injuries far more serious than those found by the doctors who examined her following the attack. This was a jury question. The injuries testified to by the doctors were sufficiently serious to not make incredible the story told by the prosecutrix. In fact, she testified that, on July 17th (the first day of the trial), she still had physical evidences of the beating suffered on May 6th.

[2-4] Appellant further argues that it is beyond comprehension how appellant could have kept up the act for half an hour if there had been the slightest resistance. The prosecutrix testified that she screamed, that she did resist, and that every act of resistance was met with punches and blows. In this state it is not required that the prosecutrix resist as long as strength endures or conciousness continues. The resistance required in each case depends upon the circumstances of that case, such as the relative strength of the parties, the uselessness of resistance, the degree of force manifested and other factors. The resistance of the prosecutrix need only be such as to make nonconsent and actual resistance reasonably manifest. People v. Cline, 117 Cal.App. 181, 3 P.2d 575; People v. Cook, 10 Cal.App.2d 511, 52 P.2d 538. Not only did the prosecutrix testify as to resistance, but her physical condition corroborates her story. The story is further corroborated by the finding of her heel half way down the slope, where it could not possibly have been had appellant's story been true. There is no merit in the point.

[5] Appellant claims there were houses so near the scene of the offense that any outcry or scuffle must inevitably have been heard by the ocupants, and by a man whom the prosecutrix testified she observed working on his automobile near by. This point was strongly urged in the trial court. In response to a request of appellant's counsel the members of the jury were taken to visit the scene. These very facts were called to their attention during that visit. Their implied finding on the point cannot be disturbed on appeal.

[6] Appellant finds great significance in the circumstance that the fur coat which the prosecutrix wore, and which was torn, the shoe with the broken heel and the pants worn by the prosecutrix at the time of the attack were introduced into evidence, but that the blouse which she wore, and which she claims was grass-stained and torn, the suit she wore, and which she claims was grass-stained, and the stockings which she claimed were badly torn as she was dragged over the rocks, were not produced. The prosecutrix testified she had the suit cleaned and had carelessly destroyed the stockings. Her credibility in this regard was solely for the jury. The sole purpose of introducing such articles would have been to corroborate her story of the beating she suffered, and the condition of her clothes. Both of these matters were amply corroborated by her physical condition and the testimony of the doctors and the police officers.

[7] This serves to briefly outline the evidence produced by the prosecution and to indicate the main contentions of appellant in reference to the sufficiency of that evidence to sustain the judgment. It is at once apparent that the evidence is ample to sustain the judgment of conviction. While it is true that in cases of this kind the testimony of the prosecutrix must be carefully scrutinized, and that rape charges are sometimes easily fabricated, nevertheless, the story of the prosecutrix in this case is not inherently improbable, and it is corroborated by other evidence. In almost every appeal in a sex case involving abnormal actions on the part of the accused it is contended that such abnormality is beyond belief. It is, of course, not normal behavior for a man to seize a woman by the throat on a well-lighted street, to beat her, to transport her to a rock quarry, to then forcibly rape her, and then to wait until daylight before leaving. But criminal behavior is seldom normal. This woman was beaten and bruised; her clothes were disheveled and torn; her heel was found where she had stated she lost it when trying to escape. These facts were proved by many witnesses. Someone during the early morning hours of May 6th brutally beat the prosecutrix. The act of intercourse is admitted. Appellant admits being with her after 3 A. M. He contends her forehead was then bruised but he does not contend that she was in the condition testified to by the doctors and police. No mention of torn and disheveled clothing is made by him. He unsuccessfully tried to convince the jury that the prosecutrix voluntarily went with him and Godfrey to the quarry and there voluntarily submitted to him; that he and Godfrey, both married men, and the prosecutrix, a married woman, then sat around talking for an hour or an hour and a half until daybreak and then went for a ride, and then, without warning, that she jumped from the car and started screaming and immediately charged him with attacking her. It is this story that is inherently improbable, not that of the prosecutrix. This is certainly not a case where the testimony of the prosecutrix is so inherently improbable that as a matter

of law it may be held to be insufficient to support the verdict. Nor is it a case where the evidence was of so dubious a character that any substantial error must have worked a miscarriage of justice.

[8-13] Appellant contends that he was unduly and improperly limited in the cross-examination of the prosecutrix. Early in the cross-examination counsel for appellant asked the witness how many times she had been married, where she had been employed, whether she had worked in various named saloons or night clubs, where she was born and where she had resided prior to coming to California. The trial judge sustained objections to many of these questions on the ground that counsel had not fixed the time, and held that inquiry into the past life of the prosecutrix would not be permitted unless relatively recent. Apparently the trial court was of the opinion that testimony concerning the past of the prosecutrix should be limited to about one year before the date of the offense. However, in spite of the rulings of the trial court, answers to many of the questions asked were in fact given by the witness. She testified that she was married to Clyde Chattin in 1937, and had been married before. She was not permitted to testify as to the details of the prior marriage. She testified that she had been a waitress. After considerable argument objections were sustained as to places where she worked prior to a year before the offense. She was asked if she worked in various named night clubs in 1934 and 1937. Objections were sustained but, nevertheless, she answered: "I didn't work in any of these places", and also stated: "No, I never worked as a B-girl." It is of course true that great liberality should be allowed in this type of case as to the scope of the cross-examination of the prosecutrix, but that does not mean that such cross-examination is unlimited. Evidence of prior acts of intercourse with other men may be elicited on cross-examination for the purpose of disproving the allegation that force was used People v. Pantages, 212 Cal. 237, 297 P. 890; People v. Degnen, 70 Cal.App. 567, 234 P. 129. But here the questions were not directed to any prior acts of intercourse. They simply were directed at prior occupations and the past life generally of the prosecutrix. It is the theory of the appellant that these were proper subjects of inquiry in order to test the credibility of the witness within the rule stated in the frequently cited case of Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624. In that case it was held that on cross-examination the present residence of the witness could be inquired into in order to identify the witness with his present environment in order that the jury could pass on his credibility. But that is far different than inquiring into the entire past life of the witness simply to test credibility. When the evidence does not tend to show prior intercourse within the rule of the Pantages case, supra, then a rule of reason must be adopted. The matter must rest largely within the sound discretion of the trier of the facts. Cross-examination is limited generally to the scope of the direct examination. Code Civ.Proc., sec. 2048. Where the general past life of the witness is not examined into on direct, although the trial judge should give a wide interpretation as to the scope of the direct, he is not required or permitted to allow an inquiry into the entire past life of the witness. This is so because otherwise the past life of the prosecutrix might well become the main issue in the case. So far as the crime here involved is concerned—rape with force and violence—the past life of the prosecutrix is not an issue, as long as it does not involve intercourse with other men. Women who may have worked in questionable places are as much entitled to protection from force and violence as those who may have lived more proper lives. The questions that appellant's counsel desired answered in the instant case were not nearly as pointed as those involved in People v. Mangum, 31 Cal.App.2d 374, 88 P.2d 207, where the problem is exhaustively discussed and where it is held that it is not error to exclude such questions. See, also, People v. Burrows, 27 Cal.App. 428, 150 P. 382.

[14] Some complaint is also made that appellant was restrained from cross-examining the prosecutrix as to whether she owned and could drive an automobile. The theory of the appellant is that, if it developed she did own, and could drive, a car, the jury could properly consider such facts in passing on the credibility of her story that she was seeking a taxicab at 3 in the morning. Such testimony would have no tendency to prove or disprove the story of the prosecutrix. Many owners

and drivers of automobiles ride in taxicabs. The ruling of the trial court was correct.

[15] Appellant also complains that he was not permitted to show, on cross-examination, that the prosecutrix had filed a robbery complaint against these defendants. This charge was apparently never pressed, and the grand jury did not indict the defendants for robbery. The prosecutrix had testified that she had $16 in her purse at the time of the attack and that she had offered this to the defendants if they would let her go. She testified that, although she did not see appellant or Godfrey take this money, while still at the quarry, she charged them with taking it, which charge they had denied. When arrested, a thorough search was made by the police of both defendants and of the automobile, and only a very small sum of money was found. Appellant contends that he had the right to show that the witness had sworn to such a complaint in order to show bias and prejudice. Assuming, without deciding, that such question was proper, a reading of the record demonstrates that the jury had before it all of the facts in reference to this robbery complaint. The limitation on the cross-examination, even if improper, could not possibly have injuriously affected appellant.

[16] Appellant contends that the trial court improperly prohibited him from proving on his direct examination, and by medical testimony, that in fact appellant was not afflicted with syphilis. The prosecutrix had testified that while Burnette was still engaged in the act of intercourse Godfrey had returned and taunted her with the statement that Burnette "was full of syphilis". Obviously, this conversation was admissible as part of the res gestae. The prosecution at no time contended that Burnette in fact had syphilis, or that he had infected the prosecutrix with the disease. The issue presented by the testimony of the prosecutrix was whether the conversation had taken place, not whether Burnette had the disease. In fact, Burnette's denial that he had the disease appears several times in the record. The proffered testimony which was rejected would not have directly or indirectly tended to prove or disprove any issue in the case, and was properly rejected.

[17] It is next contended that the trial judge was guilty of prejudicial misconduct. We have read the entire record. It must be conceded that on numerous occasions the trial judge in ruling on evidence, particularly during the cross-examination of the prosecutrix, and during the examination of appellant, made comments which better had been left unsaid. In extenuation it might be said that some of the tactics employed by appellant's counsel during the trial were of a type to reasonably exasperate the trial judge. As to some of these remarks no assignment of misconduct was made. As to others, the trial judge refused to instruct the jury to disregard them at the time they were made. But when instructing the jury at the end of the trial the trial judge not only told them that they were the sole judges of the facts, but also carefully and fully instructed them to disregard any remarks he might have made during the trial, and to disregard any intimation he might have given as to his feelings as to the facts or as to the credibility of any witness.

Undoubtedly, however, the record does contain some remarks made by the trial judge which should not have been made. There can be no doubt that occasionally the judge departed from that attitude of judicial calm which, under our system of law, he is supposed to display. Nevertheless, we are convinced that the making of such remarks, under the facts here disclosed, was not prejudicial so as to require a reversal. After reading the record it is quite clear that the error, if any, must be held to fall directly within the purpose and intent of Article VI, section 4½ of the Constitution.

[18-22] It is next urged that in the final argument to the jury the deputy district attorney was guilty of flagrant misconduct. It is a fact that in several instances she exceeded the bounds of proper argument. She stated that in one month sixteen men convicted of rape would come before the prison board to have their sentences fixed, and further, that during her fourteen years' experience in the district attorney's office "in my opinion there probably have been hundreds of convictions on rape cases." These were matters outside the record and no reference should have been made to them. In describing how fortunate Mrs. Chattin was to have secured the opportunity to escape, she stated: "And, in the opinion of the district attorney, I would go so far as to say it is doubtful whether Mrs. Chattin would ever have been seen alive again—" This was assigned as misconduct, but the assignment was overruled and denied. Undoubtedly, the remark about the possibility of the defendant's killing the

prosecutrix was called forth by her testimony that she feared for her life, and that when she begged Burnette to let her go, he replied: "You are not going to get out of this car while you are conscious, you don't think we are that dumb, do you?" The statement was a fair inference from the testimony. Thereafter, the deputy district attorney several times referred to the defendants as "yellow rats" and made a plea to free San Francisco from men of their ilk. Such invective has no place in a proper argument. This court has recently found it necessary to condemn the all-to-frequent practice of some prosecutors to overstep the bounds of propriety in oral argument. People v. McChesney, Cal.App., 102 P.2d 455. Prosecutors should remember that the accused is entitled to a fair trial, and that they are duty-bound not to take advantage of their official position so as to deprive him of that right. In the instant case, however, in view of the evidence, it cannot be held that the misconduct was of such a flagrant character as to require a reversal.

[23] Some objection is made as to the giving, and the refusing to give, certain instructions. Appellant offered an instruction on reasonable doubt. The court refused to give the proffered instruction, but in other instructions he informed the jury that all of the elements of the offense had to be proved by the state to a moral certainty and beyond a reasonable doubt. He also instructed the jury almost in the identical words of section 1096 of the Penal Code on the presumption of innocence and as to the effect and definition of reasonable doubt. This is all that was required. Pen. Code, sec. 1096a.

[24] Appellant offered another instruction, which was refused, the object of which was to warn the jury of the danger of a conviction on the uncorroborated testimony of the prosecutrix alone. Such an instruction may be permissible where the act of intercourse is denied, and where there are no corroborating circumstances. In the instant case, the act was admitted and the only issue was whether force and violence had been used. The proffered instruction had no proper place in this case.

[25] The appellant also proffered an instruction dealing with oral admissions. The proffered instruction was refused, and in its place the court instructed that: "You are instructed that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution". The instruction given is in the exact words of section 2061, subdivision 4, of the Code of Civil Procedure. In Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, it was held that section 2061, subdivision 4, supra, was unconstitutional, and that the giving of an instruction based thereon was erroneous. See, also, People v. Tucker, 28 Cal.App.2d 206, 82 P.2d 73. But in the Dana case it was also held that such instruction states a mere commonplace within the general knowledge of juries, and that the giving of such an instruction is not prejudicial error.

[26] Appellant contends that the first part of the instruction was prejudicial in that it in effect told the jury to distrust the testimony of the defendants. We do not believe the instruction should have been given, because the two defendants were both charged with the same offenses. Neither was called as a witness for or against the other, but testified solely on his own behalf. However, for that very reason, it is clear no prejudice could possibly have resulted from the giving of the instruction. The defendants did not appear before the jury as principal and accomplice, but as two principals.

[27] There are other allegations of error made in the briefs of appellant. We have considered all of them and find them to be without merit. No useful purpose would be served by setting forth each one in detail. After reading the record herein we are convinced that the case presented by the prosecution is supported by the overwhelming weight of the evidence. The story told by the prosecutrix is corroborated by the surrounding circumstances and by every physical fact capable of corroboration. The story told by appellant, where different from that told by the prosecutrix, is highly improbable and corroborated only by the testimony of the codefendant. We are convinced that any error that may have crept into the record during the long and hotly contested trial was not prejudicial to the rights of appellant so as to require a reversal.

The judgment and order appealed from are affirmed.

We concur: KNIGHT, J.; WARD, J.

39 Cal.App.2d 232

DONG FAY KWON v. KWON.

Civ. 2381.

District Court of Appeal, Fourth District, California.

May 22, 1940.

1. Stipulations ⇐4

In husband's action to annul marriage, a written "appearance and stipulation" reciting that wife had received a copy of the complaint and made her appearance in the action, and that action might be heard forthwith as default matter at any time without notice, executed by wife in office of husband's attorney, who prepared and took wife's acknowledgment without any independent advice, was a transaction condemned by the law.

2. Appeal and error ⇐641

Where, on husband's appeal from order vacating decree annulling marriage, the only certificate attached to the record was that of county clerk who certified that copies in record were true copies of originals in his office, and there was no certificate by trial judge, appellate court could not consider appeal, and appeal was dismissed.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Dong Fay Kwon against Mae Kwon for annulment of marriage. A decree annulling the marriage was rendered. From an order vacating and setting aside the decree on defendant's motion, plaintiff appeals.

Appeal dismissed.

F. H. Nottbusch, of San Diego (Frank H. Nottbusch, Jr., of San Diego, of counsel), for appellant.

Noon & Noon, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from an order vacating and setting aside a decree annulling the marriage of the parties.

Plaintiff and defendant are Chinese. They were married on May 22, 1938. In August, 1938, plaintiff took defendant to a physician who gave her a physical examination. To quote from the affidavit of the physician, he reported his conclusions in part as follows: "That both Mr. and Mrs. Kwon were informed that I did not believe her to be pregnant at that time and that pregnancy was extremely unlikely without surgical procedure and the chances for that being beneficial were so remote that it was not recommended."

The complaint for annulment of the marriage was filed on September 2, 1938. The sole ground for annulment alleged was that "Defendant was physically incapable of entering into the marriage state in that the Defendant is not able to bear children and that said incapacity continues and appears to be incurable."

On the same day the following "Appearance and Stipulation" was filed:

"Comes now Mae Kwon, the above-named Defendant, and states that she has received a true copy of the Complaint filed herein, and makes her appearance in the above-entitled action and hereby stipulates that the said action may be heard forthwith as a default matter at any time that may be convenient to the Court and without any further notice to the Defendant.

"I hereby waive any notice of trial and notices of any and all further proceedings in the above-entitled matter. I further authorize my appearance to be entered in the above-entitled matter by the filing of this stipulation or otherwise."

"Mae Kwon

"Defendant in proper person."

[1] It is admitted that plaintiff, the husband, took his wife, the defendant, to the office of his attorney who prepared and took her acknowledgment to the appearance and stipulation. Defendant did not have any independent advice in the matter. The law condemns such a transaction. 12 Cal.Jur. 713 et seq.; 13 Cal. Jur. 860 et seq. The decree annulling the marriage was rendered on September 8, 1938, with the foregoing appearance and waiver of notice by defendant taken in lieu of service of process.

On or about November 5, 1938, defendant discovered she was pregnant. On February 7, 1939, she filed her notice of motion, supported by affidavits, to vacate the decree of annulment on the ground of fraud. Plaintiff filed counter-affidavits and testimony was taken. The trial judge permitted defendant to file a supplemental motion to set aside the decree on the ground of mistake. The motion

was granted by the trial court on March 15, 1939, and the decree annulling the marriage was vacated.

During the argument before this court it was admitted that, pending this appeal, defendant had given birth to a child and that plaintiff is the father of that child.

[2] It is impossible for us to consider the appeal because plaintiff has failed to present any record that we can consider here. The only certificate attached to the record is that of the county clerk who certifies that the copies in the record are true and correct copies of the originals in his office. There is no certificate by the trial judge which is necessary in a proceeding of this nature. Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748; Clark v. McCain, 107 Cal.App. 668, 290 P. 901; Guyot v. Cassab, 118 Cal.App. 742, 5 P. 2d 912; Salinas v. Riverside Finance Co., 126 Cal.App. 675, 14 P.2d 1025; Mason v. Coalinga Union H. S. Dist., 31 Cal. App.2d 317, 87 P.2d 921.

The appeal is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.



39 Cal.App.2d 180

PAULIN v. PAULIN et al.

Civ. 6401.

District Court of Appeal, Third District, California.

May 20, 1940.

Hearing Denied July 18, 1940.

1. Contracts ⇐169

Where language of contract was fairly susceptible of either of two different interpretations, it was competent to show circumstances under which the contract was made and the matter to which it related, for purpose of determining intention of the parties.

2. Trial ⇐377(1)

Where trial judge read deposition to himself, so as to expedite trial by being readily familiar with the contents when ruling upon expected objections, though he later forbade portions thereof to be read into record, his conduct was not error as constituting reception of evidence not appearing in the record.

3. Appeal and error ⇐931(6)

The reviewing court must presume that trial judge performed his duty and based his decision upon that which was received in evidence to the exclusion of that which was offered but refused.

4. Appeal and error ⇐683

Refusal to receive parts of deposition in evidence was not reviewable where such parts were designated only by page and line and deposition was not included in the record, since reviewing court cannot consider matters outside the record.

5. Husband and wife ⇐279(1)

In action for interpretation of ambiguous agreement between husband and wife under either interpretation of which payment to wife would have extinguished husband's obligations, court did not err in sustaining objection to question addressed to wife when she was called by husband as an adverse witness, on whether she would have considered such payment full settlement of husband's obligations.

6. Contracts ⇐175(2)

The rule permitting proof of surrounding circumstances in aid of interpretation of ambiguous contracts requires that the circumstances have some probative bearing upon parties' intention in relation to the agreement, and what was intended as the agreement is material, but what a party had in mind as to his future conduct in reference to carrying out or repudiating such intention is irrelevant.

7. Action ⇐6

In action for declaratory relief, wherein the sole issue presented by the pleadings involved interpretation of ambiguous agreement, that the agreement was contra bonos mores and unenforceable because made under understanding that divorce would be obtained by one of the parties was immaterial.

8. Judgment ⇐251(1)

A judgment will not be disturbed because of failure of the trial court to give relief not embraced in the pleadings and not asked for.

9. Husband and wife ⇐279(1)

An agreement, whereby husband agreed to repay $18,000 received by wife as an in-

heritance, which had come under husband's control, "and also in lieu of interest, $100 per month * * * until the said $18,000 is paid in full", reciting that monthly payments should be in lieu of claims for support of wife and child until child should reach age of 14 or until monthly payments should have terminated, a reasonable construction was that the monthly payments were in addition to the principal of the obligation and should be considered both as interest upon the obligation until the indebtedness was paid, and as fulfilling obligation to support.

10. Appeal and error ⇐1008(3)

Where a writing is so uncertain that either of two constructions urged might be sustained, it is not within functions of a court of review to determine that trial court's interpretation should be supplanted by the other construction of which the instrument is susceptible.

11. Contracts ⇐155

Under statute requiring contract to be construed most strongly against person responsible for uncertainty therein, when the uncertainty is not removed by statutory rules, uncertainty is "removed" if there is evidence of circumstances under which the contract was made, warranting a conclusion as to intent of the parties. Civ.Code, §§ 1647, 1654.

See Words and Phrases, Permanent Edition, for all other definitions of "Removed".

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by C. D. Paulin against Grace H. Paulin and another for declaratory judgment determining rights under agreement between husband and wife. From an adverse judgment, plaintiff appeals.

Affirmed.

Boyd C. Barrington and Huron Y. Gibson, both of Los Angeles, for appellant.

Dell A. Schweitzer, Harold W. Schweitzer, and Newby & Newby, all of Los Angeles, for respondents.

LEMMON, Justice pro tem., delivered the opinion of the court.

This action is one in declaratory relief, in which the plaintiff sought to have determined the rights of the parties to an agreement entered into between himself and his former wife during the existence of the marriage relation. From a judgment adverse to him this appeal was taken.

The plaintiff and the defendant, Grace H. Paulin, entered into an agreement on March 5, 1915. The agreement recites that Mrs. Paulin inherited in 1907 approximately $18,000 from her parents, which, during the marriage relation, came under the control and disposition of the plaintiff, and "the said second party (plaintiff) is desirous of repaying to first party (defendant Grace H. Paulin) the said sum of $18,000.00 and also in lieu of interest, $100.00 per month commencing March 1, 1915, until the said $18,000.00 is paid in full; or, in case of the remarriage of the party of the first part, then, and upon the said marriage the said $100.00 shall be reduced to an amount equal to seven per cent per annum on the unpaid portion of the principal of $14,450.00". This latter figure of $14,450 is arrived at by crediting upon the sum of $18,000 property received by Mrs. Paulin under the terms of the agreement at the agreed value of $3,550. Further recital is contained therein that plaintiff is an heir at law under the will of William Henry Paulin, deceased, under which will the defendant, Security First National Bank of Los Angeles, is now acting as a trustee in the administration of a trust created by the will. Provision is found in the agreement under which Mr. Paulin assigned to Mrs. Paulin "a sufficient amount of said property to meet all obligations under and by virtue of this agreement in favor of first party, including premiums on insurance, court costs, or any further charges necessary for the complete carrying out of this agreement". The agreement then provides that Mr. Paulin will procure life insurance upon his life in the sums of $14,450 in favor of the trustee as additional security for the payment of the obligations due and to become due to Mrs. Paulin thereunder. Authorization is given the trustee to disburse from such amounts as may accrue to Mr. Paulin under the will or trust such sums as may be necessary to discharge the following: the expenses of trustee; the premiums on the policy; to Mrs. Paulin "of the said sum of $100 per month"; the balance to Mrs. Paulin "to apply on the amount due her" from Mr. Paulin.

The complaint alleges that a controversy exists between the parties to the agreement and the defendant trustee re-

lating to the construction of the agreement; that the agreement requires the payment by the trustees to Mrs. Paulin of the sum of $14,450 at a minimum rate of $100 per month, and that the full sum of $14,450 has been paid by the trustee to her. The defendant trustee in its answer alleged, and the court made a finding based upon substantial evidence, that the sum of $13,933.16 had been paid by the trustee to Mrs. Paulin up to the date of the trial of the action and that the trustee had expended $2,954.97 out of the trust funds to defray the cost of the insurance upon the life of plaintiff. Mrs. Paulin alleges by answer that by the terms of the agreement the $14,450 is to be paid out of the funds of the estate which would otherwise go to the plaintiff, and in addition thereto, and in lieu of any interest upon the indebtedness, and for maintenance and support of her, and the minor child of herself and plaintiff, the sum of $100 per month commencing on March 1, 1915, and continuing at said rate of $100 per month until the said $14,450 had also been paid to her. The court found in accordance with her contention that the sum of $27,200 had accrued upon the obligation to pay the sum of $100 per month; that the sum of $13,933.16 was to be credited thereon and that there remained owing and unpaid the sum of $13,266.84 plus the said principal sum of $14,450 or the total amount of $27,716.84; that the sum of $100 per month should continue to accrue in favor of Mrs. Paulin until the $14,450 had been paid.

[1] That an ambiguity existed in the agreement as to the obligation of plaintiff thereunder is readily apparent. The language thereof is fairly susceptible to either one of the two interpretations contended for by the parties thereto. For the purpose of determining what the parties intended by the language used, it was competent to show the circumstances under which the contract was made and the matter to which it relates.

[2, 3] Claim is made that the trial court erred in reading the deposition of Mrs. Paulin to himself, and later forbidding portions thereof to be read into the record. As we understand appellant, his position is that this amounted to a reception of evidence by the court which does not appear in the record. This hardly justifies comment. The trial judge had been forewarned that objections would be made to parts of the deposition. No doubt, to expedite the trial, he read the deposition so that he would be readily familiar with the contents when ruling upon objections. We must presume that he performed his duty as required by law and based his decision upon that which was received in evidence to the exclusion of that which was offered but refused. There is nothing in the record remotely negating this conclusion.

[4] Complaint is made that the trial court erroneously refused to receive in evidence parts of the deposition. In the rulings complained of, the trial judge referred to the excluded testimony as being certain designated parts of the deposition as found between certain lines and on certain pages thereof. The deposition is not included in the record. There is nothing otherwise in the record disclosing the testimony which was refused admission. This court cannot consider matters outside the record.

[5, 6] Mrs. Paulin was called to the stand at the trial as an adverse witness. Objection was sustained to a question put to her as to whether she would have considered the payment of $14,450 to her the next day after the signing of the agreement as full settlement of the plaintiff's obligations. Under either interpretation of the ambiguity such payment would have extinguished the obligations. An answer from the witness would not have thrown any light upon what was intended. She was also not permitted to answer questions as to whether at the time of the signing she considered the agreement to be a final property settlement, and what she meant by a statement she made, namely, "I always thought I would get a crack at him when it came to settling up his estate". The obvious purpose of these questions was to show that she had a secret, undisclosed intention to claim what she now asserts. The rule permitting proof of surrounding circumstances in aid of interpretation requires that the circumstances have some probative bearing upon the intention of the parties in relation to the agreement entered into. What was intended as the agreement is material but what a party thereto had in his mind as to his future conduct in reference to carrying out or repudiating that intention is not relevant to the issue.

[7, 8] Appellant contends that the evidence proves an understanding that a

divorce would be obtained by one of the parties was a consideration for the contract and that this renders the agreement contra bonos mores and unenforceable. The court made no finding upon this because it was outside the issues formed by the pleadings. The complaint is not an attack upon the agreement but is predicated upon the premise that the agreement is valid and enforceable. The sole issue presented by the pleadings involved the interpretation of the agreement. Neither can it be said that the case was tried with the theory that this issue was involved. It is raised for the first time upon this appeal. A judgment will not be disturbed because of a failure of the trial court to give relief not embraced in the pleadings and not asked for. Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L.R.A.,N.S., 772; Green v. Carotta, 72 Cal. 267, 13 P. 685.

There remains the question as to whether the construction of the contract claimed by Mrs. Paulin and adopted by the court can be sustained.

[9] The instrument in question contains the statement that "the said payments as herein provided shall be taken by first party in lieu of claims against second party for the maintenance and support of said first party and the minor child of the parties hereto until such child shall have reached the age of fourteen years, or until, according to the terms of this agreement, the said $100.00 payments shall have terminated". The minor child reached the age of fourteen December 16, 1926. Appellant contends that in any event the $100 payments should cease on that date. When read together the various provisions may be interpreted to mean that the $100 monthly payments were to be considered both as interest upon the $14,450 obligation until that indebtedness was paid, and in full of the obligation to support the wife and child until the child reached the age of fourteen, at which time the requirements for his education and support might necessitate the payment of some additional amount.

This agreement was intended, at the time of execution, to settle the property rights of the parties and to determine the financial responsibility of appellant for the support of his wife and child. The child was then of the age of two years. We see nothing oppressive or unreasonable in the contract under which appellant agrees to repay to his former wife the value of property, which he admitted had come under his control and which originally came to her as her personal inheritance, and, in addition thereto, the sum of $100 per month until such time as there was returned to her the equivalent of her inheritance. His interest in his father's estate, recited in the instrument to approximate $30,000, forces the conclusion that under the circumstances disclosed, $100 per month for wife and child support, and also as interest upon the agreed indebtedness until the principal sum is repaid, was not unreasonable, and that the interpretation placed upon the contract does not "shock the conscience and common sense of men" as appellant contends.

[10] There was very little extrinsic evidence before the court to aid in the interpretation. Mrs. Paulin was the only witness called. She remembered of no conversation had with appellant about the agreement or its provisions prior to the execution. The court in determining the intent of the parties was obliged to depend upon the document, and the relations between the parties herein detailed. We must conclude that the interpretation reached finds support. Where a writing is so uncertain that either of two constructions urged might be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by the other construction of which the instrument is susceptible. Slama Tire Protector Co. v. Richie, 31 Cal.App. 555, 161 P. 25; Kautz v. Zurich, etc., Ins. Co., 212 Cal. 576, 300 P. 34; Teater v. Good Hope Development Corp., 14 Cal.2d 196, 93 P.2d 112; Lewis v. Lewis, 34 Cal.App.2d 422, 93 P.2d 850.

[11] The agreement in question was prepared by Mrs. Paulin's counsel. Appellant concludes that, since Mrs. Paulin is responsible for the uncertainty which exists in the contract, section 1654 of the Civil Code requires that the uncertainty be construed most strongly against her. That section, by its terms, is to be invoked when the uncertainty is not removed by the rules set forth in the preceding sections of that code. Section 1647 provides that a contract may be explained by reference to the circumstances

under which the contract was made, and the matter to which it relates. It was proper for the court to take into consideration the situation of the parties and the relations between them as well as the objects sought to be accomplished by the agreement. The uncertainty is removed, within the meaning of section 1647, if there is evidence of circumstances under which the contract was made, warranting a conclusion as to the intent of the parties. What has been heretofore recited in that regard justifies the interpretation made by the trial court.

The judgment is affirmed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.



39 Cal.App.2d 243

HEAD et al. v. LOGAN.

Civ. 6269.

District Court of Appeal, Third District, California.

May 23, 1940.

1. Appeal and error ⇐916(1)

Where bill of particulars in action on open book account was not admitted in evidence and was not in the record, and hence was not before appellate court, such court would conclude in support of judgment that items admitted in evidence were included in bill of particulars. Code Civ.Proc. § 454.

2. Appeal and error ⇐1039(13)

In action on open book account, admission in evidence of items which were allegedly not contained in bill of particulars was not prejudicial, where questions objected to related to payments made on account, one question remained unanswered, and plaintiffs' bookkeeper testified as to payment of a certain sum on account by defendant, and trial judge observed that he had examined demand made for bill of particulars and that demand covered only items charged to account, and that no mention was made of credit items. Code Civ.Proc. § 454.

3. Account, action on ⇐6(5), 7

In action on open book account, it was not incumbent on plaintiffs to prove any more than indebtedness of defendant and in respect thereto were limited in their proof to items set forth in bill of particulars, and where payments on account made by defendant were not demanded, such items were not required to be furnished, and statutory rule limiting the proof could not be invoked in respect to them. Code Civ.Proc. § 454.

4. Witnesses ⇐255(2, 4)

In assignee's action on open book account, assignor's bookkeeper who kept all the books and accounts and made all entries therein, which entries were made from sales tags, some of which were not made out by bookkeeper, was properly permitted to refresh his memory from such tags to show the amount of the indebtedness.

5. New trial ⇐13

The statute providing for new trial on ground of irregularity in proceedings of adverse party by which defendant was prevented from having a fair trial refers to matters which may not be fully presented by exceptions taken during progress of trial and which must be shown by affidavit. Code Civ. Proc. § 657, subd. 1.

6. New trial ⇐18, 35

The admission of evidence not appearing in bill of particulars in action on open book account, the reopening of case on motion of plaintiffs without showing that plaintiffs could not have produced all available evidence at first hearing and permitting second amended complaint without notice to defendant did not require grant of new trial on statutory ground of irregularity in proceedings of adverse party by which defendant was prevented from having a "fair trial". Code Civ.Proc. § 657, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Fair Trial".

7. Appeal and error ⇐978(1)
New trial ⇐13

The question whether under all circumstances an irregularity has materially affected substantial rights and prevented a "fair trial" is addressed to discretion of trial court which, having heard and seen the witnesses, and having knowledge of circumstances which may not be reproduced in the record, is in better position than appellate court to determine the effect. Code Civ.Proc. § 657, subd. 1.

8. New trial ⇐13

In action on open book account, refusal to grant new trial because of "irregularity in the proceedings of the adverse party by which defendant was prevented from having a fair trial" was not an abuse of discretion. Code Civ.Proc. § 657, subd. 1.

9. Appeal and error ⇐918(1)

The appellate court must presume in support of judgment that permission was granted to file second amended complaint.

10. Appeal and error ⇐1041(2)

The filing of second amended complaint allegedly without leave of court was not prejudicial, where action was a simple one to recover upon an open book account, and the only difference between the first and second amended complaints was in respect to balance claimed to be due plaintiffs.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by Guy Head and another, copartners doing business under the firm name and style of Evans Mercantile Store, against J. T. Logan to recover on an open book account. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Carter, Barrett, Finley & Carlton, of Redding (Thomas J. Fanning, of San Francisco, of counsel), for appellant.

James Davis, of Yreka, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought by plaintiffs to recover the sum of $1,120.97. In a second cause of action plaintiffs sue to recover the sum of $52.82 alleged to be due them as assignees of S. H. Gillette, and in a third cause of action they seek to recover the sum of $94.46 due them as assignees of W. G. Grant. All causes of action are predicated upon an open book account. The court found in favor of plaintiffs upon all counts, and judgment was rendered as follows: Upon the first count, $1,101.32; upon the second, $48.64, and upon the third, $93.17. Defendant appeals from the judgment.

Plaintiffs, during the years 1934 and 1935, were engaged in general mercantile business at Happy Camp, Siskiyou county. Defendant, during that time, was conducting mining operations in the vicinity. The evidence shows that various and numerous articles were purchased from plaintiffs by defendant, and that plaintiffs at times advanced cash to defendant. Payments were made upon the account on many occasions. The first contention made by appellant is that the evidence is insufficient to support the findings. An examination of the record discloses that there is ample evidence to justify the finding, and the point is without merit.

[1-3] It is next urged that the trial court erred in admitting in evidence items which were not contained in a bill of particulars filed by plaintiffs. Sec. 454, Code Civ.Proc. As the bill of particulars was not admitted in evidence, nor is it in the record, and consequently is not before us, we must conclude in support of the judgment that the items mentioned were included in the bill of particulars. Furthermore, we can see no prejudice resulting from the admission of such evidence, assuming that the items were not included in the bill. The questions objected to by appellant related to payments made on the account by appellant. On one occasion appellant said he did not know, and would have to look it up. The question, therefore, remained unanswered. On another occasion Mrs. Head, bookkeeper for respondent, testified, over the objection of appellant, as to a payment of $100 on account by appellant. These are the only instances mentioned by appellant in connection with the point raised. We note that the trial judge, in overruling appellant's objection to testimony covering credits upon the account, observed that he had examined the demand made by appellant for a bill of particulars, and that such demand covered only items charged to the account of appellant, and that no mention was made therein of credit items. "You asked", the court said, "specifically in your demand for the bill of particulars, for certain things, and they were furnished". This is not only good common sense, but is a fair and equitable view. It certainly was not incumbent upon respondents to prove any more than the indebtedness of appellant, and in respect thereto they were limited in their proof to the items set forth in the bill. Sec. 454, Code Civ.Proc. Payments on account made by appellant were not demanded, and, therefore, not required to be furnished; hence, the rule limiting the proof under section 454, Code

of Civil Procedure, cannot be invoked in respect to them.

[4] It is next contended, with reference to the second cause of action, that the evidence of Henry, bookkeeper of assignor Gillette, was improperly admitted. This witness kept all the books and accounts of Gillette, and made all entries therein. The entries in the books were made from sales tags, some of which were not made out by Henry. It is contended that the witness could not use such tags to refresh his memory. He testified that the books showed defendant to be indebted to Gillette in the sum of $50.82. As these books were predicated upon the sales tags, it was not error to permit the witness to refresh his memory from such tags. Furthermore, the matter is of little consequence, as appellant admitted he owed $44 on the account. The contention is without merit.

[5-7] Appellant contends that the trial court erred in refusing to grant his motion for new trial. One of the grounds set forth in his motion for new trial was "irregularity in the proceedings of the adverse party by which defendant was prevented from having a fair trial". Sec. 657, subd. 1, Code Civ.Proc. In this connection he relies upon "the trial court's action in overruling evidence as to items not appearing in plaintiffs' bill of particulars, the reopening of the case by the court upon the motion of plaintiffs when no showing was made that plaintiffs could not have produced all available evidence at the first hearing and the toleration by the court of a second amended complaint filed by plaintiffs without notice of any kind to defendant, without motion therefor having been made, and without leave of court having been given, were highly prejudicial to defendant, and for which reasons he was prevented from having a fair trial. Furthermore, the trial court held that defendant was strictly bound by any statements made by him against interest, but, on the other hand, the court allowed plaintiffs to change their testimony at several points over the objection of defendant." In 20 California Jurisprudence, page 43, section 22, referring to the ground mentioned above, it is said: "This ground refers to matters which may not be fully presented by exceptions taken during the progress of the trial, and which, therefore, must be shown by affidavit." We do not believe that the matters mentioned come within the rule stated. Furthermore, it is held in 20 California Jurisprudence, page 44, section 23: "The question whether, under all the circumstances, an irregularity has materially affected substantial rights and prevented a fair trial is addressed to the discretion of the trial court, which—having heard and seen the witnesses, and having knowledge of circumstances which may not be reproduced in the record—is in better position than the appellate court to determine the effect."

[8] We cannot say that the trial court abused its discretion in holding that there were no irregularities of the nature specified.

[9, 10] It is contended that plaintiff filed a second amended complaint without first having obtained leave of court. This pleading was accompanied by an amended bill of particulars, which does not appear in the record. Appellant's demurrer to this complaint was overruled, and an answer was filed thereto. The findings also refer to the second amended complaint. The second amended complaint was thus treated and recognized by the trial court as having taken the place of the first amended complaint. The record is silent as to whether or not permission was given to file the pleading in question. We must therefore presume, in support of the judgment, that such permission was granted. Furthermore, no showing of any prejudice resulting from the use of the second amended complaint is made by appellant. The action is a simple one to recover upon an open book account, and the only difference between the first and second amended complaints is in respect to the balance claimed to be due respondents. In the first, the amount of $1,120.97, while in the second, it is $1,116.32. The point is absolutely devoid of merit.

Several other contentions are made by appellant, but like those discussed, they have no substantial merit. We have examined the entire record, and are satisfied that the conclusion reached by the trial court was a just and proper one.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

39 Cal.App.2d 175

GROSS v. MOLONY et al.

Civ. 12468.

District Court of Appeal, Second District, Division 2, California.

May 20, 1940.

Hearing Denied July 18, 1940.

1. Physicians and surgeons ⇐11(1)

The statutes of 1909 providing for endorsement of certificates of naturopaths but for revocation of "all certificates herein mentioned," and subsequent statutes, manifest intent that endorsement of certificates should be held to be the issuance of a license, and hence naturopaths practicing in 1909 by virtue of endorsement of certificates were subject to regulation, including revocation of license. St.1937, p. 1274, § 2378; p. 1229.

2. Physicians and surgeons ⇐11(3)

Findings of the Board of Medical Examiners that person was guilty of violating the Business and Professions Code must be sustained if substantial evidence was presented to the board to support the charges. St.1937, p. 1259, § 2141.

3. Physicians and surgeons ⇐11(3)

Evidence that naturopath prescribed capsules of grayish powder and a liquid with a large content of glycerine authorized placing naturopath on probation on ground of violation of statutes authorizing naturopaths to prescribe only "herbs" and similar treatment. St.1937, p. 1259, § 2141.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Henry Gross against William R. Molony, President of the Board of Medical Examiners of the state of California, and others, for writ of mandate directing the Board of Medical Examiners to set aside and dismiss charges of unprofessional conduct and to refrain from preventing petitioner from prescribing for patients. From orders sustaining demurrer and dismissing the petition, petitioner appeals.

Order dismissing the petition affirmed, and appeal from order sustaining demurrer dismissed.

J. H. Morris, of Hollywood, for appellant.

Earl Warren, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for respondents.

WOOD, Justice.

Petitioner has been for many years practicing in the city of Los Angeles a system of healing known as naturopathy. He seeks by this proceeding to secure a writ of mandate directing respondent board of medical examiners of the state of California to set aside and dismiss charges of unprofessional conduct which were filed against him and to refrain from preventing him from prescribing for patients in the manner set forth in his petition. The superior court sustained the demurrer of the respondents and dismissed the petition for the writ. From this order the appeal is prosecuted. Attached to the petition for the writ as exhibits are copies of two complaints which had been filed with the board and a statement of all the evidence received by the board at the hearing upon the charges. The board found petitioner guilty of the violation of section 2378 of the Business and Professions Code, St.1937, p. 1274, and placed him on probation for the term of three years.

Petitioner now contends that respondent board is without jurisdiction over naturopaths and has no authority to place him on probation or to revoke his license. Before 1909 no statute was in force providing for the licensing of naturopaths. It was provided in chapter 276, page 418, of the Statutes of 1909 that any person holding "an unrevoked certificate" issued by the board of examiners of the Association of Naturopaths of California, incorporated under the laws of the state of California, August 8, 1904, and who shall have practiced naturopathy prior to the passage of the act should continue to be entitled to practice naturopathy and that the board of medical examiners should endorse their certificates within six months from the date of the passage of the act. It was also therein provided: "But all certificates herein mentioned may be revoked for any unprofessional conduct, in the same manner and upon the same grounds as if they had been issued under this act." Naturopathy was not defined in the statutes of 1909.

The legislature in 1913 enacted chapter 354, page 722 et seq., of the statutes of

that year, which repealed the Medical Practice Act theretofore existing, created a new board of medical examiners, and for the first time provided for the issuance of licenses to so-called drugless practitioners. In this law the provisions relating to naturopaths were eliminated, and since its enactment persons who desire to be licensed to engage in drugless methods of healing, such as naturopathy, must secure a drugless practitioner's certificate from the board of medical examiners. The Medical Practice Act was codified in the year 1937 and became a part of the Business and Professions Code, St.1937, p. 1229.

[1] The legislature by comprehensive enactment has provided for the licensing and regulation of all engaged in the various healing arts. We are satisfied that it was the intent of the legislature that the endorsement of a certificate of a naturopath, as provided in the statutes of 1909, should be held to be the issuance of a license to the party whose certificate was endorsed. This is apparent from the express provisions in the act that certificates therein mentioned could be revoked for unprofessional conduct "as if they had been issued under this act". It would be unreasonable to contend that all persons engaged in curing human ailments are subject to regulation except the small number who were practicing naturopathy in 1909.

Petitioner also contends that the evidence presented before the board is insufficient to justify a finding of his guilt of violating section 2141 of the Business and Professions Code, which section provides that it is a misdemeanor for any person to practice a system or method of treating the sick without having at the time a valid certificate so to do. It is set forth in the petition that in accordance with the articles of incorporation of the Association of Naturopaths, the "Materia Medica of said Association is, and its members are authorized to treat patients by use of 'light, air, water, clay, heat, besides exercise, rest, nonstimulating diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics chiropractic, magnetism, physical and mental culture, etc., etc'." It is argued that petitioner did nothing which was not authorized in accordance with these articles of incorporation. At the hearing before the board evidence was introduced concerning the treatment of two parties, Mrs. Keeney and Mrs. Hathaway. In the case of Mrs. Keeney it was shown that the patient was a sufferer from arthritis. The transcript of the hearing before the board discloses testimony as follows: "He (petitioner) prescribed two different bottles of capsules at $10 each, one to be taken at the beginning of the meal and the other before the finish of the meal. In about 30 days he gave her another type of medicine in a bottle which contained about 100 capsules at $10, and it is marked, 'Raw Endocrine Products Ltd., 1403 West Florence Avenue, Twinoaks 3819', and written on below, 'Mrs. Keeney, No. 7349, one capsule with meals, Dr. Henry Gross, 10–26–38—." Another bottle, which Mrs. Keeney received, was marked, 'Mrs. Keeney, October 27, 1938, Mixed Vitamins, take 2 tablets 3 times a day, with each meal, 100 tabs.,' this appearing in typewriting". Mrs. Hathaway was treated for a disorder of her thyroid gland and lower colon. The transcript also discloses this testimony: "That he wrote a prescription for her and sent her to the Raw Endocrine Products, Ltd., 1403 West Florence Avenue, Los Angeles. That, on a presentation of the prescription to the Raw Endocrine Products Ltd., at the address referred to, Mrs. Hathaway was given a capsule of grayish powder". It was stipulated that Mrs. Keeney if called as a witness would testify that she was directed by Dr. Gross to purchase a product known as Alpha Naphco. By stipulation the matter on the label of the bottle containing the product was made a part of the record and was read by the deputy attorney-general: "Alpha Naphco, formerly Benetol. Activity—(spelling) Phen. coef.—I imagine that is 'coefficient.' (continuing reading:) '—H. L. Test 1.46. Phenol coefficient against yellow pus germs in ½ blood serum ½ saliva at body heat 3.11. Inert Ingredient—Inred.—' It reads here—(continuing reading:) 'Glycerine 32%, Water 40%. Contents—Not less than six ounces liquid. Carel Laboratories, Redondo Beach, California, Formerly Benetol Products Co.'". It was also stipulated that R. W. MacCorkell would, if present, testify that he is a chemist, and "that the substance which he received as that given Mrs. Keeney by Dr. Gross and that substance given Mrs. Hathaway is a beef

or muscle substance but that it may be a medicine, a chemical or compound found in materia medica, and is not composed of herbs in their natural form."

[2, 3] It was the function of respondent board to pass upon charges that petitioner was guilty of violating the Business and Professions Code and its findings must be sustained if substantial evidence was presented to the board to support the charges coming before it. We are satisfied that the evidence above stated was sufficient to sustain the findings of the board and that the superior court ruled correctly in dismissing the petition. It would not be necessary to call experts to convince the board, whether composed of medical men or not, that the prescription of capsules of grayish powder and a liquid with a large content of glycerine, could not be classified as the use of "herbs" or of any other means which naturopaths are authorized to employ.

The order dismissing the petition for a writ of mandate is affirmed. The purported appeal from the order sustaining the demurrer is dismissed.

We concur: MOORE, P. J.; McCOMB, J.



39 Cal.App.2d 164

PEOPLE v. BANKS.

Cr. 3330.

District Court of Appeal, Second District, Division 1, California.

May 20, 1940.

1. Gaming ⇐98(1)

Evidence was insufficient to support conviction of receiving money to be used as a wager upon the result of a horse race. Pen. Code, § 337a, subd. 3.

2. Criminal law ⇐1134(2)

Evidence improperly admitted in rebuttal could not be considered in determining whether evidence was sufficient to sustain conviction.

3. Criminal law ⇐655(1)

Where record in connection with proceedings on motion for new trial revealed likelihood of evidence outside of record influencing outcome of trial, as well as ruling on motion for new trial, in that trial judge to whom cause was submitted without intervention of jury stated that he was satisfied that defendant was bookmaker and that he had seen defendant in action, conviction of receiving money to be used as a wager upon the result of a horse race was reversed. Pen.Code, § 337a, subd. 3.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Norman Banks was convicted of receiving money to be used as a wager upon the result of a horse race, in violation of Criminal Code, § 337a, subd. 3, and he appeals.

Reversed.

Henry C. Huntington, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The defendant and appellant, Norman Banks, was charged in an information filed by the district attorney, in effect, with receiving money to be used as a wager upon the result of a horse race, in violation of subdivision 3, section 337a of the Penal Code.

At the trial in the superior court a jury was duly waived by the defendant and, by stipulation, the cause was submitted upon the transcript of the evidence adduced at the preliminary hearing, supplemented by the testimony of additional witnesses produced on behalf of defendant, and on behalf of the People in rebuttal.

The defendant was adjudged guilty, and the appeal is from the judgment and from the order denying defendant's motion for a new trial.

The transcript of the evidence adduced at the preliminary hearing revealed the following testimony. Police Officer R. L. Lake, on October 10, 1939, at noontime, was sitting at the counter of a cafeteria on Sixth street near Main in Los Angeles. The defendant walked up to the counter and sat down next to a lady, who was sitting beside Officer Lake and who was identified at the trial in the superior court as

Mrs. Irma Howard. The witness Lake testified that he heard the defendant ask Mrs. Howard if she had any horses that she wished to bet on that day, and that she told the defendant she wanted to bet "across the board" on a horse named "Bonicon", in the fourth race at Bay Meadows. Mrs. Howard gave the defendant $6.40. The defendant put the money in his coat pocket, wrote something on a small scratch pad, turned around and walked out of the cafeteria. The witness Lake also left the cafeteria, and he then saw the defendant standing across the street talking to two or three men in front of a magazine shop.

Officer Lake testified that "Bonicon" was the name of a horse running in the fourth race that day at Bay Meadows, which is a racetrack in the northern part of the state.

Lake further testified that he saw the defendant again on the following day in the same cafeteria, at which time the defendant was walking up and down the aisle writing something, but that he, the witness, could not see what was written. The defendant was arrested that afternoon. No "scratch sheet" or racing form was found on his person.

Mrs. Irma Howard did not testify at the preliminary hearing, but did testify at the trial on behalf of the defendant. She stated that she had known the defendant for about five years, and also knew his wife; that she ate at the cafeteria almost every day, and that she saw the defendant nearly every time she was there; that on October 10, 1939, she was sitting at the counter, and that she saw the defendant standing near the doorway; that she called to him and said: "I believe I owe you $6.40" which, she testified, was the balance due him on a loan of $10 which he had made to her three or four weeks previously. Mrs. Howard testified that she frequently borrowed money from the defendant. The witness denied that she had ever made a bet on horses with the defendant, although she had placed some bets at the racetrack.

Mr. Gerald Thornton, a bartender at the cafeteria, also testified on behalf of the defendant. He corroborated the testimony of Mrs. Howard with regard to her conversation with the defendant at the time she handed the latter the sum of $6.40. Thornton testified that he did not remember anything being said about horses.

Appellant testified in his own behalf and related the same story that had been previously told by Mrs. Howard and Mr. Thornton. He stated, in addition, that he was in the retail luggage business on Hollywood boulevard, with his brother, but that he spent considerable time around noontime at the cafeteria in question; that he received a monthly income of from $100 to $300 from the Ben-Banks Realty Company. Appellant testified that he had placed bets on horses at three or four different bookmakers' establishments, but denied that Mrs. Howard had given him any money for the purpose of wagering on a horse.

[1] The foregoing constitutes the only legal evidence in the case. Manifestly it is not sufficient to support a judgment of guilty unless the doctrine of reasonable doubt is to be disregarded.

[2] It is true that respondent, in addition to the above, relies upon so-called rebuttal evidence received over defendant's objection, consisting of testimony by one Emery, another police officer. However, such evidence, even assuming that it had some probative value, having been improperly admitted, may not be taken into account.

[3] But the judgment must be reversed for additional reasons. In connection with the proceedings on the motion for a new trial, the record reveals the likelihood or possibility of evidence outside of the record influencing the outcome of the trial, as well as the ruling on the motion for a new trial. For example, the trial judge in passing on the motion for a new trial stated the following, referring to the defendant:

"The Court: * * * I still do not believe him. I am satisfied he is a bookmaker; I am satisfied the place that he is hanging around is a bookmaking establishment. In fact, I have seen him in action myself, if that will stop him.

"Mr. Erbsen (defendant's counsel): Seen him in action?

"The Court: Yes, down at the Tiffin, and all around there. I have my lunch down there every day."

In the circumstances, the judgment and the order denying the motion for a new trial must be reversed, and it is so ordered.

We concur: YORK, P. J.; WHITE, J.

39 Cal.App.2d 163

SCOTT v. LANDIS et al.

Civ. 2397.

District Court of Appeal, Fourth District, California.

May 17, 1940.

1. Appeal and error ⇐627(2)

Where no transcript is filed within time required by law after perfecting of appeal, and there is no statement or bill of exceptions, which can be used upon appeal, settled or pending settlement, appeal may be dismissed.

2. Appeal and error ⇐627(2)

Where notice of appeal and notice to prepare transcript were filed on January 19, 1940, and court ordered transcript prepared, and appellant requested clerk to withhold preparation of transcript pending determination of motion which was denied February 5, 1940, and no further instructions were given to clerk, and no deposit was made or undertaking filed to cover costs of transcript, and no proceedings were instituted for bill of exceptions, respondent's motion as of May 14, 1940, to dismiss appeal would be granted. Code Civ.Proc. § 953a.

3. Appeal and error ⇐782

An attempted appeal from order denying motion for new trial would be dismissed.

Appeal from Superior Court, Kern County.

Action by William Harvey Scott, doing business under the fictitious name and style of Associated Credit Exchange, against Austin Landis and Anna L. Dale, also known as Mrs. Austin Landis. From the judgment and order denying motion for new trial, the defendants appeal.

Appeal from judgment and attempted appeal from order denying motion for new trial dismissed.

Austin E. Park, of Randsburg, for appellants.

Morris McLaughlin, of Los Angeles, for respondent.

GRIFFIN, Justice.

[1-3] In the above-entitled case the certificate of the county clerk of Kern county, filed herein, shows that the notice of appeal from the judgment and order denying a motion for new trial was filed on January 19, 1940. Notice to prepare a transcript under section 953a of the Code of Civil Procedure was filed on the same date. The court thereafter ordered a transcript prepared. Appellant requested the clerk to withhold preparation of the transcript pending the determination of a certain motion. On February 5th the motion was denied. No further instructions were given to the clerk. No deposit was made or undertaking filed to cover costs of the transcript. No proceedings were instituted for a bill of exceptions. On May 14, 1940, for the reasons stated, respondent moved to dismiss the appeal. Due service of the notice of motion was given. Appellants failed to appear in response to the notice. Where no transcript is filed within the time required by law after the perfecting of an appeal and there is no statement or bill of exceptions, which can be used upon appeal, settled or pending settlement, the appeal may properly be dismissed. Tompkins v. Montgomery, 116 Cal. 120, 47 P. 1006; Buckley v. Althorf, 86 Cal. 643, 25 P. 134; Judge v. Ohm, 89 Cal. 134, 26 P. 649.

Appeal dismissed. The attempted appeal from the order denying motion for new trial is dismissed.

We concur: BARNARD, P. J.; MARKS, J.



39 Cal.App.2d 189

CORDI v. GARCIA et al.

Civ. 6289.

District Court of Appeal, Third District, California.

May 21, 1940.

Rehearing Denied June 20, 1940.

Hearing Denied July 18, 1940.

1. Appeal and error ⇐1002

Reviewing court was bound by implied finding of jury based on conflicting evidence that plaintiff's loss of power in arm was due to injury inflicted by automobile driven by one of the defendants.

2. Appeal and error ⇐1048(5)

In pedestrian's action to recover for injuries sustained when struck by automobile at crossing, question asked on cross-examina-

tion of mother of automobile driver, whether her boy had previously caused her trouble by getting into other automobiles, was improper, but did not constitute prejudicial error, where trial court ruled that question was improper cross-examination and it was not answered.

3. Appeal and error ⇐1060(1)

In action by mail carrier for injuries, reference, in argument of counsel for carrier, to his possible loss of retirement pension resulting from his forced retirement because of his injuries was reversible error, where the possibility of carrier's retirement was remote and speculative, and argument was contrary to provisions of Federal Retirement of Civil Service Employees Act, and reviewing court was unable to determine what proportion of verdict was affected by argument. Civil Service Retirement Act, 5 U.S.C.A. §§ 691–710.

4. Evidence ⇐368(1)

Where a party to an action has in his possession in court documents which would be competent evidence against him, adverse party may, under proper circumstances, be entitled to an order permitting the inspection and use of them.

5. Appeal and error ⇐1047(5)
Evidence ⇐368(2)

In action for personal injuries, trial court did not commit reversible error in refusing to compel the production of reports submitted to plaintiff's physician by specialists who had examined plaintiff which were sought by defendant for purpose of cross-examination of plaintiff's physician.

6. Appeal and error ⇐1060(1)

In action for personal injuries, it was prejudicial error for plaintiff's attorney to refer in his argument to jury to contents of reports or letters affecting plaintiff's injuries, the inspection and use of which documents were refused and which were not received in evidence.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Ed. L. Cordi against Rosa Garcia, Manuel Garcia, and others to recover damages sustained when plaintiff was struck by an automobile. From a judgment for the plaintiff, defendants appeal.

Reversed.

Butler, Van Dyke & Harris, of Sacramento, and Hoge, Pelton & Gunther, of San Francisco, for appellants.

L. C. Smith, of Redding, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

A verdict was returned for plaintiff in the sum of $8,000 as damages for injuries sustained by him as the result of being struck by an automobile while he was crossing a street in Redding. He was then engaged in performing his duties as a government letter carrier. Judgment was rendered in accordance with the verdict. For the purpose of appeal it was conceded there is substantial evidence to show that the driver of the machine was guilty of negligence and that the plaintiff was free from contributory negligence. It is insisted the plaintiff was only slightly injured; that the judgment is excessive; that the court erred in its rulings in the course of the trial and that defendants' attorney was guilty of prejudicial misconduct requiring a reversal of the judgment.

June 24, 1937, Manuel Garcia, a minor, was driving a Buick automobile owned by his mother along a public street in Redding. He was on the wrong side of the street and was paying slight attention to his driving. The plaintiff, a United States letter carrier, 52 years of age, who had served the government in that capacity for seventeen years, was crossing the street in the middle of a block when he was struck by the bumper of defendants' machine. He was knocked down by the force of the blow. The contents of his mail bag were scattered on the pavement. He received injuries to his right shin and to his left shoulder. He was considerably shocked by the fall and was dazed and dizzy for a short period of time thereafter. An interval of about two hours elapsed before he resumed his duties and he was never thereafter incapacitated from the regular performance of his work. The entire case turns on the questions as to the seriousness of plaintiff's injuries and upon the effect of the alleged errors of the court and the misconduct of defendants' attorney. Eighteen months passed from the time of the accident to the trial of the case.

Several medical expert witnesses testified regarding the effect of the injuries

sustained to plaintiff's right leg and left shoulder. Their evidence is conflicting. There is substantial proof that the small bone of the right leg has thickened considerably as a result of the injury, and that the plaintiff suffered recurrent pain on that account. There is evidence that he suffers from pain in his feet which may be accounted for by the necessity of constant use of them in the performance of his duties. The chief controversy relates to the injury of his left shoulder. There is no doubt plaintiff has sustained a partial loss of the functioning power of his left arm. He suffers pain when he attempts to raise that arm vertically. He said he had no such loss of power or pain prior to the accident. Two physicians testified positively that his loss of functioning power and pain in that shoulder were attributable to the injury received. Other physicians just as emphatically asserted a chronic condition of arthritis in that shoulder caused the loss of functioning power and that it is not due to the injury received. As this court said under similar circumstances in the case of Reuter v. Hill, 136 Cal.App. 67, at page 79, 28 P.2d 390, at page 395: "In view of the conflict in evidence, it became a problem for the jury to determine whether the plaintiff was suffering from a broken ankle and a wrenched spine, or whether he was afflicted with arthritis only."

[1] Since there is a conflict of evidence in that regard, this court is bound by the implied finding of the jury that the loss of power in the arm is due to the injury received.

[2] There is no error in the ruling of the court on the cross-examination of Mrs. Rose Garcia, the mother of the boy who drove the automobile which was involved in the accident. She was asked by plaintiff's attorney if she had not previously had trouble on account of her boy "getting into other automobiles". Counsel for the defendants assigned that question as prejudicial. Of course it was improper, but it was harmless. On the court's own motion the judge ruled that it was improper cross-examination, and the question was not answered.

The cause was tried with unusual vigor on both sides. There were frequent verbal conflicts between counsel which tended to disturb the regular progress of the trial. The charges and counter-charges of counsel occasionally became acrimonious. In spite of that fact the trial judge appears to have retained his judicial temper remarkably well. He seems to have fairly and impartially determined the issues which were presented to him. Some of his remarks to counsel which have been challenged as prejudicial, in our opinion, have been misconstrued. We find nothing prejudicial in the conduct of the trial judge.

Two incidents occurred in the course of the trial which, on account of the amount of the verdict as applied to the extent of the injuries received by the plaintiff, seem to require a reversal of the judgment.

At the close of plaintiff's evidence, he moved the court in the presence of the jury to amend his complaint by increasing his demand for judgment from $10,000 to $17,400 to conform to the evidence. The theory which was argued by the plaintiff was that if he became totally disabled on account of his injuries from performing his duties as a government mail carrier he would forfeit his right to $100 per month as federal civil service retirement pension, aggregating the additional sum of $13,200 as damages to which he would be entitled. That prospective loss was calculated on plaintiff's expectancy of life based on accepted mortality tables. It is true that the complaint alleges that plaintiff "in a very short time" would be required to cease working and that he would then "forfeit said fifteen years' seniority with the United States postoffice and the value thereof" on account of his injuries. In his argument to the jury plaintiff's attorney urged the jury to consider, in fixing the amount of their verdict, the plaintiff's forfeiture of his pension when he was forced to retire. He said, "I * * * only asked for ten thousand dollars. I didn't know that that leg was going to grow progressively worse. * * * The only thing that will have any tendency or possibility of relieving that condition * * * is for him to stay off his feet, * * * which means he must give up his pension, his seventeen long years of service."

To that statement the defendant's attorney objected. He asserted that it was not true that the plaintiff would forfeit his pension. He assigned the statement as prejudicial misconduct. The court merely replied, "It will be up to the jury."

Plaintiff's attorney further argued along that line: "The records show the man is now suffering from an injury he received when he was struck by this automobile, and he will continue to suffer from it the rest of his natural life. * * * Let's not be picayunish about it. Let's be reasonable. If counsel thought Mr. Cordi wasn't hurt, and hurt badly, why did he make such an ado when I wanted to amend my complaint and ask for more money?"

Continuing his argument the attorney further said: "At the age of sixty-five had he (Mr. Cordi) not received that injury he would have had a pension coming to him of One Hundred Dollars a month, * * * we could count on * * * at the end of a thirty year grind. * * * At the age of sixty-five * * * Mr. Cordi has the right to expect that he will have a normal span of life remaining of eleven years; * * * that he would have the right to expect the sum of approximately twelve hundred dollars a year, one hundred dollars a month. * * * Eleven years at twelve hundred dollars a year is thirteen thousand two hundred dollars that he would normally expect to get from the United States government from the time he reached his age of sixty-five, and through the pension to the time of death there is a potentional thirteen thousand two hundred dollars that he has been damaged."

To this latter statement counsel for the defendants again objected, assigning it as prejudicial misconduct, and asked the court to declare a mistrial on account of adverse counsel's conduct. The court denied the motion to declare a mistrial, and said he thought the former denial to amend the complaint should not be touched upon in the argument, but explained that he only denied the motion to amend the complaint because it was applied for too late, and not because the loss of pension might not be a proper element of damages. The court failed to instruct the jury to disregard that argument. Continuing his argument plaintiff's attorney then said: "Did you ever see a wounded bird that didn't flutter? In other words, let's put it this way, when I am interrupted it must hurt; the shoe must fit. They usually never holler unless they are hurt."

[3] We are of the opinion the foregoing reference to the loss of retirement pension constitutes prejudicial error for two reasons; the asserted necessity of plaintiff's retiring on account of his injuries seems to be remote and speculative, and because that claim is contrary to the provisions of the Federal Retirement of Civil Service Employees Act. 5 U.S.C.A. chap. 14, secs. 691–710. Section 691 of that act provides that city and rural letter carriers shall be eligible to retire at the age of sixty-five years. Section 699 authorizes the payment of 60 per cent of an employee's annual average basic salary after 30 years' service. Section 710 provides that when such employee shall have served fifteen years before reaching the age of retirement and then becomes totally disabled for useful and efficient service by reason of disease or injury not due to his own bad habits, intemperance or wilful misconduct, he shall be entitled to retire on the same annual annuity provided for in sections 698 to 706 therein. From these provisions of the act it appears that since the plaintiff in this case had actually served as a letter carrier for more than seventeen years, if he was thereafter compelled to retire because of injuries sustained on account of the accident in question, he would not forfeit his pension as claimed by his attorney, and as argued to the jury, but he would be entitled to the same pro rata compensation as though he had served the entire thirty years. It was therefore erroneous to permit counsel to argue, over the objection of the defendants that plaintiff sustained damages by forfeiting his retirement pension on account of possible disability growing out of the accident. Since the jury was urged to consider as an element of damages the forfeiture of that pension we are unable to determine what proportion of the $8,000 verdict was erroneously allowed on account of loss of retirement compensation. That argument was therefore prejudicial. It constitutes reversible error.

It appears that after the accident occurred and before the time of trial the plaintiff consulted his physician, Doctor Gerrard, at Redding. Doctor Gerrard sent him to a noted specialist at San Francisco by the name of Doctor Brown, who thoroughly examined him, and then sent him to another specialist in that vicinity by the name of Doctor Linde, who also carefully examined him. It appears from depositions of these last-mentioned medical experts, which were received in evidence, that the plaintiff was suffering from "no

objective changes in any of his central or peripheral nervous system". That physician said he found only "slight numbness over the right aspect of the left upper shoulder. * * * It is a condition which gradually disappears over a period of months."

Doctor Linde, who examined the patient five months after the accident occurred, said in his deposition, regarding the condition of the plaintiff's left shoulder, "I was of the impression that his shoulder condition was due to arthritis." In effect he concluded it was not due to the result of his injury.

These medical gentlemen sent to Doctor Gerrard the reports of their examinations in the forms of letters. On cross-examination of Doctor Gerrard at the trial, defendants' counsel, for impeachment purpose, asked him if the San Francisco physicians had not reported to him the result of their examinations, and if they had not told him the condition of plaintiff's left arm was due to arthritis and not to the injury which he previously received. Doctor Gerrard's reply was that he did not recall. Other questions regarding the purport of those reports were also asked for impeachment purpose. A controversy arose between counsel regarding the use of those reports for the purpose of cross-examination. While Doctor Gerrard was on the witness stand, the defendants demanded the production of those reports to be used for the purpose of cross-examination. The attorney for plaintiff refused to permit the production or use of those documents for cross-examination. The court said it was powerless to compel their production under the circumsatnces. The examination of Doctor Gerrard was completed without the use of the reports. At the following session of court, in the absence of Doctor Gerrard, the attorney for plaintiff announced that he had the reports of the San Francisco physicians, and since their contents had been challenged he would offer them in evidence. Defendants' counsel consented to the offer. The court then suggested that if they were received in evidence at the request of plaintiff, he would be bound by that evidence. Plaintiff's attorney declared that he was not willing to be bound by the statements of those documents, and he thereupon withdrew his offer to admit them. Defendants' attorney then demanded the right to see and read them, saying that he might then offer them himself. Plaintiff's counsel refused to permit defendants' attorney to read them. The letters were not introduced in evidence or read to the jury.

During his argument to the jury plaintiff's attorney referred to those challenged reports as follows: "He (defendant's attorney) accused me of withholding * * * two letters that Dr. Gerrard received from Dr. Brown and Dr. Linde. Did I withhold them when I offered—when I stood up here and offered that they be read to you? Oh, no. Mr. Harris wasn't good enough sport to say 'All right, let's read them. (He said) 'Let me see them first.'"

[4, 5] Defendants' counsel assigned that statement as untrue. He correctly said that plaintiff's attorney withdrew his offer to admit the letters when he was told that he would be bound by their contents, and that plaintiff's counsel then replaced them in his pocket and refused to permit inspection of the letters. The court stated that the jury would remember what transpired in that regard. It is not contended the court erred in refusing to require plaintiff's attorney to inspect the letters. It is true that, under proper circumstances, a party to an action, who has in his possession in court documents which would be competent evidence against him, may be entitled to an order permitting the inspection and use of them. Morehouse v. Morehouse, 136 Cal. 332, 337, 68 P. 976; 10 Cal. Jur. 880, sec. 156. The right of defendants' attorney in this case to inspect and use the letters in question for impeachment purpose might have been properly granted. But standing alone, we are of the opinion that ruling was not reversible error. Upon the state of the record it may not have been error at all. However, in his subsequent argument to the jury the plaintiff's attorney referred to that incident regarding the letters and accused defendants' counsel with unfairly trying to entrap him and inferred that the contents of those letters would not be unfavorable to his client. This reference to the letters was assigned as prejudicial misconduct.

[6] It was prejudicial error for plaintiff's attorney to refer in his argument to the jury to the contents of reports or letters affecting the injuries received by the plaintiff, the inspection and use of which documents were refused and which instruments were not received in evidence. The jury may have secured the impression

from the argument that they were much more favorable to the plaintiff than the facts would warrant. Under somewhat similar circumstances it was held in the case of Baroni v. Rosenberg, 209 Cal. 4, 284 P. 1111, 1113, to be prejudicial misconduct to refer in argument to the contents of a document providing for certain payments by the Continental Casualty Company, which was not received in evidence, even though the court instructed the jury to disregard the statements. The court said in that regard: "Moreover, the entire discussion as to compensation was extraneous to the issues. Although the court admonished the jury to disregard it, the harm, if any, was already done, and it had no power to wipe away the false concept of the situation, imprinted upon their minds. The remark was properly assigned as misconduct, and, despite the admonition, was, in our opinion, prejudicial."

In the case last cited the Supreme Court affirmed an order of the trial court granting a new trial.

For the reasons heretofore stated, we are impelled to reverse the judgment. It is so ordered.

We concur: PULLEN, P. J.; TUTTLE, J.

15 Cal.2d 519

PEOPLE v. McALLISTER.

Cr. 4266.

Supreme Court of California.

May 27, 1940.

1. Criminal law ⇐993, 996(2)

If sentence has been entered in minutes of the court, or if defendant has begun serving his sentence or has been restrained by the sentence imposed, the court is without jurisdiction to vacate, add to, or in any manner modify sentence originally pronounced, but if the sentence has not been entered by the clerk in his minutes, and no legal restraint has been imposed upon the defendant by reason of the sentence, the court may change the sentence originally pronounced. Pen. Code, § 1205.

2. Criminal law ⇐994(3)

The clerk should enter sentence or judgment in minutes of the court within a reasonable time after its pronouncement, but what is a reasonable time may depend upon circumstances of each particular case. Pen. Code, § 1205.

3. Criminal law ⇐993

Where sentence imposing a fine at morning session was not entered in minutes of court prior to afternoon session, and defendant was not placed under any restraint by reason of the sentence, court had jurisdiction at afternoon session to modify original sentence by including therein alternative provision for imprisonment in event of nonpayment of the fine. Pen.Code, § 1205.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

H. L. McAllister was found guilty of a conspiracy to violate a provision of the General Cemetery Act. From an order denying his motion to modify the judgment as finally entered by the clerk by striking out the alternative provision thereof, the defendant appeals.

Affirmed.

Prior opinion, 93 P.2d 1033.

Klein & Clarke, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

Defendant was found guilty of a conspiracy to violate section 17 of the General Cemetery Act (Stats.1931, p. 2434). This section is now section 8780 of the Health and Safety Code (Stats.1939, chap. 60, p. 482) and provides that it is a misdemeanor to sell, offer for sale, or advertise any cemetery plot under representation that such plot is under perpetual care, before a perpetual care fund has been established for the cemetery in which the property so sold, offered for sale or advertised, is situated. The sentence was imposed upon defendant at about 9:30 o'clock on the morning of March 2, 1936, and was as follows: "It is ordered that the defendant be fined the sum of $900, payable in monthly installments of not less than $25 per month, commencing June 1."

After the pronouncement of the sentence, defendant and his counsel left the courtroom and went to the Central Bank building in the city of Oakland, being the city in which said court was held. Thereafter, and on the same day, said defendant and his counsel were called by the clerk of said court and requested to return to the courtroom of the court in which said judgment had been pronounced. The defendant and his counsel did return to said courtroom and during the "afternoon session" of said court the following proceedings were had in their presence:

"The court: The People v. McAllister. In this case of People v. McAllister, I inadvertently did not state the alternative in the event of nonpayment of the fine. It is further ordered that in lieu of the nonpayment of any part of the fine, the defendant be confined in the County Jail of this county at the rate of one day's imprisonment for every five dollars of said fine remaining unpaid, not to exceed a total period of six months." Thereupon the judgment was entered and it now appears in the judgment roll as follows:

"It is therefore ordered that he pay a fine of $900.00, said fine to be paid at not less than $25.00 per month beginning on June 1st, 1936, and each and every month thereafter until said fine be satisfied; and in default of payment of said fine, he be confined in the County Jail of the County of Alameda at the rate of one day's imprisonment for each $5.00 of said fine unsatisfied, imprisonment, however, not to exceed six (6) months."

Thereafter petitioner filed in the District Court of Appeal a proceeding in prohibition to restrain the superior court from enforcing the alternative provisions of said judgment rendered at the afternoon session of said court and being the portion thereof providing for imprisonment in case the fine was not paid. His petition was denied on the ground that it was a collateral attack upon the judgment, and as the claimed invalidity of the judgment did not appear upon the face of the judgment, such an attack would not lie. McAllister v. Superior Court, 28 Cal.App.2d 160, 82 P.2d 462, 464. In the course of the opinion therein the court stated: "* * * the alternative provision, as pronounced and entered, was not invalid on its face * * * and there was no subsequent attempt to modify the judgment * * *." The defendant thereafter filed in the trial court a motion to modify said judgment as finally entered by the clerk by striking out the alternative provision thereof on the ground that the court had no jurisdiction to change or add to said judgment, as the court attempted to do at its "afternoon session", by the addition of said alternative provision. Said motion was denied, and the appellant has appealed from the order denying his said motion.

"It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision." Bronson v. Schulten, 104 U.S. 410, 415, 26 L.Ed. 797; Black on Judgments, vol. I, 2d Ed., p. 467. This was the rule followed in this state under the first Constitution, which provided for terms of court. Constitution 1849, sec. 10, art. VI; Baldwin v. Kramer, 2 Cal. 582; Suydam v. Pitcher et al., 4 Cal. 280; People v. Thompson, 4 Cal. 238; Carpentier v. Hart, 5 Cal. 406; Shaw v. McGregor, 8 Cal. 521; Bell v. Thompson, 19 Cal. 706, 707.

Since the abolition of terms of court by the adoption of the present Constitution there have been various decisions of our appellate courts as to the time within which the court may modify or vacate an order or judgment rendered by it and substitute another for that previously rendered.

In support of his appeal from the order of the court denying his motion to modify said judgment by striking therefrom the alternative provision thereof, appellant relies in the main upon two decisions of the District Court of Appeal; In re Sullivan, 3 Cal.App. 193, 84 P. 781, and In re Garrity, 97 Cal.App. 372, 275 P. 480. In the case of In re Sullivan, 3 Cal.App. 193, 84 P. 781, 782, the petitioner was convicted of an assault with a deadly weapon and was sentenced to pay a fine of $700, and it was directed that if said fine was not paid he be imprisoned in the state prison until the fine was satisfied at the rate of $2 per day, and he was forthwith committed to the custody of the proper officer. Five days later and before his delivery to the state prison, he was again brought into court and the judgment was vacated and a second judgment was rendered which was identical with the first in every particular except that the county jail was designated as the place of imprisonment in case the fine was not paid. Petitioner was released on habeas corpus, the court holding that after his conviction and a written commitment conforming thereto was issued under which the defendant was restrained, the power of the court was exhausted and it was thereafter without jurisdiction to vacate the judgment and impose another.

In the decision of that case the statement is made that: "In our opinion the court must exercise the discretionary power conferred by section 1205 of the Penal Code, when the original judgment is rendered, or else the power to make the direction therein provided for [the alternative provision] is lost." This statement was not necessary for the decision in that case, as the second judgment was rendered some five days after the first judgment, and the defendant, during these five days, was under legal restraint by reason of the first judgment. This statement is contrary to the well-established rule announced by the Supreme Court of the United States in the case of Bronson v. Schulten, supra, 104 U.S. 410, 26 L.Ed. 797, and quoted in the fore part of this opinion. Furthermore, the District Court of Appeal cites no authority in sup-

port of the above-quoted statement, but, on the other hand, cites and apparently relies upon a case which holds directly to the contrary as, on page 196 of 3 Cal.App., on page 782 of 84 P., of its decision, we find it stated, "In Commonwealth v. Foster, 122 Mass. [317], 323, 23 Am.Rep. 326, the court, after an exhaustive review of the authorities, English and American, held that the sentence might have been amended at the same term, and before any act had been done in execution thereof, but not afterwards." In the light of these authorities, we are not able to agree with the statement of the District Court of Appeal in the Sullivan case that the court must exercise the power given it by section 1205 of the Penal Code when the original judgment is rendered, or else the power to make direction therein provided is lost.

In the case of In re Garrity, supra, 97 Cal.App. 372, 275 P. 480, 481, the court followed the decision rendered in Re Sullivan, supra, and held that, "In our opinion the court must exercise the discretionary power conferred [upon it] by section 1205 of the Penal Code [the alternative provision in case of failure to pay fine], when the original judgment is rendered, or else the power to make the direction therein provided for is lost." While we agree with the conclusion reached by the court in that case, we are of the opinion that the portion of the opinion just quoted was not necessary to the decision of any issue before the court. In the Garrity case the original judgment was pronounced against the defendant on October 31st, requiring him to pay a fine of $5,000, with no alternative of imprisonment in case the fine was not paid. On December 6th, over five weeks after the pronouncement of the original sentence the court ordered that if the fine is "not paid by December 20, 1928, the defendants shall be remanded to the Sheriff of Los Angeles county to be confined in the county jail until paid out at the rate of $8 per day". An attempt was made to imprison the defendant under this alternative provision of the sentence, and the District Court of Appeal properly held he was illegally imprisoned and discharged him from custody. It can hardly be assumed that during the time between the original sentence and the order providing for the alternative of imprisonment in case the fine was not paid, a period of over five weeks, the first sentence had not been entered by the clerk in the minutes of the court. That being so, the court had lost jurisdiction of the case and had no authority to add to or modify the original sentence pronounced upon the defendant.

In the instant case, it is conceded that the sentence imposed upon the defendant at the morning session of the court was not entered in the minutes of the court prior to the afternoon session, when the court included in the sentence the alternative provision thereof. From the nature of the sentence imposed at the morning session, the defendant was not and could not have been placed under any restraint by reason of said sentence. The judgment was pronounced on March 2, 1936, and provided for a fine of $900 to be paid in monthly instalments of $25 a month, beginning June 1, 1936. As the sentence pronounced by the court at its morning session had not been entered in the minutes of the court prior to the afternoon session, and as defendant had not been placed under any restraint by reason of the first sentence, the court at the time it pronounced the second sentence had jurisdiction and authority to amend or modify its previous sentence by including in the sentence the alternative provision in the event of nonpayment of the fine.

It was so held in Ex parte Monckros Von Vetsera, 7 Cal.App. 136, 93 P. 1036, 1037, where the petitioner had been convicted and sentenced to San Quentin. He sought his release by habeas corpus, brought in the superior court of Marin county. The court, upon the hearing of his petition, made an order on October 15th, discharging him from custody. No written order of discharge was made by the court, nor was any entry of said order made by the clerk of court in his minutes. On October 17th, in the absence of the prisoner, the court made an order vacating his order, made two days previously, and reserved the matter for further action. Petitioner then applied to the District Court of Appeal by petition for writ of habeas corpus to be released from the custody of the warden of San Quentin on the ground that the superior court, after making its order of October 15th, discharging petitioner, was without jurisdiction to vacate said order or render any further order in said proceeding. The District Court of Appeal denied the petition and held as follows: "In the case at bar the order relied on by petitioner for his discharge, never having been entered in the minutes of the court, was subject to be vacated and revised by the court, and, having been thus vacated, affords no warrant for his release from the imprisonment."

The other cases cited by the appellant and decided since the Sullivan case shed but little light upon the question now before us. In Re Bouchard, 38 Cal.App. 441, 176 P. 692, the petitioner had been sentenced under the Indeterminate Sentence Law and had served practically a year of his sentence in state prison, although the crime of which he had been convicted had been committed prior to the effective date of the Indeterminate Sentence Law. Thereafter on motion of the district attorney, the petitioner was returned from the state prison and resentenced by the trial court. On habeas corpus, it was held that the trial court was without authority to render this second judgment, inasmuch as the petitioner had begun the service and had served almost a year of his prior sentence.

In Re Gottschalk, 47 Cal.App. 260, 190 P. 649, the judgment as originally entered gave the defendant the option of avoiding the imprisonment by the payment of the fine. Later, however, the court entered an order purporting to withdraw the option and directing the imprisonment of the defendant. This order was made after the defendant had been taken into custody and brought the case within the rule that the court has no jurisdiction to modify a sentence after the defendant has been taken into custody thereunder.

In Re Claudette, 21 Cal.App.2d 688, 69 P. 2d 1021, petitioner was found guilty of petit theft and on April 17th sentenced to imprisonment in the county jail for a period of thirty days and to pay a fine of $250. The time of his imprisonment expired on May 14th, at which time the court made and signed an additional order that the petitioner be imprisoned for another thirty days, or until the fine was paid, not exceeding $8.33 a day, said sum amounting to the $250 fine originally imposed. The appellate court held that the trial court was without jurisdiction to make the second order, having exhausted its jurisdiction under the original judgment. As will be noted, a period of thirty days intervened between the original sentence and the attempt to modify it, during which time defendant had been imprisoned under the original sentence.

In Barry v. Superior Court, 91 Cal. 486, 27 P. 763, the petitioner was found guilty of contempt of court and on September 30, 1889, sentenced to be imprisoned in the county jail for five days and to pay a fine of $500, and if said fine was not paid at the end of the five days' imprisonment that he be further imprisoned until said fine should be satisfied at the rate of one day for each $2 of the fine unpaid. The petitioner served the five days' imprisonment. The court on October 5, 1890, a year and five days after the entry of the first judgment, made a further or second judgment, reciting that said fine had not been paid and ordered execution to issue against petitioner for the sum of $500 and costs. This second judgment was rendered without any notice to petitioner. This court held that the trial court did not retain jurisdiction to enter another and different judgment in the same matter on October 5, 1890. The court did not state its reasons for its decision, but it is apparent that there were two grounds upon which the decision might well have been based. One of these grounds was that one year and five days had elapsed before the judgment was attempted to be modified, and another was that the defendant in the action had been taken into custody by virtue of the sentence imposed by the first judgment, and had served imprisonment thereunder.

[1] From the foregoing cases we think the following rule has been established: If the sentence has been entered in the minutes of the court, or if the defendant has begun serving said sentence or has been restrained by the sentence imposed, then the court is without jurisdiction to vacate, add to, or in any manner modify the sentence originally pronounced. On the other hand, if the sentence pronounced has not been entered by the clerk in his minutes, and no legal restraint has been imposed upon the defendant by reason of said sentence, then it is proper for the court to change the sentence originally pronounced.

[2, 3] The question may arise in some cases as to the time in which the clerk must act in entering the sentence or judgment in the minutes of the court. That he should do so in a reasonable time after its pronouncement, we think is obvious. What is a reasonable time may depend upon the circumstances of each particular case. Usually the practice of the courts of this state is for the clerk to make up his minutes following the adjournment of the court for the day. It is not necessary for us to pass upon the question as to what is a reasonable time for the clerk to perform this duty as we are satisfied that in this case when the two acts of the court occurred on the same day, no duty was imposed upon its clerk to

enter the first sentence of the court before adjournment of the court for that day.

For the reason hereinbefore stated, the order denying appellant's motion to vacate the alternative provision of the sentence is affirmed.

We concur: SHENK, J.; CARTER, J.; GIBSON, J.



15 Cal.2d 536

In re RICHARDSON.

Cr. 4277.

Supreme Court of California.

May 27, 1940.

1. Attorney and client ⇐39

If there is doubt from face of record of conviction of an attorney that offense of which attorney was convicted involved moral turpitude, a reference to the State Bar for investigation and recommendation is proper; but, if the conviction on the face of the record shows moral turpitude, record is conclusive, whether the offense be against a law of California or any other jurisdiction. Cr.Code §§ 37, 215, 18 U.S.C.A. §§ 88, 338; St.1939, p. 357, § 6102.

2. Attorney and client ⇐39

In disbarment proceedings, matters extraneous to record of conviction of an attorney would have no bearing in determining in the first instance whether record of conviction showed that offense involved moral turpitude, but they would be material, if record was doubtful on such question and to resolve doubt an investigation by the court or the State Bar appeared necessary. St. 1939, p. 357, § 6102.

3. Attorney and client ⇐54

Record showing that attorney pleaded guilty to count of indictment alleging conspiracy to violate Federal Securities Act, and that he paid a fine of $500 which was full penalty imposed, did not preclude an examination by the court or by the State Bar on question whether, under all the circumstances, moral turpitude was involved in the charge and plea, and State Bar would be directed to return its recommendations to Supreme Court on issue whether attorney's conviction involved moral turpitude. Cr. Code §§ 37, 215, 18 U.S.C.A. §§ 88, 338; St. 1939, p. 357, § 6102; Securities Act of 1933, § 17(a) (1), 15 U.S.C.A. § 77q(a) (1).

In Bank.

Proceeding in the matter of the disbarment of Jerome Lyman Richardson, an attorney at law.

State bar ordered to determine whether facts surrounding conviction of attorney on a plea of guilty to violation of a provision of Securities Act disclosed moral turpitude.

Miguel Estudillo, of Riverside, and Robert W. Kenny and Morris E. Cohn, both of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

SHENK, Justice.

In October 28, 1939, the State Bar of California caused to be filed in this court a certified copy of the record of conviction of Jerome Lyman Richardson, in an action numbered 27812 in the District Court of the United States in and for the Northern District of New York, entitled, "The United States of America v. John L. Etheridge and Jerome Lyman Richardson."

On November 8, 1939, pursuant to section 6102 of the Business and Professions Code, St. 1939, p. 357 (formerly section 299 of the Code of Civil Procedure), this court filed an order that Jerome Lyman Richardson, hereinafter referred to as the petitioner, be removed from his office as an attorney at law in this state. The order was based upon the purported showing that the petitioner was "convicted on a plea of guilty to count XI of the indictment, charging use of United States mails to defraud, in action numbered * * * 27812" in said United States district court.

On petition for rehearing, the petitioner contended that he was not convicted of a charge of using the United States mails to defraud; that count XI of the indictment charged a violation of section 88, Title 18, United States Code, 18 U.S.C.A. § 88, namely, a conspiracy to violate "section 338, Title 18, United States Code, 18 U.S.C.A. § 338, by using and causing the use of the United States mails in furtherance of a scheme and artifice to defraud, and to violate section 77q (a) (1), Title 15, United States Code, 15 U.S.C.A. § 77q (a) (1), by employing a scheme and artifice to defraud

in the business of selling and offering to sell securities by use of the means of transportation and communication in interstate commerce, and by use of the mails, in the manner and by the means hereinafter described." It is now disclosed that the petitioner's plea of guilty went only to the portion of count XI alleging conspiracy to violate said section 77q (a) (1) of the Securities Act. The record also shows that the petitioner paid the fine of $500, which was the full penalty imposed.

The petition for rehearing was granted on the showing that the record filed and the subsequent order of this court based thereon were inaccurate as to the statement of the offense to which the petitioner had entered a plea of guilty. Later the petitioner presented a certified copy of an order of the court in New York, made and entered on November 22, 1939, amending its judgment in said action to conform to the plea and reading as follows: "The defendant having been indicted and arraigned and pleaded guilty to the offense of unlawfully conspiring with others to violate the Securities Act, Title 15, Section 77q (a) (1) of the United States Code 15 U.S.C.A. § 77q (a) (1); the Court now here, on motion of Andrew J. Culick, Esquire, Assistant United States Attorney, do adjudge and sentence the said defendant to pay a fine of Five Hundred Dollars or to stand committed to the Albany County Jail until said fine is paid."

It is stated by the petitioner that the plea of guilty to the extent indicated was agreed to by him at a time when he was ill and unable to undergo a trial without serious detriment to his health and danger to his life; that the judge imposing sentence on the plea of guilty expressed himself as unwilling to impose any penalty on the defendant Richardson in that action which would result in his being disbarred from practicing law in California. Included in the record herein is a copy of a statement signed by the Honorable Frank Cooper, judge of the United States district court above mentioned, which is in part as follows:

"Before Mr. Richardson took a plea of guilty to a charge of conspiring to violate the Securities Act, I permitted counsel for Mr. Richardson to make thorough inquiry as to whether or not such a plea and the imposition of a fine only without any commitment to any prison or jail would in California subject him to disbarment. When the plea was taken, counsel for Richardson read from a letter written by Judge Freeman of the Superior Court, Riverside County, California. I inferred from this letter that a plea of guilty to a conspiracy to violate the Securities and Exchange Act [15 U.S.C.A. § 78a et seq.] would not subject Richardson to disbarment if the fine did not exceed $500.00 and no prison sentence was imposed, since therefore no moral turpitude would be involved. * * *

"As indicated in my opinion in fining Judge Richardson $500.00, I did not believe he was at all as culpable as Mr. Etheridge, one of the co-defendants, whom I sentenced to a term in prison for a year and a month with a $500.00 fine. * * * It was because I believed Mr. Richardson to be more neglectful and careless than actually a participant in the making of fraudulent statements that I only imposed a fine and did not sentence him to imprisonment or impose a jail sentence. When I imposed the fine, I personally felt that the punishment was sufficient and I did not believe his connection with the conspiracy to violate the Securities and Exchange Act would under the laws of California subject him to disbarment.

"Under the circumstances, I feel I should make this statement on behalf of Mr. Richardson so that the Court, should it reconsider his disbarment, and I hope it does, would have all of the facts before it.

"It is represented to me that a statement of my reflections on the question of moral turpitude might only be considered if incorporated in the judgment which I signed. Until two years ago no sentence was signed in this District. For the past two years sentences have been signed but they have been confined to a mere statement of the Count or Counts of an indictment under which a defendant was convicted or pleaded. It should be clear, therefore, that any judgment imposing a sentence or fine signed by the Court would be no place for an expression of the Court's opinion on moral turpitude."

Counsel for the State Bar, in support of the order directing the petitioner to show cause why he should not be disbarred, issued when the petition for rehearing was granted, argues that the foregoing and other matters referred to by the petitioner may not be considered by this court on the question of moral turpitude; that that question is concluded by the record of conviction in the United States district court in

New York, and that the offense of conspiring to violate the Securities Act (Title 15, sec. 77q (a) (1), U.S. Code, 15 U.S.C.A. § 77q (a) (1), to which the petitioner pleaded guilty, is an offense which on its face involves moral turpitude.

[1] The petitioner points out that this court has recently stated that some violations of a law enacted under the police power to protect the public from fraudulent impositions in the sale or transfer of securities might conceivably be lacking in bad faith or dishonest intent and thus the element of moral turpitude be not involved in the commission thereof. In re Hatch, 10 Cal. 2d 147, 73 P.2d 885. He contends that the face of the record in this case and the character of the penalty imposed do not indicate, as a matter of law, that the commission of the offense to which a plea of guilty was entered, involved moral turpitude. He argues that if the offense itself might not involve moral turpitude, a conspiracy to commit the offense would not necessarily involve it. He also asserts that if, as a matter of law, the offense on which he was convicted does not necessarily involve moral turpitude, this proceeding should therefore terminate. However, he has indicated his willingness to appear before the Board of Governors of the State Bar or its appropriate committee and submit to an examination and investigation on the question of moral turpitude. This court has approved such a course in cases of conviction if the question of moral turpitude on the face of the record appears to be doubtful. In re Hatch, supra. True, if the conviction on the face of the record shows moral turpitude, then the record is conclusive of the matter (In re McAllister, 14 Cal. 2d 602, 95 P.2d 932), whether the offense be against a law of this or any other jurisdiction. In re Craig, 12 Cal. 2d 93, 82 P.2d 442. In the Hatch case, it was determined that moral turpitude was conclusively shown by the record. The attorney in that case had been convicted of violation of the California Corporate Securities Act, by knowingly participating in the issuance and sale of securities without first having obtained the permit required by law. Referring to the record of conviction in that case, this court said [10 Cal. 2d 147, 73 P.2d 887]: "The trial court apparently concluded that the acts of the defendant were of such a serious and dishonest character that protection to society demanded that he should not, during the period of probation, engage in the investment business or handle the money of other persons. It would be anomalous to conclude that he should nevertheless be permitted to continue in the practice of the law during that period. The same reason for requiring that he be restrained from further engaging in the business of making investments for others or in handling the property of others is persuasive that the motive and intent with which he acted was such as to indicate turpitude in the commission of the offenses of which he was convicted. The record of conviction therefore is sufficient upon which to dispose of the proceedings herein finally without a reference to and investigation and recommendation by the board of governors of the State Bar as to whether the defendant's acts involved moral turpitude."

However, it was also said in that case: "There is necessarily a field of doubtful cases where the determination as to whether moral turpitude was involved may fall on one or the other side of the line, depending upon the circumstances of the particular case. * * * In some doubtful cases the record of conviction may not be sufficient upon which to base a determination one way or the other on the question of moral turpitude, and appropriate action by the court may require a reference to the board of governors of the State Bar for an inquiry and recommendation. The State Bar is not deprived of jurisdiction in disciplinary proceedings to inquire into the fitness of an attorney to practice when a record of his conviction is on file with the court under section 287 et seq. of the Code of Civil Procedure. Shafer v. State Bar, 215 Cal. 706, 12 P.2d 957."

[2, 3] If there be doubt from the face of the record of conviction that the offense of which the attorney was convicted involved moral turpitude, a reference to the State Bar for investigation and recommendation pursuant to the policy declared in the Hatch case would seem to be appropriate. The matters extraneous to the record would have no bearing in determining the question in the first instance, namely, whether the record of conviction shows that the offense involved moral turpitude; but they would be material if the record be doubtful on that question and to resolve the doubt an investigation either by the court or the State Bar would appear to be necessary. Here the certified record appears to be conclusive only of the fact of

conviction. At least it does not preclude an examination by the court or by the State Bar of the question whether, under all the circumstances, moral turpitude was involved in the charge and plea.

That question in the present matter appears to be one for investigation and recommendation by the State Bar. That body is therefore directed to proceed accordingly and return its recommendation to this court on the issue whether the facts and circumstances surrounding the conviction of the petitioner on his plea of guilty disclose moral turpitude to have been involved in the commission of the offense.

It is so ordered.

We concur: CURTIS, J.; CARTER, J. GIBSON, J.



15 Cal.2d 527

MORAN v. DISTRICT COURT OF APPEAL IN AND FOR THIRD APPELLATE DIST.

S. F. 16420.

Supreme Court of California.

May 27, 1940.

1. Courts ⇐487(3)

A proceeding in mandamus to compel superior court to direct issuance of a commission to take a deposition was a "cause", and order of District Court of Appeal directing issuance of writ of mandamus forthwith was a "judgment", within constitutional provision permitting Supreme Court to transfer any "cause" pending before a District Court of Appeal, by an order made before "judgment" has been pronounced by District Court of Appeal or within 30 days after such "judgment" shall have become final by lapse of 30 days from its pronouncement. Const. art. 6, § 4c, adopted in 1928.

See Words and Phrases, Permanent Edition, for all other definitions of "Cause" and "Judgment".

2. Appeal and error ⇐1191

Under the Constitution, in the absence of a transfer to the Supreme Court, judgment of District Court of Appeal cannot be enforced until expiration of 60 days from its pronouncement, and a remittitur cannot issue from that court until expiration of that period, and hence District Court of Appeal exceeded its jurisdiction in directing that a writ of mandamus issue forthwith and a remittitur go down immediately. Const. art. 6, § 4c, adopted in 1928.

3. Courts ⇐488(1)

A cause transferred to the Supreme Court from the District Court of Appeal is removed from jurisdiction of District Court of appeal, and is then pending in the Supreme Court the same as if originally lodged there. Const. art. 6, § 4c, adopted in 1928.

In Bank.

Proceedings in certiorari by Irene E. Moran to annul an order of the District Court of Appeal of the State of California in and for the Third Appellate District.

Order annulled.

McAllister & Johnson and J. W. Dignan, all of Sacramento, for petitioner.

Johnson & Curtright, P. H. Johnson, and C. K. Curtright, all of Sacramento, for respondent.

SHENK, Justice.

This is a proceeding in certiorari to annul an order of the District Court of Appeal, Third Appellate District.

In an action pending in the superior court in and for the County of Sacramento, entitled Irene E. Moran, plaintiff, v. Arthur R. Moran, defendant, the plaintiff sought a divorce on the ground of extreme cruelty. The defendant husband answered and filed a cross-complaint, in which he alleged that the purported marriage between himself and the plaintiff was void for the reason that the plaintiff was formerly married to Paul R. Hendricks, who is still alive, and from whom she had not been divorced. The defendant prayed that the plaintiff be denied a divorce and that he be granted a decree of annulment.

At the time of the trial of the action, the defendant was unable to locate Hendricks, without whose testimony he was unable to prove the alleged prior and undissolved marriage relationship. An interlocutory decree of divorce was entered in favor of the plaintiff on March 1, 1940, and it was further determined that the defendant take nothing by his cross-complaint. On March 4th the defendant served a notice of motion for a new trial upon several grounds, in-

cluding newly discovered evidence. In support of the motion an affidavit was filed in which it was averred that since the divorce case had been determined the defendant had discovered that Paul R. Hendricks resides at Waukegan, Illinois, and that he had refused to make an affidavit concerning his marital status with the plaintiff. On March 11 the defendant applied to the superior court for an order to take the deposition of Hendricks to establish the newly discovered evidence on the motion for a new trial. The application was denied.

On March 15 the defendant served and filed in the respondent District Court of Appeal a notice of motion for a peremptory writ of mandamus to compel the superior court to direct the issuance of a commission to take the deposition of Hendricks. After a hearing of the motion and under date of April 4, 1940, the District Court of Appeal handed down its opinion and decision in the matter, concluding with an order as follows: "The writ of mandamus is granted and the court is directed to issue the commission to take testimony as prayed for." Moran v. Superior Court, Cal.App., 100 P.2d 1096, 1100.

On April 23, the defendant, on notice, moved the District Court of Appeal for an order directing the issuance of the writ of mandamus forthwith. This motion was supported by an affidavit stating "that unless said clerk shall forthwith issue said writ, the whole benefit of said proceeding to petitioner will be lost to him, for the reason that the time within which respondent court has and retains jurisdiction to review and consider said deposition of said witness on motion for a new trial now pending before it, will long since have expired before said commission can be issued and said deposition taken and returned to said court."

On the hearing of this motion the District Court of Appeal made and entered an order in its minutes in which it was "directed and ordered that the writ of mandamus issue forthwith and that the remittitur go down immediately." The present proceeding is an attack on that order, and the question is whether the District Court of Appeal exceeded its jurisdiction in directing the immediate effectiveness of said writ.

[1-3] Prior decisions disclose that the question is not an open one in this state. People v. District Court of Appeal, 193 Cal. 19, 222 P. 353. It was there held that since the creation of the District Courts of Appeal in 1904, a proceeding in mandamus has been deemed a "cause", as that term was used in the following portion of section 4 of article VI of the Constitution, as originally adopted in 1904: "The Supreme Court shall have power to order * * * any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein. The judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced."

The foregoing language was continued in effect, so far as mandamus proceedings are concerned, as a part of section 4c of article VI, adopted in 1928.

The order of the respondent District Court of Appeal of date April 4, 1940, directing that a writ of mandamus issue as prayed was unquestionably a "judgment" in that proceeding, as contemplated by the constitutional provision, and since the proceeding was a "cause" under the same provision, the judgment did not become final in the District Court of Appeal until the expiration of thirty days after its pronouncement on April 4, 1940. During the next thirty-day period the cause was subject to transfer to this court, as in the Constitution provided. In the absence of a transfer, the judgment of the District Court of Appeal could not be enforced until the expiration of sixty days from and after its pronouncement, and therefore the remittitur could not issue from that court until the expiration of that period. If a transfer to this court be made, the cause is removed from the jurisdiction of the District Court of Appeal and is then pending in this court the same as if originally lodged here.

It follows that the respondent District Court of Appeal exceeded its jurisdiction in attempting to make its judgment directing the writ of mandamus effective immediately, and the order of April 23, 1940, purporting to do so, must be set aside.

The order is annulled.

We concur: CURTIS, J.; CARTER, J.; GIBSON, J.; SPENCE, Justice pro tem.

15 Cal.2d 531

SIMON et al. v. GRAYSON et al.

S. F. 16199.

Supreme Court of California.

May 27, 1940.

Rehearing Denied June 24, 1940.

1. Wills ⇐98

A testator may incorporate an extrinsic document into a will, if such document is in existence at the time and the reference to it in the will clearly identifies it or renders it capable of identification by extrinsic proof.

2. Wills ⇐98

An attempt to incorporate a future document in a will is ineffectual, since testator cannot be permitted to create for himself the power to dispose of his property without complying with formalities required in making a will.

3. Wills ⇐98

Where letter to be written in the future by testator was incorporated in will by reference, and after writing the letter, testator executed a codicil reciting that will should remain in full force except as expressly modified by the codicil, a resulting republication of the will operated to make the letter effective, though letter was not effective when first written. Probate Code, § 25.

4. Wills ⇐302(1)

Evidence *held* to establish that letter written by testator to his executors was the letter referred to in will, and incorporated in the will by reference, notwithstanding that such letter did not bear the date which will stated the letter would bear.

5. Wills ⇐98

An informal document incorporated in will by reference need not be identified with exact precision, but it is enough that descriptive words and extrinsic circumstances combine to produce a reasonable certainty that the document is the one referred to in the will.

6. Wills ⇐538

Where letter incorporated in will by reference provided that legacies should lapse in event of executors' inability to find any of the legatees mentioned within six months after testator's death or in event of prior death of any legatee, bequest to legatee who died seven days after testator, but whose whereabouts were known to executors within two days after testator's death, did not lapse, notwithstanding that distribution could not have been made to legatee until at least four months after issuance of letters testamentary. Probate Code, § 1000.

7. Executors and administrators ⇐7

Where executors brought interpleader suit to settle controversy concerning right to legacies, provisions in will purporting to exempt executors from the duty to account did not give legatees right to judgment that executors were legally free to pay the money over to them.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Suit in interpleader by Martin E. Simon and another, as executors of the estate of S. M. Seeligsohn, deceased, against Blanche M. Grayson, as executrix of the estate of Esther Cohn, deceased, and others, for determination of construction of will. From a judgment for named defendant, plaintiffs and the other defendants appeal.

Affirmed.

Prior opinion, 94 P.2d 1044.

W. H. Spaulding and Jerome Politzer, both of San Francisco, for appellants.

R. F. Mogan and Otto C. Stelling, both of San Francisco, for respondent.

WASTE, Chief Justice.

The question presented for determination upon this appeal involves the construction and effect to be given a provision in a will purporting to incorporate a letter by reference. Respondent's claim to certain of the estate's funds is based upon the terms of the letter. The appellants, who are residuary legatees under the will, contend that the attempted incorporation by reference was ineffectual. The facts, which were presented to the trial court upon agreed statement, are as follows:

S. M. Seeligsohn died in 1935. His safe deposit box was found to contain, among other things, a will and codicil and a letter addressed to his executors. The will, which was dated March 25, 1932, contained a provision in paragraph four, leaving $6,000 to his executors "to be paid by them in certain amounts to certain persons as shall be directed by me in a letter that will be found in my effects and

which said letter will be addressed to Martin E. Simon and Arthur W. Green (the executors) and will be dated March 25, 1932." Paragraph four also provided that any one having an interest in the will "shall not inquire into the application of said moneys" and that the executors "shall not be accountable to any person whomsoever for the payment and/or application of said sum * * * this provision * * * is in no sense a trust".

The letter found in the testator's safe deposit box was dated July 3, 1933, and stated: "In paragraph VIII of my will I have left you $6,000—to be paid to the persons named in a letter and this letter is also mentioned in said paragraph. I direct that after my death you shall pay said $6,000 as follows: To Mrs. Esther Cohn, 1755 Van Ness Ave. San Francisco, Calif. the sum of $4,000—* * * If any of the said persons cannot be found by you within six months after my death, or if any of the said persons shall predecease me, the sum directed to be paid to such persons * * * shall be paid by you to my heirs as described in paragraph IX of my said Will. * * *" This letter was written, dated and signed entirely in the handwriting of the testator. No letter dated March 25, 1932, was found among his effects.

The codicil to the will was executed November 25, 1933. It made no changes in paragraph IV of the will and contained no reference to the letter, but recited, "Except as expressly modified by this Codicil, my Will of March 25th 1932 shall remain in full force and effect."

Esther Cohn's whereabouts was known to the testator's executors immediately following his death, but she herself died a week later. Respondent, as her executrix, claimed the $4,000 mentioned in the letter. This claim was challenged by appellants, residuary legatees under Seeligsohn's will, and his executors brought suit interpleading the disputants. From the agreed facts the trial court drew conclusions of law and rendered judgment in favor of the respondent. The chief question is whether the letter was effectually incorporated by reference into the will.

[1, 2] It is settled law in this state that a testator may incorporate an extrinsic document into his will, provided the document is in existence at the time and provided, further, that the reference to it in the will clearly identifies it, or renders it capable of identification by extrinsic proof. Estate of Plumel, 151 Cal. 77, 90 P. 192, 121 Am.St.Rep. 100; Garde v. Goldsmith, 204 Cal. 166, 267 P. 104; Estate of Martin, 31 Cal.App.2d 501, 88 P. 2d 234; 16 Cal.L.Rev. 154. An attempt to incorporate a future document is ineffectual, because a testator cannot be permitted to create for himself the power to dispose of his property without complying with the formalities required in making a will. Keeler v. Merchant's Loan & Trust Co., 253 Ill. 528, 97 N.E. 1061.

[3] In the case at bar the letter presumably was not in existence when the will was executed, for the letter bore a date subsequent to the date of the will. Code Civ.Proc., sec. 1963, subd. 23. However, the letter was in existence at the time the codicil to the will was executed. The respondent points out that under the law the execution of a codicil has the effect of republishing the will which it modifies (Prob.Code, sec. 25), and argues from this that Seeligsohn's letter was an "existing document" within the incorporation rule. The only authorities cited by the parties on this point are several English decisions. These cases hold that although an informal document is not in existence when the will referring to it is executed, a later republication of the will by codicil will satisfy the "existing document" rule and will incorporate it by reference provided the testamentary instruments sufficiently identify it. In re Goods of Lady Truro [1866] L.R. 1 P. & D. 201; compare In re Goods of Smart [1902], L.R.Prob.Div. 238; 4 Calif.L.Rev. 356. The principle of republication thus applied is unquestionably sound. In revising his scheme of testamentary disposition by codicil a testator presumably reviews and reaffirms those portions of his will which remain unaffected. In substance, the will is re-executed as of that time. Therefore, the testator's execution of the codicil in the present case must be taken as confirming the incorporation of the letter then in existence, provided the letter can be satisfactorily identified as the one referred to in the will. And this is true, notwithstanding the codicil made no reference to the letter and recited that the will should remain in full force "except as expressly modified by this codicil", for the letter, if properly incorporated, would be an integral part of the republished will.

[4, 5] We are also of the opinion that the trial court did not err in concluding that the letter found with the will was the letter referred to in the will. Conceding the contrary force of the discrepancy in dates, the evidence of identity was, nevertheless, sufficient to overcome the effect of that factor. The controlling authorities in this state do not require that the informal document be identified with exact precision; it is enough that the descriptive words and extrinsic circumstances combine to produce a reasonable certainty that the document in question is the one referred to by the testator in his will. Estate of Miller, 128 Cal.App. 176, 17 P.2d 181; Estate of Martin, supra; In re Plumel's Estate, supra. Here the letter was found in the safe deposit box with the will. It was addressed to the executors, as the will stated it would be. No other letter was found. Moreover, the letter is conceded to have been written by the testator, and its terms conform unmistakably to the letter described in the will. It identifies itself as the letter mentioned in the will and deals with the identical subject matter referred to in that portion of the will. All these circumstances leave no doubt that the letter of July 3, 1933, is the one that the testator intended to incorporate in paragraph four of his will.

[6] Appellants also contend that the bequest to Esther Cohn lapsed upon her death seven days after the death of the testator. They would read the provisions of the will and letter as creating a contingent bequest payable only if the legatee should be alive at the time it became legally payable to her. Hence, it is said, the gift must fail because no distribution could have been made until at least four months after issuance of letters testamentary in the testator's estate. Prob.Code, sec. 1000. But such an interpretation is contradicted by the testator's own language. The letter creates only two contingencies upon which the legacies would lapse—the inability of the executors to find any of the legatees mentioned within six months after the testator's death, or the prior death of any of the legatees. As the stipulated facts show, neither of these contingencies occurred in the case of Esther Cohn. If it be conceded that the legacy to her would not vest until she was "found" by the executors, the facts show that they knew of her whereabouts within two days after the death of the testator.

The authorities relied upon by the appellants in this connection are either cases in which a testamentary trust creating a life estate was held to fail upon the death of the life beneficiary or in which precatory language in a will conferred upon a legatee the absolute power to dispose of a bequest in his own discretion. Here the executors do not claim that they have discretion to determine who is entitled to the funds in their hands. On the contrary, they have recognized that the mandatory force of the directions contained in the letter is inconsistent with any such discretion, and have sought to have the dispute determined in the courts.

[7] Appellants finally claim that they were at least entitled to a judgment that the executors are legally free to pay the money over to them because of the provisions of paragraph four of the will purporting to exempt the executors from the duty to account. Without determining the validity or effect of that provision, it is a sufficient answer to the contention to note that the trial court was called upon by the executors to settle the controversy, and the judgment directing the disposition of the funds in their hands was therefore entirely proper.

The conclusions we have reached make it unnecessary to pass upon the respondent's contention that the letter is sufficiently testamentary in character to stand as an independent testamentary instrument.

The judgment is affirmed.

We concur: SHENK, J.; CARTER, J.; CURTIS, J.; GIBSON, J.

39 Cal.App.2d 294

PEOPLE v. MALLETTE.

Cr. 3333.

District Court of Appeal, Second District, Division 2, California.

May 28, 1940.

1. Criminal law ⇐656(1), 1166½(12)

In murder trial, court's statement to jury, on receiving in evidence defendant's commitment to hospital for insane after entry of plea of not guilty by reason of insanity, that sole question before court at time of determination of defendant's insanity was whether she was in proper frame of mind to co-operate with her counsel in preparing defense and that such determination was merely adjudication of her state of mind at time thereof, not finding as to her insanity on date of crime, was prejudicial error as calculated to forestall jury's deliberate consideration of such determination, tending to prevent jury from inferring that defendant was insane on date of crime, and erroneously stating issue, which was whether defendant was so deranged mentally as to be incapable of appreciating her situation and making any legal defense.

2. Homicide ⇐179

Evidence of accused's insanity at times before trial is admissible as tending to prove insanity at time of crime.

3. Criminal law ⇐354

Where accused's insanity, sought to be proved, is temporary or interrupted by lucid intervals, wider range as to time should be allowed to testimony than where insanity is of more continuous and permanent character, but particular conditions of each case must be allowed to fix limits of time over which inquiry should extend.

4. Homicide ⇐179

Evidence of defendant's insanity at time of trial is admissible for limited purpose of proving prior insanity.

5. Criminal law ⇐730(1), 1171(1)

The prosecuting attorney's remarks in closing argument to jury on trial of issue raised by plea of not guilty by reason of insanity after conviction of first-degree murder that defendant would walk out free if jury found that she was insane at time of offense were improper and ground for reversal of conviction, though subsequently stricken, where court declined to explain that finding of insanity would require defendant's confinement in state hospital for criminally insane and jury found that she was sane at time of homicide. Pen.Code, § 1026.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Beatrice Mallette was convicted of murder in the first degree, and she appeals.

Reversed and remanded.

Henry Haves, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

This is an appeal from a judgment of conviction of murder in the first degree and from an order denying a new trial. Defendant was accused of the murder of her husband on May 28, 1939. After entering her plea of not guilty and not guilty by reason of insanity, the court appointed three psychiatrists as a commission to examine her. At the hearing held on August 7, 1939, the court without a jury determined that the defendant was "insane at the present time", committed her to the hospital for the criminally insane at Talmadge and suspended further proceedings. On December 6, 1939, defendant having been returned to the custody of the sheriff, the cause was reset for trial and the same psychiatrists were required to examine and report as to her sanity as of the date of the homicide.

On January 9, 1940, the jury was impaneled and the trial proceeded upon the issue raised by the plea of not guilty. Two days later the jury returned a verdict of guilty of murder in the first degree with a recommendation of life imprisonment. The same jury thereupon proceeded to try the issue of "not guilty by reason of insanity". On the following day, the jury returned its verdict that the defendant was sane at the time of said homicide. On January 16, 1940, defendant's motion for a new trial upon the statutory grounds was denied, whereupon the court sentenced the defendant in accordance with said verdict.

On this appeal defendant urges especially two points, namely: (1) the court committed prejudicial error in commenting to the jury upon the significance of the commit-

ment (exhibit B) of the defendant to the said state hospital on the 7th day of August, 1939; (2) the prejudice caused by the statement of the district attorney in his closing argument in which he commented upon said statement made by the court on receiving said exhibit B and misstated the result of the jury's determining her insane.

[1-4] On receiving in evidence said commitment to the hospital for the insane, the court said: "let the jury consider the fact that there was an adjudication on the point on the day of August 7, 1939, * * * the sole question before the court at that time being whether in the opinion of the court, the defendant was in sufficient frame of mind or the proper frame of mind to cooperate with her counsel in the preparation of her defense, under which circumstances it was the duty of the court to commit the defendant until such time as she might be in sufficient mental state to cooperate in presenting her defense. At most it was merely an adjudication of the state of mind on August 7 or thereabouts and was not a finding as to her sanity or insanity on May 28, 1939." Under the circumstances, this statement of the court was prejudicial and was not cured by anything that followed. The purpose and the office of the exhibit was to give proof of the insanity of defendant on the day on which the offense was committed. It is rarely possible to find satisfactory witnesses as to the state of mind of a person accused of a heinous crime as of the date of the offense. For this reason, it is proper for the court and the jury to hear and consider evidence of insanity at times prior to the trial of the accused because such evidence has a tendency to prove the insanity at the time of the crime. "Where the insanity sought to be proved is of a temporary character or interrupted by lucid intervals, which is apt to be the case where it results from personal injuries acted upon by casual and exciting causes, a wider range on the score of time should be allowed to the testimony than in cases where the insanity is of a more continuous and permanent character, and therefore its periods of commencement and termination more clearly defined and readily ascertained. But from the nature of the case no fixed rules as to the period of time over which an inquiry of this character should be extended can be established, and hence the particular conditions of each case must be allowed to fix the limits. To allow a wide range is certainly in keeping with the humanity of the law, which always prefers the escape of the guilty to the punishment of the innocent." People v. Farrell, 31 Cal. 576, 582. Defendant's insanity at the time of the trial is admissible for the limited purpose of proving prior insanity. People v. Kirby, 15 Cal.App. 264, 114 P. 794. The facts relative to the homicide, excluding the question of her insanity, could hardly have resulted in any verdict other than that of "guilty". Following her conviction of the crime, the same jury was impaneled to try her sanity. The evidence received upon that issue indicates a close contest. It certainly did not greatly preponderate in favor of her sanity. Dr. W. H. Worley testified that six months prior to the homicide, the defendant was "delusional and was suffering from a mental disorder that was rather progressive in type". Dr. Gustave F. Boehme testified that six months prior to the homicide the defendant was mentally sick and probably suffering from "some delusional and paranoic state, which the woman apparently suffered from during this long period of time". Dr. Victor Parkin testified that on the day of the homicide defendant was sane but she was not normal mentally; that she was a very neurotic woman for a good many years. In making his examination he learned from her that she had been an invalid for many years; that she had suffered a miscarriage which began her invalidism; that she had gone from doctor to doctor and from hospital to hospital to have her health restored without any success; that she had had her uterus removed; that she had visited the Mayo Clinic where she was advised that she had various disorders including a serious condition of her pancreas; that she had inflammatory adhesions, a gastric ulcer, premature menopause, chronic cystitis with strictures of the ureters, weak kidneys and a growth on her urethra; that by reason of said ills, she had been confined to her home a great part of her married life; that during the past seven years she had spent most of the time in bed listening to the radio; that her early married life was happy; that some years ago, her husband tired of her invalidism, took to drink, neglected and quarreled with her. Dr. Rappaport, the fourth psychiatrist, testified that while he believed the defendant sane, yet she was suffering from a psychoneurosis. This

testimony of the psychiatrists cast a serious doubt upon her sanity. It was emphasized by the history of her case, corroborated by the observations of a number of lay witnesses. The evidence of the treatment that she had received at the hands of her husband in any view we take of it gives further proof of her mental disorders. If he had been kind to and patient with her during the years of her illness, then her state of mind on the day of the homicide and subsequently when she believed he had mistreated her would indicate a delusional state. On the contrary, if she had been made wretched by the abuses at his hands during the long period of her illness, then the suffering to which she was subjected was calculated to add to her mental disease. In this situation the court's comment on admitting the insanity commitment was calculated to forestall the jury's deliberate consideration of the court's determination on August 7th. It should have been received as a circumstance in the chain of the prisoner's proof without the court's depreciating its value.

Defendant had the right to have the jury consider the commitment issued on August 7, 1939, for the purpose of drawing an inference that she was insane on May 28, 1939, but the statement of the court tended to prevent the drawing of such an inference by the jury. Moreover, the trial judge erroneously stated the issue which was determined at the hearing on August 7th when he said that the sole question before the court was "whether in the opinion of the court the defendant was in sufficient frame of mind or the proper frame of mind to cooperate with her counsel". On August 7th the question before the court was whether defendant was mentally deranged to such an extent as to be incapable of appreciating her situation and making any legal defense that she might have. People v. Lawson, 178 Cal. 722, 726, 174 P. 885.

[5] An additional ground for reversal is found in the oratorical display of the prosecuting attorney. In his closing remarks to the jury he said: "As the Court told you yesterday that was only a finding of the Court from the evidence that was presented to him at the time as to the condition of the defendant at the particular time, and it was not in any way a finding whether or not the defendant was or was not insane on the 28th of May. * * * A plea of not guilty by reason of insanity is equally a trial of the case, because if the defendant should be found insane at the time of the commission of the offense that is a finding that she is not guilty of the crime, because it is a theory of our law that an insane person can not commit a crime, so the crime requires the operation of a sane mind, and therefore she will walk out free if you find she was insane at the time of the commission of the offense". These remarks were wholly out of place and their effect could not be cured by the subsequent order of the court in striking them. The jury had just convicted her of murder. After said remarks, they could not but have reasoned that if they found her insane they would turn loose upon the community a dangerous person capable of doing much mischief. The statement appealed to a deeply rooted sentiment and could not be erased by any admonition of the court. The instinctive reaction of a socially minded person to the picture of her "walking out a free woman" is too well understood to require further elucidation. Moreover, after the remarks of the district attorney had left before the jury a vision of the defendant at large in society, the court declined to explain to the jury that a finding of insanity would require defendant to be confined in the state hospital for the criminally insane in accordance with the provisions of section 1026 of the Penal Code. This, he should have done, in view of the remarks of the district attorney.

In view of the state of the evidence, of the narrow margin upon which a conviction was predicated, we are of the opinion that the comment of the court, together with the remarks of the prosecutor resulted in an unfair trial of the defendant.

The judgment is reversed and the cause remanded for a new trial on the issue of defendant's plea of not guilty by reason of insanity.

We concur: WOOD, J.; McCOMB, J.

39 Cal.App.2d 284

BEARD v. SUPERIOR COURT IN AND FOR SAN LUIS OBISPO COUNTY et al.

Civ. 12620.

District Court of Appeal, Second District, Division 2, California.

May 28, 1940.

1. Venue ⇐71

The filing of a motion for a change of venue suspends power of trial court to act on any other question until motion has been determined and any order made prior to determination of motion for change of venue is a nullity.

2. Bastards ⇐36

The statute permitting trial court in action for divorce and separate maintenance to determine motion for counsel fees and costs prior to a determination of a motion to transfer action has no application to an action to recover support money for a child born out of wedlock. Civ.Code, § 196a; Code Civ.Proc. § 396b.

3. Bastards ⇐36
Prohibition ⇐5(3)

An order requiring payment of support money for a child born out of wedlock, attorney's fees, and costs pendente lite, made prior to determination of defendant's motion for a change of venue was a nullity, and defendant was entitled to a writ of prohibition restraining enforcement of order. Civ.Code, § 196a; Code Civ.Proc. § 396b.

Application by John Mitchell Beard for a writ of prohibition to restrain the Superior Court of the state of California in and for the county of San Luis Obispo, and Hon. Ray B. Lyon, judge thereof, and Camille Lucille Roberts and March Lucille Beard, real parties in interest, from enforcing an order requiring plaintiff to pay pendente lite support money to Camille Lucille Roberts and for an order directing respondent to hear and determine petitioner's motion for a change of venue.

Writ of prohibition issued.

S. G. North, of San Diego, for petitioner.

W. J. Minville, of San Luis Obispo, for respondent.

McCOMB, Justice.

This is an application (1) for a writ of prohibition to restrain respondent from enforcing an order requiring plaintiff to pay pendente lite to Camille Lucille Roberts a sum of money for the support of the alleged child of said Camille Lucille Roberts and petitioner, and (2) for an order directing respondent to hear and determine petitioner's motion for a change of venue.

The essential facts are:

January 22, 1940, Camille Lucille Roberts filed an action in the Superior Court of the State of California in and for the County of San Luis Obispo under the provisions of section 196a of the Civil Code against petitioner, in which she sought support for her minor child. In this action she alleged that she was the mother and defendant, the father of said child. Thereafter petitioner served upon plaintiff in said action notice of a motion for a change of venue to the county of his residence, to-wit, San Diego County, California. Subsequent thereto plaintiff Roberts filed a motion for allowance of support money, attorney's fees, and costs pendente lite. March 6, 1940, respondent made an order requiring petitioner to pay support money, attorney's fees, and costs pendente lite, and further ordered that, unless the order was complied with within fifteen days from the date thereof, petitioner's motion for change of venue would be denied.

This is the sole question to be determined:

Was respondent's order requiring the payment of support money, attorney's fees, and costs pendente lite prior to the determination of petitioner's motion for a change of venue void?

[1] This question must be answered in the affirmative. It is the established law of California that the filing of a motion for the change of place of trial suspends the power of the trial court to act upon any other question until the motion has been determined (Nolan v. McDuffie, 125 Cal. 334, 336, 58 P. 4; Hennessy v. Nicol, 105 Cal. 138, 142, 38 P. 649; Walsh v. Superior Court, 44 Cal.App. 31, 32, 185 P. 998; Pickwick Stages System v. Superior Court, 138 Cal.App. 448, 449, 32 P.2d 433) and that any order made prior to the determination of the motion for a change of place of trial is a nullity (Nolan v. McDuffie, supra, 125 Cal. page 337, 58 P. 4).

[2] Section 396b of the Code of Civil Procedure has no application to an action under the provisions of section 196a of the Civil Code. The latter code section pertains to support money for a child born out of wedlock, while section 396b of the Code of Civil Procedure has application to actions for divorce and separate maintenance.

[3] Applying the foregoing rules to the facts of the instant case, it appears that respondent, having failed to pass upon petitioner's motion for a change of venue, the order of March 6, 1940, for support money, attorney's fees, and costs pendente lite was a nullity. Therefore, petitioner is entitled to the relief he seeks, and it is ordered that a writ issue as prayed in his petition.

We concur: MOORE, P. J.; WOOD, J.



39 Cal.App.2d 300

PEOPLE v. HUDSPETH.

Cr. 3304.

District Court of Appeal, Second District, Division 2, California.

May 28, 1940.

1. Automobiles ⇐355(13)

Conviction of negligent homicide, as defined by the Vehicle Code, of truck driver, was sustained by evidence that truck driver was driving on wrong side of boulevard at reckless speed at curve at night and collided with automobile approaching from opposite direction, and that injuries sustained by motorist in the collision caused his death within one year. Vehicle Code, § 500, St. 1935, p. 173.

2. Criminal law ⇐1159(2)

In a case of conflicting testimony, it is for the jury and the trial court to reconcile and harmonize the testimony, and, where there is sufficient evidence to support the conviction, it will not be disturbed on appeal.

3. Criminal law ⇐822(1)

In prosecution of truck driver for negligent homicide, instructions with reference to the crime charged and defining the crime in the language of the statute, together with numerous stock instructions customarily given in cases involving automobile collisions, when taken as a whole, fairly stated the law. Vehicle Code, § 500, St.1935, p. 173.

4. Criminal law ⇐822(1)

Instructions must be construed as a whole.

5. Criminal law ⇐823(1)

Error may not be predicated on the omission from a single instruction of some exception thereto, condition, definition, or phrase which is elsewhere properly given in another portion of the charge.

6. Criminal law ⇐808½

An instruction defining a crime in the language of the statute is sufficient.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Chester Hudspeth was convicted of negligent homicide, and he appeals.

Affirmed.

Donald MacKay, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from a judgment, after conviction by a jury of negligent homicide, as defined by section 500 of the Vehicle Code, and from an order denying his motion for a new trial. He predicates his appeal upon six propositions, which for the purpose of this opinion, may be reduced to two: (1) that the evidence is insufficient to sustain the conviction; and (2) errors of the court in refusing certain proposed instructions while giving certain erroneous instructions.

I. It appears that on July 22, 1939, about 1:30 o'clock a. m., defendant, who was employed by the city of Los Angeles, was driving a city garbage (Chevrolet) truck, west on Washington boulevard, east of its intersection with Alameda. At a point varying, according to the witnesses, from 200 to 334 feet east of Alameda, the defendant's truck collided with the Ford car driven by the deceased, one John D. Flanagan, who was driving easterly on Washington. Following the collision, the bed of the Chevrolet was knocked on to the north side of the boulevard while its

chassis continued on, veering to the south and over through the grounds of the service station at the southeast corner of said intersection with Alameda, the defendant driver being unable to stop his truck by reason of injuries to the left wheel. Just preceding the collision, said truck of defendant was traveling at a speed of from 35 to 50 miles an hour; the Ford car was going at a speed of 15 miles per hour. Washington boulevard, at the scene of the accident, was on a curve about 620 feet in length; it is slightly more than 40 feet in width with a soft shoulder on each side of the pavement. At the point of collision, the curve made it impossible to see more than 60 feet ahead. There was no light at the point of the impact nearer than 190 feet. The Ford car was driving on the south or right side of the boulevard while the truck had pulled over from the north to the south side of the boulevard in order to pass another motorist, just before colliding with said Ford car. The lights of the Ford car were burning although the left lamp was not expelling a brilliant beam by reason of the fact that the glass in front of the lamp was broken and the reflector was covered with a sack. Upon being struck, the Ford car was pushed around with its rear wheels off the pavement on the south side of the boulevard with the front of the car facing to the north. In the impact, said Flanagan received a compound fracture of the skull with lacerations of the brain, from which he died within a year. His blood was found to contain 14 per cent alcohol, which was sufficient to cause his intoxication.

[1, 2] In view of the foregoing facts, while it does not present an ideal case of harmony among the witnesses who testified, yet the evidence was ample to warrant the conviction of defendant for driving in a negligent manner in that he was driving on the wrong side, at a reckless speed, on a narrow, curved boulevard, where traffic was fairly congested even at 1:30 o'clock in the morning. Driving in such manner and under such conditions constitutes a misdemeanor. In a case of conflicting testimony of the witnesses, it is a matter for the jury and the trial court to reconcile and harmonize the testimony, and where there is sufficient evidence to support the conviction, it will not be disturbed on appeal.

II. Defendant's attacks upon the instructions of the court are as follows:

1. The court erred in refusing to instruct the jury that there must be a causal connection between the negligent manner of driving and the death which had occurred.

2. It was error to instruct the jury that the test of the criminal responsibility of the accused was his negligence without including in such test that the death was the proximate result of the injuries caused by said negligence.

3. It was error to instruct the jury that a misdemeanor is an unlawful act not amounting to a felony.

4. It was error to require the jury to determine the legal effects of the acts of the defendant.

Defendant has set forth in his brief a number of instructions which he claims to be erroneous and a number of instructions which were refused by the court. It would serve no useful purpose to include all of the rejected instructions for the reason that they are either repetitious of instructions given or they are attempts to instruct the jury that they must find a causal connection between the negligent driving of the defendant and the death of the deceased. Pursuant to section 500 of the Vehicle Code, St.1935, p. 173, the court instructed the jury as follows:

"The defendant is charged with the crime of negligent homicide in violation of Section 500 of the Vehicle Code, which section provides, when the death of any person ensues within one year as the proximate result of the injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to a felony, the person so operating such vehicle shall be guilty of negligent homicide.

"A misdemeanor is an unlawful act not amounting to a felony."

The court also gave the following instruction:

"You are further instructed that contributory negligence of the deceased, if there be such, is no defense in this case. The test of the responsibility of the defendant in this case is, did he at the place and on or about the time charged in the information drive his automobile in a negligent manner or in a manner amounting to a misdemeanor and did such unlawful act contribute to the death of the deceased? If it did, although other independent causes also contributed, the crim-

inal responsibility of the defendant for the death of the deceased is made out."

"Therefore, if you find from the evidence beyond a reasonable doubt that at the place and on or about the time charged in the information the defendant drove the automobile he was driving in a negligent manner, or in a manner amounting to a misdemeanor, and that the unlawful act of the defendant contributed to the death of the deceased, then it will be your duty to find the defendant guilty as charged in the information, even though you should also find that the deceased, himself, was guilty of contributory negligence and that the act of the deceased himself contributed to his own death."

The court further instructed the jury that when the death of any person ensues within one year as the proximate result of the injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to a felony "the driver of such vehicle is guilty of negligent homicide". "No person shall drive a vehicle on a highway at a greater speed than is reasonable or prudent having due regard for the traffic on and the surface and width of the highway and in no event at a speed which endangers the safety of persons or property. A violation of this law is a misdemeanor. * * * Any person who drives any vehicle upon the highway in such a manner as to indicate a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving * * * a misdemeanor. * * * Approximate cause is that cause which in natural and continuous sequence unbroken by any new cause produces the result and without which the result would not have occurred. * * * If you find that Mr. Hudspeth at and immediately prior to the time of the accident in question was operating his automobile in a careful, lawful and prudent manner and that a confusing emergency arose * * * then Mr. Hudspeth was obliged to use only that degree of care which a person of ordinary prudence would have used under such circumstances, and if he used such care, he was not negligent although you may find that some other course of conduct on his part might have avoided the accident."

[3-6] The foregoing, together with numerous stock instructions customarily given to juries in cases involving automobile collisions fairly state the law. Instructions must be construed as a whole. Error may not be predicated upon the omission from a single instruction of some exception thereto, condition, definition or phrase which is elsewhere properly given in another portion of the charge. People v. Semone, 140 Cal.App. 318, at page 326, 35 P.2d 379. Furthermore, an instruction defining the crime in the language of the statute is sufficient. People v. Bratton, 125 Cal.App. 337, 14 P.2d 125; People v. Martin, 44 Cal.App. 45, 185 P. 1003.

Under the instructions given, the jury was privileged to find from the evidence that the defendant drove his truck upon the highway at a speed greater than was reasonable or prudent in view of the traffic and the surface and the width of the highway. If he did so drive, he committed a misdemeanor. It was just such driving as that of the defendant in the manner and under the circumstances described which constitutes a misdemeanor in the contemplation of the Vehicle Code. That he might cause a collision and injury to another by reason of his negligent manner of driving was an event likely to occur and which he should have foreseen. The facts were such as would warrant the jury in finding that there was "some measure of wantonness or flagrant or reckless disregard of the safety of others, or willful indifference". People v. Hurley, 13 Cal. App.2d 208, 217, 56 P.2d 978, 983.

Defendant requested some 13 special instructions which were denied. No useful purpose would be served by including all of said instructions in this opinion. Practically all of them were covered by stock instructions and by other instructions given by the court. Defendant proposed an instruction that the "burden is on the people to prove beyond a reasonable doubt that defendant was negligent and that such negligence, if any, was the proximate cause of said accident". Such instruction would have been at variance with the instruction given by the court in conformity with the language of section 500 of the Vehicle Code. Said code section provides that a homicide is a felony when committed through the negligent driving or when done while the driver is committing a misdemeanor, if death ensued within a year from the date of the injury. But that provision contains no language indicating that the negligent driving of the accused must have operated alone to effect the injuries of the deceased.

Since the instructions given contain a fair statement of the duty of the jury with reference to the evidence in the case, any of the rejected instructions would have been supererogatory, if not erroneous.

The judgment and the order appealed from are affirmed.

We concur: WOOD, J.; McCOMB, J.



39 Cal.App.2d 287

PEOPLE v. DYSART et al.

Cr. 3322.

District Court of Appeal, Second District, Division 2, California.

May 28, 1940.

Hearing Denied June 27, 1940.

1. Bail ⇐42

The trial court did not err in exonerating defendant's bail bond during course of trial and remanding her to sheriff's custody, since a trial court may order a defendant into custody as soon as the trial has commenced, and such an order does not violate defendant's right to bail as secured by the Constitution. Pen.Code, § 1129; Const. art. 1, § 6.

2. Criminal law ⇐273

Colloquy between trial court and defendant wherein defendant stated that the court did not coerce her to plead guilty and did not offer any inducement showed that defendant did not enter pleas of guilty because of any coercion, nor could defendant contend that she had entered pleas of guilty on the advice of her counsel.

3. Licenses ⇐42(3)

Counts of an indictment charging that on stated dates defendant willfully, unlawfully, feloniously and knowingly issued, executed and sold for value a certificate of interest in an oil and gas mining title and lease and an interest in an oil and gas development and prospecting business being conducted for profit without having first applied for and secured from the commissioner of corporations a permit authorizing her to do so, were sufficient to allege a public offense. St. 1917, p. 673.

4. Indictment and Information ⇐196(2)

A plea of guilty waives any defects in form of allegations in an indictment.

5. Criminal law ⇐1023(8)

An order denying defendant's motion in arrest of judgment is nonappealable.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Stella Dysart and others were charged with conspiracy to violate the Corporate Securities Act, St.1917, p. 673, and grand theft, with violation of the act, and with grand theft, and from judgments against her on each of three counts to which she plead guilty, Stella Dysart appeals.

Affirmed.

George Acret and George Stahlman, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Warner I. Praul, Deputy Atty. Gen., Buron Fitts, Dist. Atty., of Los Angeles County, and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

McCOMB, Justice.

Defendant was charged in an indictment filed in Los Angeles county with (a) one count of conspiracy to violate the Corporate Securities Act, St.1917, p. 673, and grand theft, (b) forty-one additional counts alleging violation of the Corporate Securities Act, and (c) eighteen more counts charging grand theft. After her demurrers were overruled she entered a plea of not guilty as to each count. Pending the trial defendant was released from custody on bail in the sum of $5,000. In due time the trial was commenced before a jury, and after nineteen days of trial defendant's bond was exonerated and she was remanded to the custody of the sheriff. The following day she asked for permission to withdraw her plea of not guilty as to counts IV, XIV, and XVI. This request was granted. Defendant was rearraigned upon the three counts just mentioned and entered a plea of guilty as to each. A mistrial was then declared as to the balance of the counts in the indictment. Subsequently defendant made a motion for an order vacating her plea of guilty to the three counts in the indictment, and also for permission to enter a plea of not guilty to said counts on the ground that said pleas were made involuntarily and under duress. She also made a motion in arrest of judgment

on the ground that the indictment in the counts as to which she had plead guilty did not state a public offense. Both of the motions just mentioned were denied. Thereafter judgment and sentence were pronounced against defendant on each of the counts as to which she had plead guilty. From these judgments she now appeals. There are also *purported* appeals from the orders denying her motions in arrest of judgment.

Defendant relies for reversal of the judgments on these propositions:

First: The trial court committed prejudicial error in exonerating her bail bond during the course of the trial and remanding her to the custody of the sheriff.

Second: Defendant's pleas of guilty to counts IV, XIV, and XVI of the indictment were entered under duress.

Third: A public offense is not alleged in counts IV, XIV, or XVI of the indictment.

[1] Defendant's first proposition is untenable. The law is established in California that it is within the power of the trial court to order the defendant into custody as soon as the trial has commenced and that such order does not violate defendant's right to bail as secured by article I, section 6 of the Constitution of the state of California. People v. Williams, 59 Cal. 674, 676; People v. Nickell, 22 Cal.App.2d 117, 123, 70 P.2d 659; sec. 1129, Pen.Code.

This rule is clearly stated by our Supreme Court in People v. Williams, supra, 59 Cal. at page 676 thus:

"We are of the opinion, however, that it was within the power of the Court to order the defendant into custody *as soon as the trial commenced.* Section 1129 of the Penal Code provides as follows: 'When a defendant who has given bail appears for trial, the Court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the Court, and he must be committed and held in custody accordingly.'

"The defendant's counsel contends that the above section of the Code is unconstitutional, inasmuch as it violates the right of bail secured by the Constitution. We do not think, however, that the position is well taken; and in this view we are sustained by the decision of the Court in the case of People v. Beauchamp, 49 Cal. 41."

From the foregoing it is evident that defendant's suggestion that the trial court should have declared a mistrial on her motion after remanding her to custody is wholly devoid of potency.

[2] Defendant's second proposition is likewise without merit. At the time defendant made her motion for an order vacating her plea of guilty and for permission to enter a plea of not guilty the following colloquy took place:

"The Court: Did I coerce you?

"Defendant Dysart: No, your Honor, you did not.

"The Court: Did I offer any inducement of any kind whatever?

"Defendant Dysart: No, your Honor, you did not.

"The Court: Did anyone represent to you that I had made any statement to you?

"Defendant Dysart: Your Honor, my attorney represented to me that he was a very good friend of your Honor and there were very good reasons why I should plead guilty and accept clemency and that he was a very good friend of Mr. Johnstone."

From the foregoing it is clear that defendant did not enter her pleas of guilty because of any coercion, neither is there any merit in the contention that defendant entered her pleas of guilty upon the advice of her counsel. See People v. Manriquez, 188 Cal. 602, 605, 206 P. 63, 20 A.L.R. 1441.

[3] Defendant's final proposition is likewise without merit. Count IV of the indictment, omitting nonessentials, read as follows:

"On or about the 18th day of May, 1937, at and in the County of Los Angeles, State of California, the said defendants, Stella Dysart, * * * did willfully, unlawfully, feloniously and knowingly, issue, execute and sell for value a security of their own issue to one Inez C. Bowers, as defined in said Corporate Securities Act, to-wit: a certain certificate of interest in an oil and gas mining title and lease in Section Nine (9) Township Fourteen (14) North, Range Nine (9) West, New Mexico Principal Meridian, McKinley County, New Mexico, without first having applied for and secured from the Commissioner of Corporations of the State of California, a permit authorizing them so to do."

Count XIV, which is substantially the same as count XVI read thus:

"On or about the 16th day of March, 1938, in the County of Los Angeles, State of California, the said defendants, Stella Dysart * * *, did willfully, unlawfully, feloniously and knowingly sell and issue and cause to be sold and issued for value to John J. McFarlane, a certificate of interest and participation, investment contract, certificate of interest in title to property, profits and earnings, to-wit: a one-tenth of one percent interest in a business to be conducted for profit, an oil and gas development and prospecting business known as Mutual Land Owners, Ltd., without having first applied for and secured from the Commissioner of Corporations of the State of California a permit authorizing them so to do."

In People v. Rubens, 11 Cal.App.2d 576, 54 P.2d 98, 1107, a count in an indictment similarly worded was held to state facts sufficient to constitute a public offense, the court saying, 11 Cal.App.2d at page 579, 54 P.2d at page 100:

"We are of the opinion each count of the indictment states facts sufficient to constitute the offense with which it purports to charge the defendants. * * * The indictment, as amended, alleges in each count that the defendants, on a specified date 'did willfully, unlawfully and knowingly authorize, direct and aid in the issue and sale of, and did issue, execute and sell, and cause, and assist in causing to be issued, executed and sold for value to' individuals who are named therein, 'a security of their own issue, as defined in said Corporate Securities Act, to-wit: A certain certificate of interest in an oil and gas lease' on specifically described real property in Sacramento county, 'without first having applied for and secured from the Commissioner of Corporations of the State of California a permit authorizing them so to do.' This is a sufficient allegation of facts constituting the public offense prohibited by the provisions of section 18 of that act. St.1917, p. 673, 2 Deering's Gen.Laws, 1931, p. 1924, Act 3814, and amendments thereto. There is no merit in the contention that the indictment fails to state facts sufficient to constitute the public offenses against the defendants which are sought to be charged therein."

[4] Other objections which defendant raised by special demurrer to the indictment will not be considered by us for the reason that a plea of guilty waives any defects in form of allegations in an indictment. Weir v. United States, 7 Cir., 92 F.2d 634, 635, 114 A.L.R. 481. Writ of certiorari denied, 302 U.S. 761, 58 S.Ct. 368, 82 L.Ed. 590.

[5] An order denying defendant's motion in arrest of judgment is nonappealable. People v. Rubens, 11 Cal.App.2d 576, 579, 54 P.2d 98, 1107; People v. Planer, 23 Cal.App.2d 251, 252, 72 P.2d 767. Therefore, the purported appeals from the orders denying defendant's motions in arrest of judgment are dismissed.

For the foregoing reasons the judgments are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.



39 Cal.App.2d 280

CORTOPASSI et al. v. CALIFORNIA-WESTERN RAILROAD & NAVIGATION CO. et al.

Civ. 11173.

District Court of Appeal, First District, Division 2, California.

May 28, 1940.

Hearing Denied July 25, 1940.

1. Railroads ⇐327(3)

A person attempting to cross railroad tracks was bound to exercise due care, and could not, in exercise of due care, walk forward with his head continually turned to the rear.

2. Appeal and error ⇐927(6)

In reviewing an order directing a verdict on an opening statement, appellate court must apply rules analogous to those which govern it in reviewing an order granting a nonsuit after the introduction of evidence.

3. Appeal and error ⇐927(3)

On review of an order granting a nonsuit after plaintiff has presented his evidence, every favorable inference fairly deducible and every favorable presumption fairly arising from evidence adduced must be considered as facts proved in favor of plaintiff, and where evidence is susceptible of two constructions or if one of several inferences may reasonably be made, court must take view most favorable to plaintiff,

and it is only when facts are indisputable, and when no other inference than that of negligence or contributory negligence can be drawn from the facts, that the issue becomes one of law for the court.

4. Trial ⇐109

In action to recover for death of a pedestrian who was struck by gasoline locomotive, it was error to grant motion for nonsuit on ground that pedestrian's contributory negligence was established as a matter of law by plaintiff's opening statement according to which pedestrian was familiar with the premises and stepped on tracks with back turned to on-coming locomotive, where statement failed to indicate what pedestrian did in exercise of due care immediately before he stepped onto track, and in view of statutory presumption of care exercised by deceased. Code Civ.Proc. § 1963, subd. 4.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Rosina Cortopassi and Lillian Cortopassi, a minor, by Rosina Cortopassi, her guardian ad litem, against California-Western Railroad & Navigation Company, a California corporation, and others, to recover damages for death of pedestrian struck by locomotive. From an adverse judgment, plaintiffs appeal.

Reversed.

Philander B. Beadle, of San Francisco, Clifton Hildebrand, of Oakland, and Renzo Turco, of San Francisco, for appellants.

Hoge, Pelton & Gunther, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

Joseph Cortopassi, while crossing a railroad track, was struck and killed by a gasoline locomotive. His surviving widow and minor daughter commenced an action to recover damages. The defendants filed an answer containing certain denials and pleading the contributory negligence of the decedent. The case was called for trial before the trial court sitting with a jury. After the jury had been impaneled counsel for plaintiffs made an opening statement. After he had finished, counsel for the defendants made a motion for a nonsuit. The motion was granted and from the judgment entered thereon the plaintiffs have appealed.

In their brief the plaintiffs have copied the proceedings in the trial court. In the brief of the defendants they recopied portions and parts thereof they have italicized. Portions pertinent to the issue presented on this appeal are set forth below. The parentheses are ours. "Mr. Hildebrand: Yes. May it please your honor. Ladies and gentlemen of the jury, I will make a brief opening statement what we expect to prove in this case. The deceased had worked for a good many years for the Union Lumber Company. * * * He was in good health at the time of the happening of this accident and had worked that day. After finishing work on that particular day he had gone over to order or to arrange for the purchase of some lumber on the grounds there of the Union Lumber Company. In going over there he had gone through the yard of the Union Lumber Company *on a path which was regularly used* by the employees of the company and others. He was coming back there after making these arrangements when he was struck by this gasoline locomotive that was being operated by the California-Western Railroad. (Here follow specifications of negligence of defendants.) They were backing slowly down around this curve, according to the testimony, and Mr. Cortopassi *was walking* so that his back in crossing on the pathway across the track, *his back was in the direction from which they were coming.* As he went to go across this track *they came down around this curve* and there was a logging train on the next track making a great deal of noise, puffing, and with a lot of cars there so that nothing much could be heard on the adjoining track, * * * The deceased *with his back that way* and with such slow moving car coming around the curve, was struck by this car without any lookout on the car and no conductor as the regulations required, and was killed. The deceased was a man *thoroughly familiar with the premises,* had been going back and forth on the pathway and other employees going that way for years. It was a well-known pathway to the yard and thoroughly familiar to everyone in the yard. (Here follows statement of damages.) Mr. Hoge: May it please the court the defense at this stage of the case moves for a nonsuit on the basis of the open-

ing statement made by the plaintiff in the case. According to the opening statement the deceased was entirely familiar with the premises and used the premises for many years. He stepped upon the track and with his back turned was struck by this train, proceeding very slowly. Under the law of this state deceased, under these circumstances was guilty of contributory negligence as a matter of law. * * * The Court: Motion for nonsuit on the opening statement will be granted."

[1-4] In making the opening statement, Mr. Hildebrand, acting for the plaintiffs, did not purport to state the case for the defendants. A most careful examination of the statements made by him does not disclose anything to the effect that the decedent negligently stepped onto the railroad track. The statement was to the effect that when the deceased was struck his back was turned to the oncoming locomotive. However, the statement is wholly silent as to what the deceased did or did not do in the exercise of due care immediately before he stepped onto the railroad track. It will be conceded that before attempting to cross the track of the steam railroad the deceased was bound to exercise due care. However, he had a right, at least at some time, to proceed. In proceeding it was his duty to watch his step. He could not, in the exercise of due care, walk forward with his head continually turned to the rear. Moreover, from the facts before us it appears the deceased was bound to apprehend danger from in front as much as from the rear. The statement contained the expressions "down" and "around this curve". Those expressions indicate the topography was not level or laid out in straight lines. They tend to indicate that visibility was poor. There is a presumption that a person takes ordinary care of his own concerns. Code Civ.Proc., sec. 1963, subd. 4. From the facts contained in the opening statement various inferences in favor of the plaintiff may be drawn. In Bias v. Reed, 169 Cal. 33, at page 38, 145 P. 516, at page 518, the court said: "In reviewing an order directing a verdict on an opening statement, the appellate court must apply rules analogous to those which govern it in reviewing an order granting a nonsuit after the introduction of evidence." And in Gregg v. Western Pac. R. Co., 193 Cal. 212, 223 P. 553, the court was called upon to pass on an order granting a nonsuit after the plaintiff had presented his evidence. On page 216 of 193 Cal., 223 P. on page 554, the court said: "Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs." It is only when the facts are clear and indisputable and when no other inference than that of negligence or contributory negligence can be drawn from the facts that the issue becomes one of law and not of fact. McQuigg v. Childs, 213 Cal. 661, 663, 3 P.2d 309. Applying these rules to the present case it is clear it may not be said as a matter of law that the deceased was guilty of contributory negligence. But the sole question presented to the trial court was the contention that the deceased was guilty of contributory negligence. It follows that the motion for a nonsuit should not have been granted and that the effect of granting the motion was to deprive the plaintiffs of a trial on the merits.

The defendants cite and rely on Clary v. Lindley, 30 Cal.App.2d 571, 86 P.2d 920; Kelly v. Fretz, 19 Cal.App.2d 356, 65 P.2d 914; and Mundy v. Marshall, 8 Cal. 2d 294, 65 P.2d 65. Each of those cases presented a wholly different set of facts. In each case the issue of the contributory negligence of the injured person was not limited to the instant of the impact but covered his movements prior to the impact. In other words, in each case the presumption, if any, was dispelled. Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 9, 210 P. 269.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

39 Cal.App.2d 336

TAYLOR v. PARSONS et al.

Civ. 12528.

District Court of Appeal, Second District, Division 2, California.

May 29, 1940.

1. Appeal and error ⇐786, 1126

The judicial council having repealed section of court rules, providing for dismissal of appeal or affirmance of judgment on ground that appeal is frivolous, respondents' motion to dismiss appeal or affirm judgment on such ground is not well taken. Rules for Supreme Court and District Courts of Appeal, rule 5, § 3.

2. Appeal and error ⇐627(2, 3)

A motion to dismiss appeal or affirm judgment because of appellant's failure to serve copy of transcript on respondents should be denied, as no prejudice, not curable by ordering appellant to serve copy of transcript immediately, resulted to respondents. Rules for Supreme Court and District Courts of Appeal, rule 1, §§ 1, 2, 4.

3. Appeal and error ⇐801(1)

The District Court of Appeal, having granted appellant permission to file opening brief tendered in response to order to show cause why appeal should not be dismissed for lack of prosecution, need not consider whether reasons advanced by appellant for delay in filing brief meet requirements of court rule. Rules for Supreme Court and District Courts of Appeal, rule 1, § 5.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by George Taylor against J. H. Parsons and another. Judgment for defendants, and plaintiff appeals. On motions to dismiss the appeal or affirm the judgment and to strike appellant's opening brief from the files.

Appellant ordered to serve a copy of the transcript on respondents within five days, respondents granted 30 days to file and serve a brief in reply to appellant's opening brief, appellant granted 20 days after service of respondents' brief to serve and file reply brief, and motions denied.

Walter Gould Lincoln, of Los Angeles, for appellant.

Harold M. Davidson, of Alhambra, for respondents.

McCOMB, Justice.

These are motions (1) to dismiss the appeal or affirm the judgment on the grounds (a) that the appeal is frivolous and (b) that the requirements of rule I, sections 1, 2, and 4 of the rules for the Supreme Court and District Courts of Appeal (213 Cal. xxxv, xxxvi) have not been complied with; and (2) to strike from the files appellant's opening brief on the ground that appellant has not made a showing sufficient to permit the filing of the same under rule I, section 5 of the rules for the Supreme Court and District Courts of Appeal (213 Cal. xxxvi).

(1)

The essential facts are:

The clerk's transcript was filed December 16, 1939. A copy of this transcript has never been served on respondent. Appellant took no further steps until this court on March 4, 1940, issued an order to show cause why the appeal should not be dismissed for lack of prosecution. This order was made returnable March 27, 1940. March 27, 1940, appellant tendered an opening brief, which the court ordered filed, and the order to show cause was dismissed.

[1] Rule V, section 3 of the rules for the Supreme Court and District Courts of Appeal (213 Cal. xliii) formerly provided for the dismissal of an appeal or the affirmance of a judgment on the ground that the appeal was frivolous. This section, however, of the rules was repealed by the judicial council September 29, 1939, effective as of November 1, 1939. Therefore, respondents' motion to dismiss or affirm the judgment on the ground that the appeal is frivolous is not well taken.

[2] It is true, as contended by respondents that appellant should have served a copy of the transcript upon them. However, we fail to see where any prejudice has resulted to respondent which cannot be cured by ordering appellant to serve a copy of the transcript immediately. Therefore, respondents' motion to dismiss the appeal or affirm the judgment should be denied.

(2)

[3] This court has heretofore granted appellant permission to file his opening

brief and it is thus unnecessary to consider whether or not the reasons which appellant now advances for his delay in filing an opening brief meet the requirements of section 5 of rule I of the rules for the Supreme Court and District Courts of Appeal, supra.

For the foregoing reasons (1) appellant is ordered to serve upon respondents within five days from the date of this order a copy of the transcript in the above-entitled case, such service to be evidenced by filing with the clerk of this court of an acknowledgment of service by respondents or an affidavit of service by appellant; (2) respondents are granted thirty days from the date of this order within which to serve and file a brief in reply to appellant's opening brief; (3) appellant is granted twenty days after service of respondents' brief in which to serve and file a reply brief; and (4) the motion to dismiss or affirm the judgment and the motion to strike appellant's opening brief are and each is denied.

We concur: MOORE, P. J.; WOOD, J.



39 Cal.App.2d 267

PEOPLE v. RATTEN et al.

Cr. 3312.

District Court of Appeal, Second District, Division 2, California.

May 27, 1940.

Hearing Denied June 26, 1940.

1. Burglary ⇐41(8)

Evidence was sufficient to sustain convictions of two defendants for burglary from several residences.

2. Criminal law ⇐627½

The provision of the Code of Civil Procedure for inspection of documents which is found in part II thereof could not be invoked in burglary prosecution, since the sections of the code in part II are applicable to civil actions only and may not be invoked in criminal actions. Code Civ.Proc. § 1000.

3. Criminal law ⇐519(3)

In burglary prosecution, trial court did not err in receiving in evidence one defendant's purported confession consisting in his taking police officers to various premises where he had committed burglaries, where it did not appear that defendant made disclosures because of duress, threats, or a promise of immunity or hope of reward, and record disclosed that he furnished information freely and voluntarily.

4. Criminal law ⇐531(4), 1170(1)

In burglary prosecution, it was error to sustain objections to questions propounded to police officer, who had been placed on stand by district attorney to testify to confessions by one defendant, undertaking to ascertain on a voir dire circumstances under which defendant was arrested and circumstances surrounding his treatment before his confessions, but error was harmless where officer's testimony disclosed no confession and statements made by the defendant were not prejudicial.

McCOMB, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Lindel O. Ratten and Joseph E. Brown were convicted of burglary, and they appeal.

Affirmed.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

Walter L. Gordon, Jr., and Marshall Denton, Jr., both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before the court without a jury (1) defendant Ratten was found guilty on one count of burglary, and (2) defendant Brown was found guilty on four counts of burglary. Defendant Ratten appeals from the judgment, while defendant Brown appeals from the judgments and also from the orders denying his motion for a new trial.

Viewing the evidence most favorable to the People (respondent), the facts are these:

August 25, 1939, Mr. Schwartz, who lived at 2929 Eleventh avenue, Los An-

geles, retired at about 11:30 p. m. The following morning he discovered that his trousers had been removed from a closet in his room and $15 had been extracted therefrom (count I).

August 24, 1939, Mr. Franklin, who lived at 3415 Fourth avenue, Los Angeles, retired at about 10:30 p. m. The next morning he discovered that his trousers had been removed from his bedroom, and, when he found them later in his kitchen, he discovered that some money had been taken from the pockets (count II).

August 22, 1939, Mr. Harmell, who lived at 2848 Buckingham road, Los Angeles, retired at about 1 a. m. When he arose later in the day he discovered that his pantaloons were missing, and upon finding them in the hallway of the building in which he resided he discovered that $160 in cash had been taken from one of his pockets (count III).

September 13, 1939, Mr. Tucker, residing at 2138 Dunsmuir avenue in Los Angeles, retired at about 8 p. m. He was awakened during the night and found that $2 had been taken from his purse (count IV).

Defendants rely for reversal of the judgments upon these propositions:

First: There is no substantial evidence to sustain the findings of fact upon which the judgments were necessarily predicated.

Second: The trial court committed prejudicial error in sustaining objections to questions asked by defendants of Officer Bowers on his voir dire examination.

Defendant Brown urges these additional propositions:

(A) The trial court committed prejudicial error in denying a motion under section 1000 of the Code of Civil Procedure for inspection of certain documents in the possession of the district attorney.

(B) The trial court committed prejudicial error in receiving in evidence his purported confession.

[1] Defendants' first proposition is untenable. An examination of the record discloses substantial evidence considered in connection with the inferences which the trial court may have properly drawn therefrom to sustain the facts set forth above and each and every material finding of fact upon which the judgments of guilty were necessarily predicated. For example, September 16, 1939, defendants were driven by police officers through the Wilshire police district of Los Angeles and defendant Brown pointed to 2929 Eleventh avenue, stating, "That is where I got in." A little later the same evening he called their attention to 3415 Fourth avenue and pointed out a dining room window as the place where he entered the house. He was then taken to 2848 Buckingham road and there pointed out a window on the south side as the place where he entered that house. When taken to 2138 South Dunsmuir avenue, he led the officers from the living room through the dining room to the back bedroom, where he told them a man had been sleeping in one of the beds.

In addition, defendant Brown was taken to Mr. Tucker's home later and Mr. Tucker thanked him for not taking a pawn ticket, to which defendant Brown replied, "Well, you wanted it, didn't you?" Mr. Tucker also said to defendant Brown, "Well, it was pretty clever, Joe, breaking the gun open and taking the bullets out and I followed you out in the yard with nothing," to which defendant Brown "just smiled".

The foregoing testimony clearly connects defendant Brown with the four offenses set forth above, counts I to IV, inclusive.

Defendant Ratten admitted driving defendant Brown to the vicinity of 2138 Dunsmuir avenue the evening Mr. Tucker's home was burglarized and admitted that he knew defendant Brown intended to commit a burglary. He also admitted that according to a prearranged plan he met defendant Brown shortly after the burglary and was assisting him in making his escape at the time he, Ratten, was arrested. Clearly he was an accomplice of his codefendant and was properly found guilty of the burglary charged in count IV. Further discussion of the evidence is unnecessary.

The errors alleged in defendants' second proposition will not be considered by us for the reason that it is the established law of this jurisdiction that, where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made to the trial court, so that the reviewing court can determine whether the proffered evidence would have been material and beneficial to the party offering it. (Travelers Fire Ins. Co. v. Brock & Co., 30 Cal.

App.2d 115, 117, 85 P.2d 904; People v. Ferdinand, 194 Cal. 555, 570, 229 P. 341; People v. Erno, 195 Cal. 272, 280, 232 P. 710; People v. Hinshaw, 40 Cal.App. 672, 674, 182 P. 59.)

The rule is clearly stated by Mr. Justice Houser, speaking for our Supreme Court in People v. Ferdinand, supra, in discussing an identical proposition of law as follows at page 570 of 194 Cal., 229 P. at page 346:

"No offer of proof from any source followed the ruling by the court sustaining the objection to the question, and it must be assumed that, had counsel for defendant been in possession of any fact tending to show coercion, a tender of such evidence would have been made in defendant's behalf."

Again in discussing a similar objection in People v. Erno, supra, Mr. Justice Waste, now chief justice of the Supreme Court, says at page 280 of 195 Cal., 232 P. at page 714: "Objection was made and sustained, and counsel for Hard did not further offer to enlighten the court as to what he intended to show, other than to say that he proposed to rebut the testimony of Erno, without stating in what particular, and to 'show fear on the part of the defendant Hard, that he had grounds to be afraid.' Assuming that any part of the testimony which appellant might have introduced along the line indicated was material, and would have had the effect he now claims it would, he should have stated its purpose more fully and clearly to the trial court. We cannot, in the present state of the record, determine whether or not any substantial right of the appellant was prejudiced by the ruling. People v. McGann [194 Cal. 688, 694], 230 P. 169; People v. Ferdinand [194 Cal. 555], 229 P. 341."

In the present case, the questions did not indicate that the answers would be either material or beneficial to defendants, nor was any offer of proof made.

[2] Defendant Brown's additional proposition (A) is untenable. Section 1000 of the Code of Civil Procedure is to be found in part II, title XIV, chapter 3 thereof. It is now established in California that the sections of the Code of Civil Procedure in part II are applicable to civil actions only, and that the provisions in this part of the Code of Civil Procedure may not be invoked in criminal actions. (Gonzales v. Superior Court, 3 Cal.2d 260, 263, 44 P.2d 320.)

[3] Defendant Brown's additional proposition (B) is also without merit. The purported confession of which he complains consists in defendant Brown's taking the police officers to the various premises where he had committed burglaries. An examination of the record fails to disclose that this defendant made these disclosures to the officers because of duress, threats or a promise of immunity or a hope of reward. As far as the record discloses he furnished the information freely and voluntarily. Hence it is obvious that there was no error in receiving the questioned evidence.

For the foregoing reasons the judgments and orders appealed from are and each is affirmed.

MOORE, Presiding Justice (concurring).

[4] I concur in the foregoing opinion except in so far as it relates to the attempted voir dire of Officer Bowers. During the course of the trial, police officer Bowers was placed upon the stand by the district attorney to testify to certain confessions by the defendant.

Prior to his recital of the statements made and acts done by the defendants, counsel for the defendants undertook to ascertain upon a voir dire the circumstances under which the defendant was arrested and the circumstances surrounding his treatment prior to his confessions to the police and his accompanying of the officers to the scenes of his crimes. Objections were sustained to a number of such questions.

Such rulings were error. It is always pertinent for the defendant's counsel to inquire into such circumstances in order that the court may be advised whether or not any force or other menace was exercised upon the defendant to induce his confession. But no damage was done by the ruling for the reason that the testimony of the officer disclosed no confession and the statements made by said defendant were not prejudicial to the appellants.

I concur: WOOD, J.

39 Cal.App.2d 327

MUTCH v. SAN DIEGO ELECTRIC RY. CO.

Civ. 2391.

District Court of Appeal, Fourth District, California.

May 28, 1940.

Hearing Denied July 25, 1940.

1. Appeal and error ⇐1012(1)

A judgment should be reversed where immutable physical laws disclose that the testimony upon which judgment is based could not by any possibility be true, but it is not always possible to tell what immutable physical laws are applicable in a given situation.

2. Evidence ⇐591

In action for injuries sustained in attempting to board street car, testimony of passenger on cross-examination, allegedly showing physical impossibility of accident happening in manner claimed, would be considered in connection with remainder of passenger's testimony and with other evidence in his behalf.

3. Appeal and error ⇐1008(1)

In action for injuries sustained in attempting to board street car when motorman, without warning, started car and closed doors, causing passenger's foot to be caught in folding step, conflict between testimony of passenger regarding manner in which accident happened and evidence of tests by employees of street car company to show physical impossibility of accident happening as claimed was for trial court, sitting without a jury.

4. Carriers ⇐318(8)

In action for injuries sustained in attempting to board street car when motorman, without warning, started car and closed doors, causing passenger's foot to be caught in folding step, evidence did not establish physical impossibility of accident occurring in manner alleged, so as to preclude recovery, nor was evidence of passenger so inherently improbable or unbelievable as to require its rejection.

5. Appeal and error ⇐1056(1)

In action for injuries sustained in attempting to board street car when motorman, without warning, started car and closed doors, causing passenger's foot to be caught in folding step, refusal to permit motorman to testify that shortly before trial passenger requested that he be allowed to try and get his foot caught in door of step was not prejudicial, in view of another motorman's testimony respecting a similar request made of him by passenger, and in view of passenger's testimony that he had made such a request of two motormen.

6. Appeal and error ⇐1047(1)

In action for injuries sustained in attempting to board street car when motorman, without warning, started car and closed doors, causing passenger's foot to be caught in folding step, alleged refusal of opportunity to secure testimony of absent witness was not reversible error where no diligence was shown, no offer of proof was made, and matter was not pressed, particularly where evidence was cumulative.

7. Trial ⇐66

In action for injuries sustained in attempting to board street car when motorman, without warning, started car and closed doors, causing passenger's foot to be caught in folding step, whether case should be reopened for purpose of taking statements of trial court respecting test and inspection of street car made by the court was in court's discretion.

8. Trial ⇐66

In action for injuries sustained in attempting to board street car when motorman, without warning, started car and closed doors, causing passenger's foot to be caught in folding step, denial of motion to reopen case for purpose of taking additional evidence in the form of a statement by trial court of test and inspection made by the court of street car involved in purported accident was not an abuse of discretion.

9. Appeal and error ⇐891

Application to the District Court of Appeal for leave to produce additional evidence in the form of tests and demonstrations of operating mechanisms of doors and steps of street car involved in accident would be denied, in view of fact that such inspection was made by trial court and that making of another such test and demonstration would merely add to existing conflict in evidence, since such conflicts are within exclusive domain of trial court.

Appeal from Superior Court, San Diego County; J. G. Bruton, Judge.

Action by John T. Mutch against the San Diego Electric Railway Company for injuries sustained by plaintiff as he was at-

tempting to board a street car operated by the defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, and V. F. Bennett, of San Diego, for appellant.

Atherton & Atherton, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries alleged to have been suffered by the plaintiff. The court, sitting without a jury, awarded the plaintiff $1,600 and the defendant has appealed from the judgment. Among other things, the court found that the plaintiff was injured as he was attempting to board a street car operated by the defendant, when the motorman, without warning, started the car and closed the doors, and the plaintiff's left foot was caught in the folding step.

The appellant's main contention is that the evidence is insufficient to support the findings and judgment for the reason that it conclusively appears that it was a physical impossibility for the purported accident to have happened. It may be here noted that the motorman testified that on this occasion he stopped the car and opened the doors to admit another passenger; that he saw no one else and closed the door; that after this passenger paid his fare he looked to see that there was no vehicle or pedestrian in the way and started the car smoothly; that when the car had moved three or four feet someone slapped the side of the car door and asked him to wait a minute; that he stopped the car, opened the door and the respondent entered; and that from the time he first saw the respondent until the car stopped the respondent moved with the car and was on his feet. Another witness for appellant, a high school girl who was riding on the street car, testified to the same effect.

It should also be noted that there were two doors at the front end of the street car in question, with a stanchion or handhold between them. These doors were opened and closed by a mechanical contrivance operated by the motorman. The opening of the doors lowered the bottom steps and when the doors were closed these bottom steps were raised so that they stood on edge just outside the doors.

The respondent testified that as he got out of an automobile at the curb, he saw the street car approaching and another man standing at the stopping place; that he went out to where this man was standing, before the street car stopped; that he carried in his right hand a box containing a microscope which weighed 35 pounds; that as the other man entered the front one of the two doors he placed his left foot on the bottom step of the second door from the front and took hold of the hand-hold between the two doors with his left hand; that he attempted to follow the other man through the front one of the two doors, swinging the box he carried ahead of him; that as he was doing this the doors of the car closed and the car moved forward; that the closing doors skinned a knuckle on his left hand, but he got his hand out; that the folding step caught his left foot; that he fell back to the pavement but still held on to the box; that his left foot caught in the step and he took two or three hops on his right foot before the car was stopped and the doors opened; and that he twisted his back and injured the left side of his body, including his foot, leg and hip.

This testimony corresponds almost exactly with a written statement which the respondent gave to the appellant, at its request, six days after the accident.

The testimony of the driver of the automobile from which the respondent alighted is to the same effect. He testified that the respondent, carrying the box in his right hand, went directly toward the door of the street car where the other man was standing; that the two men were about three feet apart when the car stopped; that he had a clear view of what occurred; that when the car stopped the door opened and the other man got on; that the respondent "reached up and got the bar, put one foot up there"; that the door then closed on his hand and the car started; that the respondent hopped along on one foot and fell over on the box; that then someone in the car "hollered" and the car stopped; that the respondent fell over on the box at about the same time the car stopped; and that the respondent immediately got up and entered the car.

The respondent's evidence is partially corroborated, at least to the extent of showing that something out of the ordinary happened, by a part of the testimony of appellant's witnesses. The high school girl, to whom we have referred, further testified that when the respondent boarded the car he took a seat beside her; that he imme-

diately crossed his left leg over his right knee, pulled down his sock and looked at his ankle; that the motorman asked what was wrong and she asked him if he was hurt; and that he said he was not hurt but he continued to rub his ankle for a block or two. The motorman also testified that immediately after the respondent boarded the car he saw him rubbing his shins and asked what was the trouble and that the respondent replied that he had a funny sensation; that to his question as to what caused it the respondent said: "I caught it in your car step"; and that he told the respondent this was impossible and that he must be mistaken, but that the respondent insisted that this had occurred although he said he was not hurt.

The respondent went to a doctor the day after the occurrence in question. This doctor died before the trial and his testimony was not available. Another doctor testified that he examined the respondent four days after the date of the alleged accident; that the respondent then had an abrasion or bruise on the front of his left foot, with some blackness, swelling and redness; that he had tenderness on his foreleg and thigh; that there was evidence of muscle strain and evidence of a sprain of the tendons, ligaments and muscles of the left leg and hip region; that he thereafter treated him twenty times; and that he seemed to be suffering pain from an injury. He further testified that the respondent had an arthritic condition which had been aggravated by strain or sprain. Before the cause was submitted, the trial judge, the reporter, the respondent and counsel for both parties inspected the street car in question.

[1] It is not contended that the respondent's evidence, if believed, is insufficient to support the findings and judgment. It is insisted, however, that this evidence is so inherently improbable and unbelievable that it must be disregarded in the light of certain facts which conclusively show that it was physically impossible for this accident to have happened in anything like the manner related by the respondent's witnesses. Cases are cited to the proposition that a judgment may and should be reversed where immutable physical laws disclose the fact that the testimony upon which the judgment is based could not by any possibility be true. While this may be conceded it is also true, as pointed out in many automobile collision cases, that it is not always possible to tell what immutable physical laws are applicable in a given situation because of the many unknown factors such as, for instance, the weight of the respective objects, the force and direction of the blows, the time element, and the uncertainty arising from the actions and reactions of the human beings involved in the accident.

[2] The contention that it was physically impossible for this accident to have happened in the manner claimed is based upon certain evidence of tests made with the car in question and upon a part of the testimony given by the respondent. On cross-examination, the respondent was asked whether, on the occasion in question, after placing his left foot on the step of the second door and taking hold of the stanchion between the two doorways he then brought his weight up on his left foot; whether he took his right foot off the ground; and whether, when the step folded up, he was standing with his weight on his left foot and his right foot suspended in the air and about to be placed on the step of the first doorway. To each of these questions he replied in the affirmative. Two employees of the appellant testified that about a year after the accident they made a test on this same street car, which was then in approximately the same condition, by placing weights on the lower steps when the doors were open, for the purpose of ascertaining what weight thereon would prevent the closing of the doors and the raising of these steps. They testified that when a weight of 62 pounds was placed on the step nearest the front end of the car the operation of the mechanical device failed to close that door and raise that step and, similarly, that a weight of 43 pounds on the step of the second door prevented the closing of that door and the raising of that step. They also testified that one of them placed his left foot on the step to the second door when the doors were in an open position, without putting much weight on that foot, and that when the doors were closed by the operating mechanism the step was raised against the foot but that this man had no difficulty in withdrawing it.

From this evidence, and since the respondent weighed 188 pounds, it is argued that it conclusively appears that the door and step could not have closed while he was standing with his full weight on his left foot and, further, that if it be assumed that only a part of his weight was

on his left foot and the step did fold it could not have so held his foot as to drag him while the car was in motion.

It is at once apparent that this excerpt from the testimony of the respondent, upon which the appellant relies, is not necessarily subject to the interpretation placed upon it by the appellant. The statements thus made should be considered in connection with the remainder of respondent's testimony and with the other evidence given in his behalf. While it may be true that there was an instant when much of his weight was on his left foot, as his right foot left the ground, it must also be remembered that he was holding to the stanchion between the doors with his left hand and that he was swinging a 35-pound box ahead of him as he was attempting to place his foot on the step of the front door and to enter that door. A part of his weight would naturally be sustained by his left hand, and his swinging motion through the air following a 35-pound weight in his right hand would further reduce the pressure from his left foot. If the front door closed as he was swinging toward it his right foot would naturally go to the ground. This is what occurred, according to his evidence, and the resultant shift of his weight may well have been sufficient to permit the second step to be raised against his left foot. All of these things may have been further affected by the sudden movement of the car and the respondent's reaction thereto. There are no physical facts which give us an accurate measure of these various forces, or which conclusively show that the doors could not have been closed and the steps raised.

The fact that another man, while making a test under less excitable conditions, was able to withdraw his foot when the step was raised against it is not conclusive. Many a person catches his foot where another does not. The respondent was 68 years old and there is evidence that he was not as active as he had once been. He would naturally be startled by the sudden moving of the car and if the step closed on his foot about the same time, his first thought may have been to keep his balance by hopping along on his right foot and he may not have had the presence of mind to make the effort necessary to extricate his foot, and which might be made by a man making such a test under calmer conditions. The respondent did not claim to have been dragged while lying prone. He said he took two or three hops on his right foot while his left foot was caught, and that he fell back to the pavement. He could hardly have taken the hops after he fell, and the other eye-witness said he fell over at about the time the car stopped.

[3,4] All of respondent's evidence was to be taken into consideration and while the evidence of the tests made by appellant's employees was also to be considered this merely created a conflict, which was one for the trial court. No facts appear from which it can be said that it was a physical impossibility for the accident to occur in the manner stated, or which disclose the respondent's evidence to be so inherently improbable or unbelievable that it must be rejected in its entirety.

[5] The appellant next contends that the court erred in not permitting one of its motormen, George Wills, to testify that the respondent approached him shortly before the trial, while he was changing the trolley at the end of his line, with a request that he (the respondent) be allowed to try and get his foot caught in the door of the step. It is argued that the only purpose of making such a request would be that the respondent wished to secure information concerning the mechanism of such street cars with a view to fabricating a story which would seem plausible and support the claim he had decided to make. However, another purpose would seem more or less reasonable since the motorman had claimed, immediately after the accident, that such a thing was impossible. Moreover, another of the appellant's motormen was allowed to testify that the respondent made a similar request of him about the same time, and the respondent testified that he had made such a request of two motormen. No possible prejudice appears.

[6] It is next contended that the court erred in not giving the appellant an opportunity to secure the testimony of a witness named Brownstone. It appears that this witness was subpoenaed and that when the trial of the case was continued appellant's counsel phoned the witness giving the date to which the trial was postponed, but did not again subpoena him. Counsel discovered on the date to which the case was continued that the

witness had left town. Early in the trial he reported this to the trial judge and stated that he did not desire to ask for a continuance, but that at the close of the evidence, if the court would like to have the testimony of this witness, he would arrange to take his deposition. At the close of the evidence counsel told the court he would like to have the privilege of taking the deposition of this witness "if you think it is material or important". After some discussion the court said: "We won't waste any time on that." It appears that the testimony which this witness would have given was that he saw the respondent shortly after the accident occurred but on the same day, that he saw him walking and standing and that he did not observe any limp or evidence of injury. No diligence was shown, no offer of proof was made, and the matter was not pressed. The evidence was cumulative, at best, and it could hardly have affected the result since the effect of injuries is not always immediately apparent. No reversible error appears.

[7, 8] The appellant further contends that the court erred in denying its motion to reopen the case for the purpose of taking additional evidence. This motion was made after the trial judge had stated that he would give judgment for the respondent and had directed him to prepare findings. The evidence thus requested included the testimony of the witness Brownstone, which we have already mentioned and which requires no further consideration. It also included "a statement by the trial court of the test and inspection made by said court of the street car involved in the purported accident". This was not additional evidence but an attempt to get a written record of evidence already before the court which had taken the form of an inspection of the street car. If the inspection and test had not convinced the court that it was physically impossible for the accident to have happened it is difficult to see how the making of a statement by the trial judge as to what he had observed could have changed the situation. The matter was one entirely within the discretion of the trial court and no abuse of that discretion appears.

[9] The appellant has applied to this court for leave to produce additional evidence, it being requested that this court take the testimony of the witness Brownstone and take evidence in the form of tests and demonstrations of the operating mechanism of the doors and steps of the street car involved in this accident. The first of these matters has been sufficiently covered. The test and demonstration requested would seem to be less the taking of new evidence than the repeating of evidence already taken and considered by the trial court, in the hope that it might have a different effect upon this court. Such an inspection was made by the trial court and while the results are not set forth in the record the making of such tests and the results thereof were rather completely described in the testimony of two witnesses for the appellant, which does appear in the record. Aside from any other consideration, it rather clearly appears that the making of such a test and demonstration could do no more than add to the already existing conflict in the evidence. Such conflicts are within the exclusive domain of the trial court.

The application for leave to produce additional evidence is denied, and the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



39 Cal.App.2d 273

RIDEAUX v. TORGRIMSON.

Civ. 12512.

District Court of Appeal, Second District, Division 2, California.

May 27, 1940.

Hearing Denied July 25, 1940.

Abatement and revival ⇐54

Where plaintiff had been denied relief under original complaint against decedents' administrator, alleging that plaintiff was injured by negligence of one decedent while plaintiff was acting within scope of employment by decedents and that decedents had failed to comply with Workmen's Compensation Act, plaintiff could not, by amended complaint, recover against administrator under statute requiring an employer to indemnify employees for losses caused by employ-

er's want of ordinary care, since causes of action arising under such statute are in tort and abate with death of tort feasor. St. 1917, p. 857, § 29(b); Civ.Code, § 1971, now St.1937, p. 258, § 2800.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Maxine D. Rideaux against John Torgrimson, Jr., as administrator of the estates of John Torgrimson, deceased, and Anna Torgrimson, deceased, for personal injuries. From a judgment of dismissal predicated upon the sustaining of defendant's demurrer to plaintiff's fourth amended complaint without leave to amend, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Aaron Sapiro, Samuel DeGroot, Samuel A. Rosenthal, and Burton B. Crane, all of Los Angeles, for appellant.

W. M. Greathouse, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of dismissal predicated upon the sustaining of defendant's demurrer to plaintiff's fourth amended complaint without leave to amend in an action to recover damages for personal injuries, plaintiff appeals.

The essential facts are:

August 4, 1937, plaintiff filed a complaint alleging in substance as follows:

(1) August 5, 1936, defendant was appointed and qualified as the administrator of the estate of John Torgrimson, deceased, and Anna Torgrimson, deceased.

(2) July 3, 1936, plaintiff was employed by decedents.

(3) July 3, 1936, while employed by decedents and while acting within the scope and course of her employment, plaintiff received personal injuries as a result of the negligent and careless operation of an automobile by John Torgrimson.

(4) John Torgrimson and Anna Torgrimson died as a result of injuries received in the accident which caused injury to plaintiff.

(5) Decedents had not at the time of plaintiff's employment or at the time of the accident complied with the provisions, rules, and regulations of the "Workmen's Compensation, Insurance and Safety Act" by securing to plaintiff as their employee compensation under said act.

Plaintiff by amendment to her complaint filed June 27, 1939, now seeks to predicate a cause of action upon section 1971 of the Civil Code (now section 2800, Labor Code, St.1937, p. 258). To plaintiff's fourth amended complaint defendant filed a demurrer on the following ground, among others:

That plaintiff's complaint as amended was predicated upon the theory of a tort action and was therefore barred by the terms of section 340, subdivision 3, of the Code of Civil Procedure.

The trial court sustained the demurrer on the foregoing ground among others.

This is the sole question necessary to be determined:

Is plaintiff's complaint predicated upon a tort and thus barred by the statute of limitations?

This question must be answered in the affirmative. Plaintiff's argument that an action based upon the former section 1971 of the Civil Code (now section 2800 of the Labor Code) [1] is an action quasi ex contractu, is contrary to the authorities in California. In Krebenios v. Lindauer, 175 Cal. 431, 166 P. 17, Mr. Justice Henshaw in affirming a judgment of the superior court sustaining a demurrer to a complaint predicated upon a theory similar to that in the present action, on the ground that it was a tort action and the statute of limitations had run, thus states the law at page 432 of 175 Cal., 166 P. at page 18: "If appellant's research had led him to an examination of the cases in this state, this court would have been saved this appeal. Thus in Denning v. State, 123 Cal. 316, 55 P. 1000, a deckhand upon the state's tugboat sued to recover damages for injuries which he sustained by reason of having been given an unsafe place to work—a weak and defective ladder which he was compelled in the performance of his duty to climb, and which broke under his weight. Says this court: 'This action, however, is in tort, and not upon contract. * * * Here the contract of employment has nothing whatever to do with the liability except to create a duty on

[1] This action arose prior to the adoption of the Labor Code. Therefore, section 1971 of the Civil Code is the only section here involved.

the part of the employer, a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages; nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz., that of employer and employé, and under the old system of pleading was always classed as an action ex delicto.' To the same effect is Basler v. Sacramento, etc., Ry. Co., 166 Cal. 33, 134 P. 993."

It is likewise settled that if a new cause of action is introduced into a complaint by way of an amendment the action is deemed to have been commenced at the time of the amendment to the complaint for the purpose of ascertaining whether or not the statute of limitations has barred the prosecution of the new cause of action. (Merchants' Nat. Bank v. Bentel, 166 Cal. 473, 478, 137 P. 25.)

Applying the foregoing rules to the facts in the instant case, it appears that the cause of action stated in the original complaint was predicated upon defendant's decedent's failure to comply with section 29 (b) of the Workmen's Compensation Act St.1917, p. 857 (a statutory cause of action), while the cause of action which plaintiff is now urging, is predicated upon an action ex delicto. The tort which is the basis of the present action occurred July 3, 1936, and the fourth amended complaint introducing the present cause of action was not filed until June 27, 1939, more than a year subsequent to the date of plaintiff's injury (in fact the original complaint which was filed August 4, 1937, was filed more than one year after the accident). Thus the cause of action is barred by subsection 3, section 340 of the Code of Civil Procedure, and the trial court properly sustained defendant's demurrer to the amended complaint.

Plaintiff's cause of action is also barred for another reason, which is that, since the cause of action is an action ex delicto or a tort action, as shown above, the cause of action abated with the death of the tort-feasors. The law is settled that a cause of action for personal injuries, in the absence of a statute expressly providing for its survival, abates upon the death of the tort-feasor. (De La Torre v. Johnson, 200 Cal. 754, 757, 254 P. 1105; 1 C.J. S. Abatement and Revival, p. 196, § 143 [1936]; 1 Cal.Jur. 71, § 41 [1921]; 1 Cal. Jur. Ten Year Supp. 10, § 31 [1936].) In the present case there is no express statutory authority providing for the survival of such a cause of action.

For the foregoing reasons the judgment is affirmed.

WOOD, Justice (concurring).

I concur in the judgment. In the former appeal in this matter (Rideaux v. Torgrimson, 12 Cal.2d 633, 86 P.2d 826) it was held that an action by an employee against his employer, based upon the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917, as it existed in the year 1936, survives the death of the employer. It was also held on that appeal that the plea of res judicata could not be considered since a defense of this nature must be either pleaded or proved and the record before the court was not such as to permit consideration of such defense.

The record now before us shows a situation very different than that of the former appeal. In her fourth amended complaint plaintiff alleged that she had applied to the industrial accident commission for relief under the provisions of the Workmen's Compensation Act; that her application had been denied on the ground that her employment was not such as to bring her within the provisions of the act; and that thereafter the Supreme Court of California had denied her petition for a writ to review the order of the industrial accident commission. From the allegations of plaintiff's complaint it is apparent that she may not now rely upon the provisions of the Workmen's Compensation Act but must base her petition for redress upon the provisions of section 1971 of the Civil Code (which became sec. 2800 of the Labor Code in 1937). Causes of action arising under section 1971 of the Civil Code are founded on the negligence of the employer. Such causes of action sound in tort and abate with the death of the tort-feasor.

I do not concur in that portion of the opinion of Mr. Justice McCOMB in which the view is expressed that the fourth amended complaint introduces a new cause of action.

I concur: MOORE, P. J.

39 Cal.App.2d 247

LAKE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11449.

District Court of Appeal, First District, Division 2, California.

May 24, 1940.

1. Mandamus ⇐43

The Superior Court's denial of defendant's motion to dismiss action before ruling on motion to vacate judgment on which action was based was judicial determination that defendant had no right to dismissal, so as to require denial of his petition to Court of Appeal for writ of mandamus requiring Superior Court to dismiss action, regardless of whether parties' mutual exchange of letters agreeing to continuances was equivalent to written stipulation therefor. Code Civ.Proc. § 583.

2. Mandamus ⇐42

An order of trial court, acting within its jurisdiction on mixed question of law and fact, cannot be controlled by mandamus, whether right or wrong.

3. Mandamus ⇐168(2)

On application for writ of mandate, requiring Superior Court to dismiss action pending therein, Court of Appeal must presume, in support of Superior Court's order denying petitioner's motion to dismiss, that all evidence, including that not brought up, supports such order.

Proceeding by Fred W. Lake for a writ of mandamus requiring the Superior Court in and for the City and County of San Francisco to dismiss an action pending therein.

Petition denied, and alternative writ discharged.

Wm. B. Chaplin and Fred W. Lake, both of Oakland, for petitioner.

Bronte M. Aikins, and James L. Feely, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The petitioner sued in mandamus to require the dismissal of a proceeding pending in the respondent court. The alternative writ of mandamus was ordered issued upon the allegations of the petition that the complaint was filed on November 21, 1932; that the defendants answered on April 17, 1933; that on July 11, 1939, petitioner moved the respondent court for an order dismissing the action, which motion was denied; and "that no stipulation in writing was ever given or made, by or between counsel or otherwise, by which the time of trial of said action was extended beyond the five year period following the commencement of said action, and no such extension of time of trial was ever given or made in any way."

[1-3] Upon the return day an answer was filed to the petition alleging that the parties through the exchange of numerous letters agreed and stipulated to the various extensions of time for bringing the cause to trial. Proof of these allegations was made by affidavit and they are not denied by the petitioner. The pertinent question presented by the return is whether the mutual exchange of letters between the parties agreeing to continuances of the day of trial is equivalent to where "the parties have stipulated in writing" within the terms of section 583 of the Code of Civil Procedure. But the pleadings as a whole present a much simpler question as they disclose that the question stated was the issue presented to the trial court in petitioner's motion to dismiss the action and that such motion was heard upon evidence taken at the time, but which is not before us in this proceeding. Hence the denial of that motion on October 2, 1939, was a judicial determination of the issue of petitioner's right to a dismissal adverse to this petitioner. Thus the decision upon this application for a writ must rest upon the solid ground that when the trial court has acted within its jurisdiction upon a mixed question of law and fact its order, whether right or wrong, cannot be controlled by mandamus. Bank of America, etc., v. Superior Court, 22 Cal.App.2d 450, 452, 71 P.2d 296, 297. In that case the court, fully recognizing the mandatory character of the code section, said: "and in order to take a case out of the operation thereof the stipulation provided for in the exception must be in writing and it must clearly and definitely appear therefrom that the statutory time was deliberately intended to be extended by both parties". The intention of both parties to extend the time of trial here is fully disclosed by these con-

ceded facts: the action in the court below was based upon a money judgment recovered against the Honey Lake Valley Company and Fred W. Lake by Alice L. Aikens. While the plaintiff Atkins was endeavoring to bring the cause to trial the defendants therein moved the trial court for a vacation of the original judgment upon which the pending action was based. Both parties then agreed to numerous continuances awaiting the ruling on the motion to vacate the former judgment. Though this motion was made on June 30, 1937, it still remains undecided. It would have been futile, of course, to have proceeded with the trial of the pending action if the motion to vacate the judgment upon which it was based should have been granted, and this appears to have been the mutual understanding of the parties. But, upon this application for a mandate we must presume in support of the order that all the evidence, including that which has not been brought up, supports the order complained of.

The petition is denied and the alternative writ is discharged.

We concur: STURTEVANT, J.; SPENCE, J.



39 Cal.App.2d 292

GUTELIUS v. GENERAL ELECTRIC CO.

Civ. 12426.

District Court of Appeal, Second District, Division 2, California.

May 28, 1940.

Appeal and error ⇐1222

Appellant's motion to amend remittitur on ground of inadvertence of District Court of Appeal would be denied, where appellant did not claim fraud or mistake and waited more than 60 days after decision had been filed before presenting motion.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

On motion to amend remittitur.

Motion denied.

For prior opinion, see 99 P.2d 682.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for appellant.

Samuel A. Rosenthal, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The decision of this court upon the appeal of the action is contained in our written opinion filed February 26, 1940, 99 P. 2d 682. Petition for rehearing in this court having been denied on or about March 15, 1940, the petition for hearing in the Supreme Court having been denied on the 25th of April, the remittitur was filed in the superior court on the 29th day of April, 1940. On May 2, 1940, appellant filed its notice of motion to recall said remittitur and for an "order amending the judgment, remittitur and mandate" of this court by directing that judgment be entered in favor of defendant instead of the order merely reversing the judgment.

The grounds of appellant's motion are: (1) That the holding of this court is that plaintiff cannot recover; (2) that upon no theory could plaintiff make any further substantial showing; (3) that the omission of this court to direct the entry of judgment in favor of defendant was inadvertent.

Appellant's motion must be denied for the very good reason that the order heretofore entered was not made through inadvertence or because of any mistake of fact or incomplete information. Moreover, the motion was not timely presented.

In the case of Heroux v. Atchison, Topeka & Santa Fe R. R., 35 Cal.App.2d 128, 94 P.2d 820, we declared that, "where an aggrieved party is cognizant of fraud or mistake upon which the appellate court has based its decision, unless such party acts promptly and at the first opportunity to call the court's attention thereto, an order recalling the remittitur will not be made after the same has been issued". The basis of appellant's motion now is neither fraud nor mistake, yet it does found its motion upon "inadvertence" of this court. If this court entered said decision through inadvertence, that fact was as well known to appellant immediately upon his reading our opinion as it could have been at any time. Any error or inadvertence in an opinion may as well be called to the attention of the court immediately upon the filing of the opinion as it might be in a motion to recall the remittitur more than two months after the opinion has been filed.

Indeed, while this court had under advisement the respondent's petition for rehearing, it would have been the appropriate season to call the court's attention to any claimed defect in the order. In the case of In re Rothrock, 14 Cal.2d 34, 92 P.2d 634, 637, a note from the 23 California Law Review, at page 354, is quoted as follows: "It would appear from these cases that a remittitur will be recalled when, but only when, inadvertence, mistake of fact, or an incomplete knowledge of all the circumstances of the case on the part of the court or its officers, whether induced by fraud or otherwise, has resulted in an unjust decision." Therefore, if there had been an inadvertence, it was appellant's duty promptly to file its motion upon the discovery of such inadvertence. But, instead of proceeding with diligence to present such motion, appellant waited in excess of sixty days after our decision had been filed before presenting the motion to recall the remittitur. The enormous flow of business through the appellate courts requires that the bar speedily bring to the attention of the court any errors of which complaint may be made in order that they may be scrutinized while the facts are fresh in the minds of the justices.

The motion is denied.

We concur: WOOD, J.; McCOMB, J.



38 Cal.App.2d Supp. 771

LEBET v. CAPPOBIACHO et al.

Civ.A. 1251.

Appellate Department, Superior Court, City and County of San Francisco, California.

March 2, 1940.

Insurance ⇐607

One who had executed an assignment authorizing insurance carrier to institute and prosecute such actions at law or in equity as carrier should deem proper "in the name of the undersigned or otherwise" was entitled to maintain action for damages to automobile as against defense that he had been fully compensated by carrier and that carrier was the only party entitled to prosecute the action. Code Civ.Proc. § 367.

Appeal from Municipal Court of City and County of San Francisco.

Action by Paul Lebet against F. J. Cappobiacho and others, to recover damages to an automobile. Judgment for plaintiff, and defendants appeal.

Affirmed.

Long & Levit, of San Francisco, for appellants.

J. J. Doyle, of San Francisco, for respondent.

DOOLING, Judge pro tem.

This is an appeal from a judgment for $106 for damages to the rear of an automobile. Defendants proved in the trial court that plaintiff had been fully compensated for this damage by an insurance carrier. They then urged and urge on appeal that the insurance carrier became subrogated to all of plaintiff's rights and was the real party in interest under Code of Civil Procedure section 367, and under that section the only party entitled to prosecute the action. They cite Offer v. Superior Court, 194 Cal. 114, 228 P. 11.

Plaintiff counters by citing Loggie v. Interstate Transit Co., 108 Cal.App. 165, 291 P. 618. To this citation should be added Inglewood Park Mausoleum v. Ferguson, 9 Cal.App.2d 217, 49 P.2d 305. These two cases hold squarely that it is no defense to an action for damages to property that the plaintiff has been fully reimbursed by an insurer. We need not, however, rely on these cases to decide this appeal.

Plaintiff introduced an assignment to the insurance carrier which contained the following provision: "The said Insurance Company, its successors and assigns are hereby forever authorized and empowered, * * * to * * * institute and prosecute such actions at law or in equity as it shall deem proper, in the name of the undersigned or otherwise * * *."

The precise question was presented in Ephraim v. Pacific Bank, 136 Cal. 646, 69 P. 436. In that case it is stated on page 647: "An assignment was offered in evidence from the plaintiff receiver to E. Schlessinger, made before the action was commenced, for the purpose of showing that the action was not brought in the name of the real party in interest. The assignment expressly conferred upon the assignee the right to prosecute and collect the allowance in the name of the receiver."

The court disposes of the point at page 651 of 136 Cal., on page 438 of 69 P., in the following language: "The plaintiff had the right to maintain the action, within the rule in Giselman v. Starr, 106 Cal. 651, 40 P. 8. If he should obtain a judgment, its satisfaction would protect the defendants from any claim by the assignee of plaintiff."

A search through Shepard shows that this holding has never been questioned or overruled in California. We feel bound by this decision and for that reason deem a discussion of authorities cited from other jurisdictions unnecessary.

Judgment affirmed.

I concur: GRIFFIN, Judge.



38 Cal.App.2d Supp. 759

PEOPLE v. KAY.

Cr. A. 267.

Appellate Department, Superior Court, City and County of San Francisco, California.

Jan. 18, 1940.

1. Criminal law ⇐304(21)

It is common knowledge that the number of coins or tokens which a slot machine which can only be used for gambling pays out, if it pays at all, is entirely dependent upon chance and that its operation is likewise so dependent.

2. Gaming ⇐74(6)

The use of the word "is", in statute making unlawful the possession of slot machines upon the results of the action of which money "is" staked or hazarded, does not limit the broad prohibitions of the statute so as to restrict its operation to those cases only in which slot machines are in actual use. Pen.Code, § 330a.

See Words and Phrases, Permanent Edition, for all other definitions of "Is".

3. Gaming ⇐63(3)

The statute, making unlawful the possession of a slot machine upon the result of the action of which money is staked or hazarded, does not repeal by implication the provisions of statute prohibiting the operation of a slot machine for money, checks, credits, or other representative of value. Pen.Code, §§ 330, 330a.

4. Statutes ⇐184

In order to ascertain the true spirit and import of an act, the courts may consider the mischiefs the act was designed to remedy.

5. Gaming ⇐74(6)

The intent of the statute, making unlawful the possession of a slot machine upon the result of the action of which money is staked or hazarded, was to prohibit any such machine which is normally and as a customary thing used as a gambling device, regardless of whether the machine is used for gambling purposes. Pen.Code, § 330a.

6. Gaming ⇐74(6)

The mere possession by accused of slot machines which were so constructed that they were incapable of being used for any purpose other than gambling constituted violation of statute making unlawful the possession of slot machines upon the result of the action of which money is staked or hazarded, regardless of whether the machines were actually used or kept for gambling purposes. Pen.Code, § 330a.

Appeal from Municipal Court of City and County of San Francisco.

Julian H. Kay was convicted of violating Penal Code, § 330a, by possessing a slot machine, and he appeals.

Affirmed.

J. W. Ehrlich, of San Francisco, for appellant.

Matthew Brady, Dist. Atty., and Arthur Jonas, Deputy Dist. Atty, both of San Francisco, for respondent.

CONLAN, Presiding Judge.

Appellant Julian H. Kay was convicted in the municipal court of the City and County of San Francisco by verdict of a jury of violating section 330a of the Penal Code of California. When the case was submitted to the jury the defendant moved for an advised verdict of not guilty. The motion was denied. After his conviction, appellant made a motion in arrest of judgment and a motion for a new trial, both of which motions were also denied. The appellant has appealed from these rul-

ings and from the judgment of conviction. The sole issue presented by this appeal is whether the mere possession of a slot machine of such construction that it is incapable of being used for any purpose other than gambling is a violation of Penal Code section 330a. We are of the opinion that it is.

The record discloses that the San Francisco police seized, under a search warrant, 294 slot machines stored in a warehouse. The machines were owned by appellant and had been stored by him and as a result the charge was placed against him upon which he was subsequently convicted.

The machines were introduced into evidence and their operation described by a police officer called on behalf of the people. It appears from the construction of the machines offered in evidence, as well as from the testimony of the police officer, that they cannot be used, or played, for any purpose except to gamble. To operate the machine a coin is placed in a slot at the top of the machine and a handle on the side of the machine pulled which causes three reels, visible through a window in the front of the machine to revolve. These reels revolve at different speeds, each reel rotating separately and independently of the other. Each reel has painted on its circumference devices representing lemons, cherries, oranges, plums, bells and bars. The rotating reels are finally stopped by the haphazard action of the internal mechanism of the machine. After all three reels are stopped, if the cherries, oranges, plums, etc., on the three reels appear through the window in the front of the machine in certain combinations indicated in a legend painted on the front of the machine, the machine will pay varying sums in coins or tokens, depending upon the combination in which the reels have stopped. It will pay nothing at all if the reels stop in a combination which does not appear in the legend. The machines cannot be operated except by coins or tokens and are not adapted to the automatic vending of merchandise.

[1] It is evident that machines of this description can be used for but one purpose: to gamble. The operator has no control over the action of the machine after he has inserted the coin and pulled the lever. It is a matter of common knowledge that the number of coins or tokens which the machine pays out, if it pays at all, is entirely dependent upon chance and that its operation is likewise so dependent.

Machines of this character should not be confused with slot machines which have for their purpose the vending of merchandise without any element of chance. In ordinary vending machines a coin is deposited in a slot, a lever is pulled, and merchandise is received for the coin deposited. Each person depositing a coin of like denomination receives the same value of mercandise as any other person, no element of chance or uncertainty whatsoever existing. The only reason a person would not receive the article purchased is that the machine is not working properly or it is not stocked. In the legitimate vending machine there is no more chance or uncertainty involved than in a purchase from a clerk, he handing the merchandise to the purchaser and the purchaser paying him the stipulated price.

Penal Code section 330a is as follows: "Every person, who has in his possession or under his control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained or kept, in any room, space, inclosure or building owned, leased or occupied by him, or under his management or control, any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, redeemable in, or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from such machine, when the result of action or operation of such machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance, and every person, who has in his possession or under his control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained or kept, in any room, space, inclosure or building, owned, leased or occupied by him, or under his management or control, any card dice, or any dice having more than six faces or bases each, upon the result of action of which any money or other valuable thing is staked or hazarded, or as a

result of the operation of which any merchandise, money, representative or article of value, check or token, redeemable in or exchangeable for money or any other thing of value, is won or lost or taken, when the result of action or operation of such dice is dependent upon hazard or chance, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

[2] Appellant concedes that this section makes it unlawful to operate the machines found in his possession but contends that the language of the section is not sufficiently broad to make unlawful their mere possession. This argument is based very largely upon the use of the word "is" in the statute. It is claimed that the phrase in the statute "upon the result of action of which money * * * is staked or hazarded" limits the broad prohibitions of the statute and restricts its operation to those cases only in which the machines are in actual use. But the case of Bobel v. People, 173 Ill. 19, 50 N.E. 322, 64 Am.St.Rep. 64, is, in our opinion, in point and to the contrary.

There the statute used the word "is", i. e., "* * * that whoever, in any room * * * keeps * * * joker * * * or slot machine * * * upon which money is staked or hazarded * * * or upon the result of the action of which money or other valuable thing is staked, bet, hazarded, won or lost * * *." Ill. Rev.Stat.1939, c. 38, § 341. It was held that the mere possession of a slot machine, which was a gambling device, was a violation of the Illinois statute. The court stated (50 N.E. 324): "It is next contended that the allegation descriptive of the purposes for which the slot machine was used is faulty. The indictment charges that plaintiff in error did 'keep a certain slot machine, the same then and there being a device upon the result of the action of which money or other valuable thing is staked.' It is claimed that this last allegation should be, 'upon the result of the action of which money or other valuable thing was then and there staked.' The allegation of the indictment is in the language of the statute, and that is sufficient. * * * The clause, 'upon the result of the action of which money or other valuable thing is staked,' is descriptive of the uses of the machine. * * * While a plausible argument is made that, in view of the phraseology of the statute and especially of the title, the purpose of the act is not to prohibit the mere keeping or using of such a device, but only the keeping or owning of the same to be used for gambling purposes, still it cannot be doubted that the legislature has the power to prohibit the mere keeping in possession of such gambling devices as well as to prohibit their use, as it has done in respect to obscene and indecent pictures, drawings, books, etc. * * * And we are of the opinion that it was the purpose of the legislature in enacting this statute, not only to suppress the use of these gambling devices, or the keeping of them for gambling purposes, but also to prohibit the ownership or the keeping of them, whether for gambling purposes or not; otherwise, why make it a criminal offense to own or keep them, without qualification as to the purpose of such ownership or keeping, * * *."

[3-5] To accept appellant's construction of the statute (sec. 330a of the Penal Code) that the machines must be in use before there is a violation, we would have to cast entirely aside the purpose of its enactment, because, before section 330a was enacted, section 330 of the Penal Code covered and still covers a situation where a slot machine is operated for money, checks, credits or other representative of value. Ex parte Williams, 1906, 7 Cal.Unrep. 301, 87 P. 565. There is nothing in section 330a which repeals by implication the provisions of section 330. Ex parte Lowrie, 1919, 43 Cal.App. 564, 185 P. 421. In order to ascertain the true spirit and import of an act, the courts may also consider the mischiefs such act was designed to remedy. Section 330 of the Penal Code was ineffectual so far as the operation of a slot machine for anything other than money, checks, credits or other representative of value was concerned; likewise it did not prohibit the possession of these devices. Obviously then, section 330a of the Penal Code, which was enacted after the decision in Ex parte Williams, supra, had for its intention the absolute prohibition of "any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, * * * or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, re-

deemable in, or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from such machine, when the result of action or operation of such machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance, * * *." We interpret this to mean any such machine or contrivance which is normally and as a customary thing used as a gambling device. We are of the opinion that it was the intention of the legislature to prohibit these machines in the possession or control of anyone in any place, whether for gambling purposes or not; otherwise why set forth, "Every person, who has in his possession or under his control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained or kept, in any room, space, inclosure or building owned, leased or occupied by him, or under his * * * control, * * *."

This construction of our statute is not only proper but necessary if any effect is to be given to the statute and the purposes of its enactment, to-wit: the suppression of gambling devices. A contrary construction for all practical purposes would place section 330a in the position of being superfluous, and we cannot believe that was the intention of the legislature.

Bobel v. People, supra, is cited with approval in Hurvich v. State, 1935, 230 Ala. 578, 162 So. 362, where the mere possession of a slot machine gambling device was held to violate the Alabama law. The court there stated, 162 So. at page 363: "* * * We think it clear that for the purpose of preventing the use of a device for gambling the Legislature may prohibit its possession or ownership, when it is designed for that purpose. The statute does not make its intended use for [that purpose] a prerequisite."

Stanley-Thompson Liquor Co. v. People, 63 Colo. 456, 168 P. 750, 751, involved certain gambling devices, some of which were stored in the back room of plaintiff in error's place of business, and some in a warehouse. It is stated in the opinion:

"It is well settled that things which are capable of no use for lawful purposes—and it is established that these instruments are of that class—are not the subject of property. They cannot be recovered in replevin, nor will damages be given for their loss or injury. They are, as some courts have said, 'outlaws.' [Citing cases.] * * *

"Since thay are at all times a menace to society, not being capable of use except by violating the law, there is no reason why their abatement as a nuisance should be delayed until the law has been violated."

Appellant relies strongly on the case of Fey v. Rossi Improvement Co., 1914, 23 Cal.App. 766, 139 P. 908, 909, in which case the plaintiff sought to cancel a lease, claiming that he had leased the property for the purpose of manufacturing slot machines thereon, and that thereafter section 330a of the Penal Code was enacted, making such machines illegal. The court there stated: "The complaint in the present case does not allege that the demised premises were leased for the purpose of manufacturing any of the gambling devices designated in the statute. The allegation of the complaint in this behalf is merely that the premises were leased for the purpose of conducting therein the business of manufacturing 'coin-operating machines commonly known as nickel-in-the-slot machines' * * *."

It is obvious that the decision in the case of Fey v. Rossi Improvement Co., supra, was based upon the uncertainty in the complaint, in that it did not specify that the premises were leased to manufacture gambling devices designated in the statute and the decision further states that the possession of certain nickel-in-the-slot machines which return something of value without any element of chance other than that usually presented in ordinary transaction of barter and trade are not illegal under section 330a of the Penal Code. This decision is not helpful to the appellant.

In the Matter of Rogers, 1911, 160 Cal. 764, 118 P. 242, a machine, the operation of which involved a hazard to a customer with reference to cigars, was held to be a lottery under sections 319 and 320 of the Penal Code. In People v. Brown, 151 Misc. 717, 273 N.Y.S. 560 (May 16, 1934), involving a machine similar to the one in the instant case and a statute substantially the same as section 330a of the Penal Code, there was proof that tokens were inserted in the machine and tokens issued therefrom for which a police officer received fifty cents. It was held that the keeping or maintaining of such a machine was a violation of section 982 of the Penal

Law, Consol.Laws, c. 40, which denounced the keeping of a machine into which may be inserted a piece of money or other object, and from which as a result may be issued any pieces of money, etc.

In Triangle Mint Corp. v. Edward P. Mulrooney, Feb. 26, 1931, Supreme Court, Appellate Division, Second Department, 232 App.Div. 783, 248 N.Y.S. 880, it was held that the police were justified in seizing certain slot machines which, with the insertion of a cotter pin as a cloak or cover therefor, would make the machine an innocent vending machine, but with the cotter pin extracted would make the machine a contrivance in violation of sections 970-a and 982 of the Penal Law. The opinion states: "The machines are undoubtedly manufactured and leased for gambling purposes, with the insertion of the cotter pin as a cloak or cover therefor."

People v. Jennings, Court of Appeals of New York, July 15, 1931, 257 N.Y. 196, 177 N.E. 419, relied upon by appellant, involved a machine, which, by the dropping of a coin in a slot and the pulling of a lever, a candy mint falls out of the machine and a witty or funny saying appears in an upper panel. One or more metal rings of no intrinsic value may also fall out according to the combinations formed upon the turn of the lever. These rings or metals, are of no monetary value. By their insertion in the slot, other bright or witty statements appear in the panel. The only chance connected with the operation of the machine is that wit or humor may momentarily brighten up the vacuous minds hunting amusement. It was held that the judgment of conviction of section 982 was unsupported by the evidence and was reversed because nothing of value, at least of money value, came out of the machine in the control and possession of the defendant.

However, in People v. Wertheimer, 152 Misc. 733, 274 N.Y.S. 90, 92, Aug. 4, 1934, a conviction was had for the possession of slot machines in violation of section 982 of the Penal Law. The opinion states:

"Appellant's counsel cites the case of People v. Jennings, 257 N.Y. 196, 177 N.E. 419, upon their claim that a wire tying the key to the machine had to be removed and coins inserted in the machine before it would properly work; that therefore the machines were not, in their then condition such as defined by the statute.

"I think the case cited is clearly distinguishable from this case. There a machine which was legal could be transformed into a machine which was illegal, which, however, has not been done. In the case at bar, there was no transformation required. The machines here were manufactured for the purpose of doing that which under the statute is illegal. The mere fact that a wire had been (apparently only on some of them) so attached that it had to be removed so that the machine could work at all, did not make of those machines a legal machine within the statute."

We are of the opinion that the decisions of these cases are additional authority for the People's contention that the machines in question are, from their construction, gambling devices.

[6] We are of the opinion that since the slot machines in the instant case are incapable of being used for any purpose except gambling, their mere possession is a violation of Penal Code section 330a and that it is not a necessary element of the offense that the machines be actually used or kept for gambling purposes.

The judgment of conviction is ordered affirmed.

We concur: GRIFFIN, J.; DOOLING, Justice pro tem.

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